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THE  
SOUTHEASTERN REPORTER,  
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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST  
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**JUDGES**

OF THE

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<sup>1</sup>Elected January 30, 1896.

## AMENDMENT TO RULES.

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### SUPREME COURT OF NORTH CAROLINA.

#### 33.<sup>1</sup>

Sections 2 and 3, of rule 33, are amended by striking out the words "and a half," so that they will read as follows:

<sup>1</sup> For rule 33, originally adopted, see 22 S. E. ix.

v.25 s. E.

(2) The counsel for the appellant may be heard for one hour, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour.

As amended February, 1896.

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FLYNN et al. v. JACKSON et al.

(Supreme Court of Appeals of Virginia. July 9, 1893.)

POSTNUPTIAL SETTLEMENT—VALUABLE CONSIDERATION—PRESUMPTION—EVIDENCE—WIFE'S SEPARATE ESTATE—CREDITORS—VALIDITY OF SETTLEMENT.

1. In a suit to set aside an alleged fraudulent conveyance, other creditors filed their petitions setting up their debts, asked to be made parties plaintiff, and prayed certain relief, but did not ask for process against defendants. An account was directed to ascertain the priority of the claims, of which defendants had full notice, and on the coming in of the commissioner's report the grantee filed exceptions. *Held*, that the objection that defendants were not summoned to answer the petitions could not be raised for the first time on appeal.

2. A postnuptial settlement, made when the husband is indebted, is fraudulent and void against his creditors, and will be taken as voluntary, unless those claiming under it can show a valuable consideration.

3. The recitals in a deed, as to the consideration, are not evidence against creditors who have assailed the fairness and validity of the deed.

4. In a suit to set aside a fraudulent conveyance, where no discovery is called for, the answers are not evidence of the statements they contain against the complainants.

5. Where a husband has collected and used his wife's money with her knowledge and consent, and without any promise for its repayment, the presumption that it was a gift cannot be rebutted, as to his creditors, by his afterwards treating the money as a loan.

6. Where a wife relinquishes her interest in property, or assumes the payment of debts due from her husband, so as to make them charges on her separate estate, on the faith of a postnuptial settlement which is void as to the husband's creditors, the settlement will be held good to the extent of a just compensation for the interest which she may have parted with or of the debts which she has assumed to pay.

Appeal from circuit court, Roanoke county; Henry E. Blair, Judge.

Suit by Jackson Bros. against H. V. Flynn, Theo. Royalty, and others, to set aside a conveyance of property. From a decree in favor of complainants, defendants appeal. Modified.

Pugh & Moffett, for appellants. G. W. & L. O. Hansbrough, for appellees.

BUCHANAN, J. The object of this suit was to set aside a deed, made by a husband

to his wife, conveying to her a house and lot and certain personal property, upon the ground that it was made without valuable consideration, and for the purpose of hindering, delaying, and defrauding his creditors, and to subject it to the payment of the debts of the husband.

After the suit was brought, other creditors of the husband filed their petition in the cause, setting up their debts against the husband, charging that the conveyance was made without consideration, and for the purpose of hindering, delaying, and defrauding creditors, asking to be made parties plaintiff in the suit, and praying to have the conveyance set aside, and the property subjected to the payment of their debts.

They did not ask for process against the defendants named in the bill, and, so far as the record shows, none was issued.

At the April term, 1892, of the court, the defendants having failed to answer the bill, which they had been properly summoned to answer, it and the petition were taken for confessed and a decree rendered adjudging the conveyance made by the husband to his wife to be fraudulent and void, setting it aside, and directing an account to ascertain their liens and their priorities and the annual rental value of the house and lot.

The commissioner, after giving notice to all the parties, took the account and filed his report upon the 12th of May, 1892, in which he reported the amount and priorities of the judgments and debts asserted in the cause, and that the annual rents would not pay the debts reported within five years.

The husband and wife having, at the June term, 1892, filed their separate answers to the bill, the court, at the April term, 1893, set aside its former decree, so far as it had adjudicated that the deed from Flynn to his wife and the deed of trust executed by Mrs. Flynn to secure Royalty's debt were fraudulent and void, and brought the case on to be heard on the papers formerly read, the answer of Flynn and wife, the report of the commissioner, exceptions thereto, and depositions of witnesses. Royalty and Crumpecker, trustee, having failed to answer, the bill and petitions were taken for confessed as to them. The exceptions to the commission-

er's report were overruled, the report confirmed, the priority of liens fixed, the conveyance from Flynn to his wife declared fraudulent and void, and set aside and annulled, the debt of Royalty secured by the deed of trust postponed until the debts reported against the husband had been satisfied, and a sale of the property directed.

From this decree Mrs. Flynn and Theo Royalty appealed.

A motion was made to dismiss Royalty's appeal, on the ground that, having allowed the bill to be taken for confessed against him, his remedy for any error in the decree to his prejudice was by motion in the court which rendered it, under the provisions of sections 3451 and 3452 of the Code, and that, until such motion had been made, he had no right of appeal.

Mrs. Flynn claimed that a part of the consideration for the property conveyed to her was her agreement to pay a debt of \$525 which her husband owed Royalty, and that this sum, together with \$200 subsequently loaned, made up the \$725 which was secured by the deed of trust executed by her to Crumpecker, trustee. She was interested in establishing the validity of Royalty's debt, at least to the extent of \$525, against her husband. Her appeal necessarily brought up that question. It is a matter, therefore, of no consequence whether Royalty appealed or not, and the motion to dismiss his appeal, not being of any practical importance, will not be considered further.

The trial court held that Mrs. Flynn, whose deposition was taken in the cause, was an incompetent witness, and this is assigned as error in the petition; but the counsel of petitioners in their note of argument very properly conceded that she was not a competent witness, and abandoned that assignment of error.

It is also assigned as error that the court rendered a decree upon the petitions filed in the cause, and established the debts therein set up, without having first summoned the defendants to answer the same.

It appears, as above stated, that an account was directed to ascertain the priority of the claims so asserted, of which the defendants had full notice, and that, upon the coming in of the commissioner's report, the appellant Mrs. Flynn filed exceptions thereto, not on the ground that the debts set up in the petitions were not due, but that they were not liens upon the house and lot, because she, and not her husband, was the lawful owner thereof. No objection having been made in the lower court because the defendants were not summoned to answer the petitions, it cannot be made here for the first time, under the circumstances of this case.

The action of the circuit court in declaring that the conveyance of Flynn to his wife was without consideration and void as to his creditors is also assigned as error.

Every postnuptial settlement, where the

husband is indebted at the time it is made, is, as against his creditors, fraudulent and void; and such settlement will be taken as voluntary unless those claiming under it can show that it was made for valuable consideration. *Fink v. Denny*, 75 Va. 663, and cases cited; *Hatcher v. Crews*, 78 Va. 460; *Perry v. Ruby*, 81 Va. 817; *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184.

The conveyance recites, and the answers of Flynn and wife aver, that at the time of the execution of the deed the husband was indebted to the wife in the sum of \$2,367 for rents on her separate estate collected and used by him, for \$800 which she had borrowed and let him have the use of, and for the payment of which she had given liens on her separate estate; that these amounts and her undertaking to pay a debt of \$525 which her husband owed to Theo Royalty, aggregating the sum of \$3,692.34, constituted the consideration for the property conveyed.

The recitals in the deed as to the consideration, though admissible as against a person claiming under the husband, are not evidence against creditors who have assailed the fairness and validity of the deed. *William & Mary College v. Powell*, 12 Grat. 372; *Blow v. Maynard*, 2 Leigh, 29; *Perry v. Ruby*, 81 Va. 817; *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184.

No discovery being called for, the answers were not evidence of the statements they contain against the complainants. *Fink v. Denny*, 75 Va. 663; *Hatcher v. Crews*, 78 Va. 460; *Perry v. Ruby*, 81 Va. 817.

The presumption of law being that the conveyance was voluntary, the burden of proof that it was made upon valuable consideration was upon those claiming under it. *Blow v. Maynard*, 2 Leigh, 30; *Fink v. Denny*, 75 Va. 663; *Hatcher v. Crews*, 78 Va. 460; *Perry v. Ruby*, 81 Va. 817; *Rixey's Adm'r v. Deltrick*, 85 Va. 42, 6 S. E. 615; *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184.

The evidence does not show that the husband was indebted to the wife, as recited in the deed and averred in the answers. There is evidence tending to show that he collected the rents due her, and received the \$800 borrowed by her; but it does not appear that the wife took from or required of him any promise or obligation for its repayment, or raised any account against him. It seems to have been the ordinary case of the husband's collecting and receiving the wife's money, and using it, with her knowledge and consent, without any promise for its repayment. As was said by Judge Riely in *Throckmorton v. Throckmorton*: "There is nothing in the evidence, in view of their relations as husband and wife, to create the relation of creditor and debtor. Under these circumstances, the law does not imply a promise of repayment, as would be the case if they were strangers, but presumes that the receipt and use of her moneys or property, or its proceeds, was a gift of them by her to

her husband, and not a loan." 91 Va. 42, 43, 22 S. E. 163, and cases cited; *Jacobs v. Hesler*, 113 Mass. 157, 160, 161.

The fact that they, after the husband had become insolvent, treated the money so received by him as a loan, and he undertook to secure its repayment to the wife, does not change the character of the original transaction, at least as to his creditors. No subsequent agreement between the husband and wife can make that a debt which was originally a gift, nor will a conveyance made by the husband to the wife in consideration thereof be valid as against existing creditors. *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 200; *Humes v. Scruggs*, 94 U. S. 22; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638.

The evidence, however, does show that the wife assumed to pay a debt of \$525 due by her husband to Theo Royalty, and that she executed the deed of trust to Crumpecker, trustee, upon the house and lot to secure its payment. To that extent the property conveyed to her was upon a consideration deemed valuable in law, and must stand as a security for that sum. Although a postnuptial settlement may have been made under such circumstances that it must be pronounced fraudulent and void as to the creditors of the husband, yet, if the wife relinquishes her interest in property, or assumes the payment of debts due from her husband, so as to make them charges upon her separate estate, upon the faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with, or of the debts which she has assumed to pay. *William & Mary College v. Powell*, 12 Grat. 372, 385; *Rixey's Adm'r v. Deltrick*, 85 Va. 42, 6 S. E. 615.

The decree of the circuit court declaring the deed of settlement of July 7, 1891, void as to the creditors of Flynn is erroneous to the extent that it failed to provide that the property conveyed by the husband to the wife should stand as a security for the debt which she had assumed to pay Theo Royalty, and to give it priority over the claims of the creditors that were not liens upon the property when the conveyance to her was made, and to that extent the decree must be reversed, but in all other respects affirmed, and the cause remanded to the circuit court, with directions further to proceed in the same according to the principles hereinbefore declared.

(93 Va. 374)

#### SLOCUM v. COMPTON.

(Supreme Court of Appeals of Virginia. July 9, 1896.)

**ERECTMENT—VERDICT FOR PORTION OF LAND IN SUIT—DESIGNATION OF BOUNDARY—EVIDENCE OF TITLE—SUFFICIENCY.**

1. A verdict in ejectment for part only of the land in suit must designate the boundaries of such part, or refer to some instrument from which such boundaries can be determined.

2. Where plaintiff in ejectment failed to

show title from the commonwealth, but claimed the commonwealth's title through proceedings by her grantors under Code 1873, c. 108, § 41, as amended by Acts 1879-80, c. 214, p. 206, providing that the commonwealth's title to land which had been settled continuously for five years, and on which taxes had been paid within five years by the person in possession, shall be relinquished "to the person in possession of the land claiming the same under such settlement and payment," and the evidence affirmatively showed that plaintiff's grantors were not in possession of the land when proceedings under such act were begun, it was proper to sustain a demurrer to the evidence for want of title in plaintiff.

Error to circuit court, Buchanan county; W. T. Miller, Judge.

Action by Mary E. Sloum against Miles L. Compton. From an order sustaining a demurrer to plaintiff's evidence, and a judgment for defendant, plaintiff brings error. Affirmed.

Finney & Stenson, for plaintiff in error.  
Wm. E. Burns, for defendant in error.

BUCHANAN, J. The plaintiff brought an action of ejectment in the circuit court of Buchanan county to recover two tracts of land; one containing 1,400, and the other 1,600, acres. Upon the trial of the cause there was a verdict for the plaintiff, in the following words: "We, the jury, find for the plaintiff the land in controversy, in an estate in fee simple, except the land the defendant has fenced up, and the land conveyed to the defendant by B. W. Compton and Mary A. his wife." Upon motion of the defendant the verdict was set aside, and a new trial awarded.

Upon the second trial the defendant, without introducing any evidence, demurred to the plaintiff's evidence. The court sustained the demurrer, and gave judgment for the defendant.

The action of the court in setting aside the verdict upon the first trial, and in rendering judgment for the defendant upon the demurrer to the evidence upon the second trial, is assigned as error here.

Where a verdict is for a part only of the land sued for, the boundaries of the part recovered should be designated. The verdict must be certain in itself, or must refer to some certain standard by which to ascertain the land so found; otherwise it will be too uncertain to warrant a judgment upon it. *Callis v. Kemp*, 11 Grat. 84; *Gregory v. Jacksons*, 6 Munf. 25.

#### Second Trial.

The verdict upon the first trial was plainly insufficient, and the court did not err in setting it aside.

There was nothing in the case to take it out of the general rule that the plaintiff in an action of ejectment must show that he is the owner of the legal title to the land sued for.

The plaintiff, in making out her title, did

not introduce in evidence, or rely upon, a grant from the commonwealth, but endeavored to show that she had acquired the commonwealth's title by acts done and proceedings had under section 41 of chapter 108 of the Code of 1873, as amended by chapter 214 of the Acts of Assembly of 1879-80, p. 205. That section is as follows:

"No location of any land office warrant upon any land which shall have been settled continuously for five years previously, upon which taxes shall have been paid at any time within the said five years by the person having settled the same, or any person claiming under him, shall be valid; and any title which the commonwealth shall have to such land shall be hereby relinquished to the person in possession of the land claiming the same under such settlement and payment to the extent of the boundary line enclosing the same: provided said boundary line shall not include more than fifteen hundred acres, and every person so in possession, so claiming may have such land surveyed, and before the court of the county where such land, or any part thereof lies, prove such settlement for such time and such payment; whereupon such court shall order the plat and certificate of such survey to be recorded. Thereafter the said record shall be conclusive evidence in any controversy between the claimant thereunder and any person claiming under a location of the said land made after such order. This act shall relate as well to land forfeited for the nonpayment of taxes, or the failure to have the same entered on the commissioner's books, or both these causes, and to land escheated or escheatable, and to waste and unappropriated land."

She introduced in evidence portions of the record in two ex parte proceedings had in the circuit court of that county under sections 13 and 14 of chapter 172 of the Code of 1873 (Code 1887, §§ 3340, 3341), which provide where and how the contents of lost or illegible records may be proved and preserved, to show that her vendors, Baldwin and Beavers, had acquired the commonwealth's title to the land sued for, by virtue of a settlement made upon it, and proceedings had under section 41 of chapter 108 of the Code of 1873, as amended and quoted above; the original papers in the "court-right" or "settlement-right" proceedings (as they are called in those counties where they are most common), and the record made of them, having been destroyed by fire. From the report of the commissioner of the circuit court setting up these lost records, it appeared that the grantors of the plaintiff in the year 1882 had caused to be surveyed each of the tracts of land claimed by the plaintiff as vacant land; that they produced before the county court a plat and survey of each parcel, proved that they had possessed the same for five years, had paid taxes thereon within that period; that no other person claimed the land; that the court ordered the

survey and plats to be recorded; that they, together with the orders directing it, were properly recorded in the clerk's office of the county court; and that both the record and the originals in the court-right proceedings had been destroyed by fire.

She also introduced in evidence a deed for the land in controversy, executed to her on the 28th day of May, 1883, by Baldwin and Beavers, the parties who had instituted the court-right proceedings. After putting in evidence some other papers, not material to the question under consideration, she proved by Baldwin, one of her vendors, and her only witness, "that he was one of the grantors in the deed to Mady E. Slocum; that the land described in the entry made in the name of G. W. Rife, and assigned by Rife to Beavers and Baldwin, was the same as the land in controversy; that he (witness) made the entry for Rife, and that Rife then lived within about  $\frac{1}{4}$  of a mile of the land in controversy, and had a very small portion of it cleared and inclosed; that it had been so cleared and inclosed some 10 or 12 years before the date of said entry, and that, at the time he (witness) made the survey for the court right, that the father of the defendant was in possession of the G. W. Rife land, but did not live on the land covered by the court-right papers, being the 3,000 acres in litigation; that in making the said survey he ran through one or two of Compton's fields, and that he offered to run out a piece of it to Compton (meaning defendant's father), but that Compton said that he had all he wanted; that neither witness nor Beavers had ever been in possession of the land; that he lived about 12 miles from it; that the defendant was in possession of the land; that he lived about 10 miles from it, and Beavers about 12 miles from it; that the defendant was in possession of the land, and claimed it, at the time of bringing this suit."

The evidence of the plaintiff not only failed to show that she was entitled to recover the land in controversy, but clearly showed that she had no such right. She did not bring herself, nor those under whom she claims, within the provisions of the statute upon which she relied to show that she had acquired the commonwealth's title, or had the right to recover the land from the defendant. The object of the statute was to protect actual settlers upon the lands of the commonwealth which were subject to entry, and those in possession of such lands, claiming under them. It was never intended that persons should, under its provisions, acquire title to her lands without paying anything therefor, except where they had been actually settled, as required by the statute, and were in the possession of the original settlers, or those claiming under them, when proceedings were had in the county court, under the statute, for the purpose of obtaining record evidence of their

rights in the lands, and in order to protect themselves from the subsequent location of land-office warrants thereon. The statute only provides for the relinquishment of the commonwealth's title "to the person in possession of the land claiming the same under such settlement, and payment to the extent of the boundary line enclosing the same: \* \* \* and every person so in possession, so claiming may have such land surveyed, and before the court of the county where such land or any part thereof lies, prove such settlement for such time and payment; whereupon such court shall order the plat and certificate of such survey to be recorded."

It appears clearly by her own evidence that her vendors, Baldwin and Beavers, were not in possession of the land when they instituted the court-right proceedings under which they and she claimed. This being true, the proceedings were without authority of law, and conferred no rights upon the parties claiming under them.

The judgment of the court upon the demurrer to the evidence is right, and must be affirmed.

(33 Va. 349)

PERSINGER'S ADM'R v. CHAPMAN et al.  
(Supreme Court of Appeals of Virginia. July 9, 1896.)

**EQUITY—REFORMATION OF INSTRUMENT—MISTAKE—LACHES.**

Where, on a settlement of mutual accounts, defendant executed to the other party a bond for the balance due, and, during the two years that the other party lived thereafter, no objection was made to the correctness of the settlement, equity will not reform or cancel the bond, in an action thereon by the executor of the obligee, on the ground of mistake in the accounting, unless a full statement of the account can be made, and the mistake clearly appears.

Error to circuit court, Roanoke county; Henry E. Blair, Judge.

Action by the administrator of James S. Persinger, deceased, against F. J. Chapman and another. Judgment for defendants, and plaintiff brings error. Reversed.

L. H. Cocke, for plaintiff in error. G. W. & L. C. Hansbrough and R. H. Logan, for defendants in error.

CARDWELL, J. This is an action of debt, brought by the personal representative of James S. Persinger, deceased, in the circuit court of Roanoke county, on a bond executed by F. J. Chapman and F. Rorer, his surety, to the plaintiff's testator, in his lifetime, and for the sum of \$1,250, bearing date February 13, 1883, and payable six months after date, with interest. At the trial the defendant Chapman tendered his special plea in writing, in the nature of a plea of equitable set-off, the substance of which is that the bond sued on was executed under a mistake, in payment for 24 acres of land in Roanoke county, known as

a part of the "Chapman Mill Property," while in fact, at the date of the execution of the bond, Chapman had fully paid for the same. Upon this plea, issue was joined, and after all the evidence was submitted the plaintiff demurred to the defendant's evidence; and, both both parties agreeing thereto, the jury were discharged from the further consideration of their verdict, and all matters in issue—both of law and fact—were referred to the court for its decision, and the court overruled the demurrer, and gave judgment for the defendant. To this judgment a writ of error was awarded by a judge of this court.

The evidence adduced by the defendant Chapman in support of his plea shows, at the most, that the transaction between him and the plaintiff's testator, who was the defendant's father-in-law, ran over a period of at least 8 or 10 years prior to the execution of the bond, and involved frequent payments of money by the one for the other; that the transactions between them were numerous, and their accounts of them very imperfectly kept, so that any account that may be stated between the parties, especially in view of the death of one of them, must be purely conjectural. The witnesses testified more from impression upon their minds, than from any knowledge they had of the transactions between the parties. Indeed, one of the defendant's witnesses (Ballard) frankly states that the impressions as to which he testifies are gotten from the testimony of another witness, whose deposition was taken in another case and read in this case, and not from anything which he himself knows of the transactions between Chapman and Persinger. It is admitted that the consideration for the bond was the conveyance of the 24 acres of land to the defendant Chapman's wife, and that the deed was executed and acknowledged by Persinger on the day after the bond was executed; and the witness Ballard also testifies that he was present on the 14th of February, 1883, the day after the bond sued on was executed, when a settlement of a general character was had between Persinger and Chapman, which resulted in Chapman executing two other bonds to Persinger, one of which was also signed by his wife, and that the \$1,250 bond did not enter into this final settlement, if, indeed, it was mentioned at all. It is a significant fact that, although Persinger lived nearly two years after the bond was executed, there is not the slightest evidence that Chapman ever suggested the mistake that he now claims was made.

What was said by Moncure, P., in *Foster v. Rison*, 17 Grat. 340,—a case very similar to the one at bar,—is peculiarly appropriate here, viz.: "It is possible, after all, that the account given of this matter in the examination of Wm. Rison is the true one, and that the credit of \$975 given to J. W. F. in the settlement was in fact given by mistake. But, whether the fact be so or not, I think it is not proved by that degree and amount of evidence

which ought to be required under the circumstances, and that, in attempting to correct such supposed mistake, there would be danger of doing injustice to the estate of J. W. F." The effort of Chapman is to show that in the final settlement with James S. Persinger, February 14, 1883, he was improperly charged with a certain bond of one John A. Persinger, that he in fact had paid at the instance of James S. Persinger, and that, when he executed the bond for the 24 acres of land, he had made payments, on account of the purchase by him of the entire Chapman Mills property, equal to, if not in excess of, the amount that he was to pay therefor, and that, if he had been given credit for this bond and all payments made on the mill property, he would have owed Persinger nothing. The attempt to show that he had not been credited, in the final settlement, with the John A. Persinger bond, was made in the suit brought against Chapman and wife to recover the bond executed by them, which was given as the result of the final settlement referred to, and which suit was finally decided by this court (*Chapman v. Persinger's Ex'r*, 87 Va. 581, 13 S. E. 549), and against Chapman; and by the decision the decree of the lower court was reversed on the ground, among others, that, "whilst equity will reform instruments executed in mutual mistake, yet this can never be done unless the true state of the case can be established," and that the evidence was insufficient to show the true state of the case. The evidence in the case here is clear that there could be no true statement of the case established, and that any effort to reform the instrument claimed to have been executed in mutual mistake would, in all probability, if not certainly, result in injustice to the estate of James S. Persinger, deceased. Equity will not extend its aid to one who has been guilty of culpable negligence. It requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may be fairly expected from a reasonable person. And it has been repeatedly decided that equity will not relieve against mistake when the party complaining had within his reach the means of ascertaining the true state of facts, and, without being induced thereto by the other party, neglected to avail himself of his opportunities of information. *Beech*, Mod. Eq. Jur. pp. 53, 54; *Foster v. Rison*, supra; *Towner v. Lucas' Ex'r*, 13 Grat. 705, 722; *Harris v. Harris' Ex'r*, 23 Grat. 706; *White v. Campbell*, 80 Va. 181; *Chapman v. Persinger's Ex'r*, 87 Va. 581, 13 S. E. 549; *Grymes v. Sanders*, 93 U. S. 55. In the last case cited it was said: "A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands." There is nothing whatever in the evidence to take this case out of the operation of these well-established rules, and we are therefore of opinion that the evi-

dence is plainly insufficient to sustain the defendant's special plea, and that it was error in the court below to overrule the demurrer to his evidence and give judgment for him; and the judgment will be reversed and annulled, and this court will enter such judgment as the court below should have entered, sustaining the plaintiff's demurrer to defendant's evidence, and giving judgment for the plaintiff for the amount of the debt sued on, with interest and costs.

(93 Va. 389)

## SIMMONS v. PALMER et al.

(Supreme Court of Appeals of Virginia. June 9, 1896.)

## EQUITY—RESCISSION OF CONTRACT—MISTAKE OF FACT—LACHES.

In an action to rescind a deed executed in November, 1890, it appeared that plaintiff was shown lot 5 in block 15, on the plat, but that when he went out to inspect the property, the agent, through mistake, pointed out lot 5 in block 18, which was 100 yards further south, on the same street; that plaintiff was thoroughly acquainted with the location of lots in that neighborhood, and had once owned this lot; that after paying the required cash payment, and receiving a deed of the lot in block 15, plaintiff discovered the mistake, but made no offer to return the deed, and as late as the summer of 1891, when one of the notes fell due, objected to paying it for the sole reason that there was a variance between its terms and the recitals in the trust deed by which it was secured; that at the time of the sale other lots in the same street, further out than plaintiff's lot, readily sold for the price paid by plaintiff; and that when suit was brought the value of property in that neighborhood had greatly depreciated. *Held*, that equity would not grant relief.

Appeal from circuit court, Roanoke county; Henry E. Blair, Judge.

Bill by S. F. Simmons against one Palmer and others to rescind a deed. From a decree dismissing the bill, plaintiff appeals. *Affirmed*.

G. W. & L. C. Hansbrough and M. G. McClung, for appellant. A. B. Pugh, for appellees.

KEITH, P. The facts out of which this controversy grows, as shown by the pleadings and proofs, are as follows: S. F. Simmons on the 6th of November, 1890, purchased of Armstrong, Critz & McClung, real-estate agents at Salem, in Roanoke county, a certain lot of ground on Colorado street, in said town, for the sum of \$2,000,—\$1,000 payable in cash, and the residue represented by notes payable to Hutton, Saunders, Ruff, and Palmer, which constituted liens upon the lot, the legal title to which was held by Palmer. It seems that the real-estate agents had for sale lot 5 in section 15 on the plat of the Salem Improvement Company, and offered that lot for sale to Simmons. Thereupon Simmons and Critz drove out to Colorado street, and, when they came to lot 5 in block 18, Critz stopped,

and showed that lot to Simmons as the one which was the subject of negotiation; thinking that he was in fact showing him lot 5 in block 15, which was on the same street, and about 100 yards further to the south. Simmons agreed to take the lot, and paid the \$1,000 in cash, and assumed the payment of the notes to Hunton, Saunders, and Palmer, and a deed was executed to him for lot 5 in block 15. Immediately thereafter, with the deed in his pocket, Simmons drove out to inspect the lot, and discovered that the lot conveyed to him was not the lot which had been shown to him upon the occasion when he looked at it in company with Critz. He did not go back immediately to the office of Armstrong, Critz & McClung; but the next morning he saw Critz, and they drove out to the lot, and the mistake which had been made was pointed out. Critz did not controvert the fact that a mistake had been made. Simmons then went to see Armstrong, another member of the firm, and said to him: "You have deeded me a lot which I have not bought. I bought lot 5 in section 18, and you have deeded me lot 5 in section 15, which I do not want; and you must take the lot back, and deliver me my money and bonds." This is substantially the account given of the transaction by Simmons. Armstrong gives a somewhat different account of it. That lot 5 in section 18 was shown to Simmons by Critz is beyond dispute; that the deed conveyed lot 5 in section 15 is not denied; that the mistake was promptly brought to the attention of the real-estate agents is established by the proof. But it appears by a preponderance of proof that Simmons accepted the deed, and never offered to return it, although he demanded a restitution of the money which he had paid, and the delivery to him of the notes which he had executed. It further appears that Simmons had been the owner of this land for a number of years before he sold it to the Salem Improvement Company; that he was the vice president of that company; that he was thoroughly acquainted with the land, and its subdivision into streets, alleys, and lots. His acquaintance with it was so intimate that he says himself that it was altogether unnecessary for him to refer to the map, or to visit the lots, in order to know their location. Indeed, an inspection of the map exhibited in this cause will show that this must be so. Colorado street starts from Boulevard Roanoke, which cuts diagonally across the lands of the Salem Improvement Company. It runs almost due south from the old town of Salem. The sections, beginning on the right, after leaving Boulevard Roanoke, passing into Colorado street, and going south, are numbered consecutively on the right, from 1 to 8; then, crossing Colorado street, and coming back to Boulevard Roanoke, they are numbered consecutively from 9 to 18; so that

section 18 would be the first section on Colorado street, after leaving the old town of Salem, and section 15 is immediately beyond it, and upon the same side of the street. Therefore no one in the least degree acquainted with the plat of the town could fail to discriminate between lot 5 in section 16 and lot 5 in section 15, or be ignorant as to their relative positions and advantages, without going upon either. The preponderance of evidence is that at the beginning of the negotiations the lot pointed out to Simmons on the plat was lot 5 in section 15. He therefore had every opportunity to know, and it is difficult to resist the conviction that he did know with perfect precision, the lot which was the subject of the negotiation, and which was described in his deed.

In coming before the court upon this state of facts, and asking for a rescission of an executed contract, where there is no imputation of fraud or imposition, the plaintiff puts himself at a disadvantage; for he was grossly negligent, if not willfully blind, in failing to discover the mistake of which he now complains. The proof establishes beyond doubt that during November and December, 1890, and the spring of 1891,—indeed, until some time in the summer of 1891,—lots upon Colorado street, in various blocks, some of them much further out from the old town of Salem than that in question, were readily sold for the price paid by the plaintiff for the lot purchased by him. Within the dates named, the Salem Improvement Company, of which Simmons was vice president, actually sold lots on Colorado street, in sections 4, 5, 7, 13, 14, 15, and 16, at prices ranging from \$2,000 to \$2,300; the latest sale, in point of time, being the 21st of March, 1891, when lot 12, section 14, was sold for \$2,050.

In *Pom. Eq. Jur.* § 856; in treating of relief upon the ground of mistake, it is said: "There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief, defensive or affirmative. The fact concerning which the mistake is made must be material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief, affirmative or defensive." To the same effect, it is said by Beach, *Mod. Eq. Jur.* § 52: "A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must

go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the party complaining would not have entered into the agreement, or assumed the obligation, from which he seeks to be relieved." And the proof must be clear and convincing of the existence of the state of facts upon which the claim for relief is based. In this case it is more than doubtful whether the location of the lot, as between sections 15 and 16, was so material as that it can be said to have animated and controlled the conduct of the parties. There is every reason to believe that the purchase was made for speculative purposes. There was great activity in real estate in the town of Salem at that time. Lots were being rapidly disposed of, and it appears by the proof that at the date of this transaction, and for several months thereafter, lots upon this street readily commanded from \$2,000 to \$2,300. But assuming that, upon the discovery of the mistake, Simmons was entitled to rescind the contract, the situation was eminently one which called for prompt and decisive action on his part. He should at once have returned the deed, and demanded the restitution of his money and the cancellation of his obligations growing out of this purchase; but this he did not do, but as late as the summer of 1891, when one of the notes due upon this purchase was presented to him for payment, he objected to paying it, not upon the ground that he was not liable, by reason of the mistake upon which he now relies, but because of the variance between the terms of the note and the recitals in the trust by which it was secured. At this time the market for real estate in Salem had become dull, lots were falling in price, and in a little while transactions in real estate appear to have almost ceased. Then, and not until then, this suit was instituted. In the meantime he had held the deed, and was in a position to profit by the transaction, had the lots continued to enhance in value; and he now seeks to be released from the purchase, when the situation has so changed as that the other parties to the contract cannot be restored to their former position. The application for relief, in such cases, upon the ground of mistake, must be made with due diligence, and what constitutes due diligence is to be determined by reference to the facts attending the particular case in judgment. The diligence required should be proportioned to the injurious consequences likely to result from delay. As was said by Earl, J., in *Thomas v. Bartow*, 48 N. Y. 193: "In ordinary cases of tort and breach of contract, it is a fair and just rule which requires the injured party to use ordinary diligence to make his damages as small as he can, and confines his recovery to so much damages only as he could not, by good faith and ordinary diligence, have averted. Much more, where a party comes into equity seeking relief on the ground

of mistake, should he show that he has used due diligence and good faith to avert the consequences of the mistake; and it would be a poor administration of equity that would give him relief after, by his delay and omission of duty, he had caused irreparable mischief to the other party." The decree complained of, dismissing the bill, is without error, and is affirmed.

(93 Va. 380)

# **NICKELS v. PEOPLE'S BUILDING, LOAN & SAVING ASSN.**

(Supreme Court of Appeals of Virginia. July 9, 1896.)

**ACTION BY FOREIGN CORPORATIONS—SUFFICIENCY OF COMPLAINT—BUILDING AND LOAN ASSOCIATIONS—FORFEITURE OF STOCK—RIGHT TO WAIVE FORFEITURE—CONTRACTS—LAW OF PLACE.**

1. Under Code, § 1104, and Acts 1889-90, p. 170, prescribing the conditions under which a foreign corporation may transact business in Virginia, it is not necessary, in an action brought by such corporation, that the complaint should allege that the plaintiff had complied with the provisions of the law relating to foreign corporations.

2. A bond given to a building and loan association to secure a loan provided that on default of payment of any installment of interest or premiums for three consecutive months the whole principal sum, interest, and premiums should immediately become due. Defendant defaulted May 28, 1892, and continued in default until February, 1893, when he made a payment, with subsequent payments on March 1st and 18th. The sums were sufficient to pay the premiums and dues up to within three months of the time suit was brought, but they were not sufficient to pay interest, premiums, and dues. *Held*, that though, under the by-laws of the association, defendant's stock might have been forfeited on default, the plaintiff was not obliged to declare forfeiture, but had the right to continue the stock in force, and to apply any payments to the liquidation of any of its dues against defendant.

3. The provision in the bond that upon default of payment of installments the whole sum should become due, is not a provision for the increase of the debt by way of a penalty or forfeiture rendering the contract void.

4. A bond executed in Virginia and payable in New York is governed by the law of New York, and not of Virginia, as regards the question of usury.

Appeal from circuit court, Wise county; W. T. Miller, Judge.

Bill by the People's Building, Loan & Saving Association to foreclose a trust deed executed by W. H. Nickels. There was judgment for plaintiff, and defendant appeals. Affirmed.

H. C. McDowell, Jr., for appellant. John A. Kelly and Jos. L. Kelly, for appellee.

**KEITH, P.** The People's Building, Loan & Saving Association, a corporation organized under the laws of the state of New York, filed its bill in the circuit court of Wise county on the 19th day of April, 1894, in which it shows that on the 10th of June, 1891, Nickels was admitted as a member of the said association, having subscribed to 30 shares of the stock. Soon after becom-

ing a member, he borrowed from the association the sum of \$3,000, agreeing to repay the same in monthly installments, pursuant to the terms and conditions set forth in the bond dated the 10th of June, 1891, payable to the plaintiff, and signed by Nickels, and in the deed of trust executed on the same day for the benefit of the plaintiff, in which certain property was conveyed by Nickels and his wife to E. A. Walton, trustee, to secure the bond. In the bond and deed of trust it is stipulated that, "if default should be made in the payment of any interest or premium moneys provided for in said bond and deed of trust, and the said default should continue for a period of three months after the same shall have become payable, that the whole of the principal sum thereby secured should become due, and the trust deed be liable to foreclosure. The bill then charges that Nickels has made default in the payment of numerous installments of premium and interest provided for; that his default has continued more than three months, and that there is unpaid and owing to the plaintiff for principal and interest the sum of \$2,909.50; that Walton, trustee, declines to execute the trust imposed upon him, and that the plaintiff is therefore compelled to come into equity for the enforcement of its lien. Nickels demurred to and answered the bill, admitting that the plaintiff is a corporation, and that it is organized under the laws of the state of New York. He denies that he ever received the sum of \$3,000 from the said association. He admits that he did receive the sum of \$2,700. He denies that default has been made in the payment of the installments stipulated, and continued for more than three months prior to the institution of the suit; and denies that the sum claimed in the bill, or any other sum, was due complainant at the institution of the suit. He alleges that the contract between himself and the association is usurious. He asks that his answer may be treated as a cross bill, and that the People's Building, Loan & Saving Association shall be required to answer its allegations. The association did demur to and answer the cross bill denying all the material allegations therein contained. Thereupon proofs were taken, and the circuit court entered a decree in favor of the plaintiff for the sum of \$2,700, with interest, subject to credits for interest and premiums paid, and providing that unless Nickels, or some one for him, should, within 60 days from the date of the decree, pay the sum so found due, the land conveyed in the deed of trust to Walton should be sold. From this decree, an appeal was allowed to Nickels by one of the judges of this court.

The first question arises upon a demurrer to the bill. It is contended upon the part of the appellant that, in order to maintain its suit, it was necessary for the plaintiff to aver a compliance with the laws of this state with

reference to companies incorporated in foreign states doing business within its limits. See Code Va. § 1104, and Acts Assem. 1889-90, p. 170. It is unnecessary to inquire whether or not, under the statute cited, a contract made in this state by an insurance company chartered under the laws of another state, which has not complied with our laws above referred to, is void or voidable, the question lying behind that being one of pleading. Can the question be raised by a demurrer to a bill, or is it matter of defense? Upon the part of the defendant it is contended that compliance with the conditions prescribed by law is a prerequisite to the right to sue in the domestic courts, and must be made affirmatively to appear. Upon the part of the appellee it is contended, without admitting that the failure to comply with the law would at all affect the validity of the contract, that the question cannot be raised by demurrer, but that it is strictly a matter of defense, and the failure to comply must be made to appear by plea or answer. There is no such issue made in any of the pleadings presented in this record. Without considering the effect of section 1104 and of the statute found in Acts Assem. 1889-90 upon the validity of the contract, we have no hesitation in deciding that it is not necessary for a foreign corporation, in order to sustain its action, to set forth in its complaint that it has complied with the laws of the state entitling it to do business therein, but that this defense, if available, is a matter to be pleaded and proved by the defendant. See 6 Thomp. Corp. §§ 7965, 7979-7981. The demurrer was properly overruled.

The next assignment of error is that the suit was prematurely brought. As we have seen, one of the conditions of the bond, and of the deed of trust given to secure it, is that, should any default be made in the payment of the principal or any interest or premium moneys secured to be paid, and should the same remain unpaid and in arrears for the space of three months after the same shall have become payable, then the whole principal sum, together with interest and premium thereon, should immediately become due. The suit was brought on the 19th of April, 1894, and the plaintiff avers that default had been made in the payment of the interest and premium moneys for more than the period of three months, and therefore sues for the entire sum alleged to be due by reason of that default. Upon the part of the appellant it is claimed that there had been no default continuing for a space of three months, and that the suit was prematurely instituted. The grounds of the appellants contention are that all of the premium and dues had been paid by him to May 28, 1892; that thereupon he failed to pay his premiums and dues as required by the by-laws, and that by reason of the failure to make the payments he had, by virtue of article 12 of its articles of incorporation, forfeited his stock to the association; that

this forfeiture had become absolute, having existed from May 28, 1892, until February, 1893; that on February 13, 1893, he paid to the association \$200, on March 1, \$100, and on March 18, \$80,—making \$380; and that this sum, applied to the premium and dues, paid those which were in arrears, and left a sum to his credit with the association sufficient to keep down interest and premiums to a period within three months prior to the institution of this suit; that, therefore, the default had not continued for three months when the suit was instituted. It is a novel proposition which is here contended for. We recall no instance in which a forfeiture has been urged and insisted upon by him whose right or interest was to be divested by its enforcement. The presumption is that the continuance of his relations with the company was an advantage to the appellant, because it enabled him, by the payment of his dues, premiums, and interest to the company, to discharge all of his obligations to it, including the principal sum received by him as a loan, and it is certain that the association would not have been permitted to rely upon an enforcement of this forfeiture, unless it could show that it had strictly complied with all the conditions upon which its rights to claim the forfeiture were made to depend; and if, at the time of the payment of the several sums of money referred to, it had appeared that the forfeiture had not been declared, that the money had been received by the company, it would have been applied to the relief of the appellant, and to the exoneration of his shares from the penalty incurred by his failure regularly to meet his dues. There was no application made of these several sums of money to any particular debt or demand on the part of the appellant, and it is conceded that the association had the right to apply these payments thus unappropriated to any existing obligation. The contention is that, the stock being forfeited, there was no obligation save the payment of premium and dues, and that, therefore, the payments were necessarily to be applied to their extinguishment. This position is not tenable, unless at the time the payments were made the conditions were such that a court of equity would not have relieved against the forfeiture at the suit of the appellant. The shares of stock still stood upon the books in the name of the original holder. There had been no act or declaration made indicating a purpose upon the part of the company to enforce the penalty denounced for the failure promptly to meet its demands upon the appellant. Upon the receipt of the money it appears that it was placed to the credit of the appellant in liquidation of all the demands then existing against him, including interest, premium, and dues; and when so applied the sum was insufficient to keep down future installments, so that when the suit was brought there were arrearages of interest and pre-

miums which had continued for more than three months, and the condition had occurred upon which, by the terms of the contract, the whole debt, principal and interest, became due and payable. Under such circumstances a court of equity would have relieved against the forfeiture had the association sought to enforce it, and the appellant cannot be permitted to occupy the anomalous position of demanding its imposition in order to meet the exigencies of his case. So that this assignment of error is not well taken.

It is further contended upon the part of the appellant that a provision in a contract that the principal and interest shall become due upon failure to pay installments of interest is a penalty or forfeiture against which a court of equity will relieve, but such is not the modern doctrine on this subject. In the case of *Association v. Read*, 93 N. Y. 479, there was a similar provision, and the court said: "This is not a case where a larger sum is made payable in consequence of the nonpayment of a smaller sum, and payment of a larger sum is not imposed as a penalty. But this is a case where the whole of the specified sum becomes due because the partial payments are not made as stipulated, and the principles of law which authorize courts of equity sometimes to relieve from forfeitures do not apply to such a case as this." A provision in a contract, not that the amount of the debt should be increased, but that in a specified event the time for the payment of a certain sum due shall be accelerated, does not create a penalty or forfeiture against which a court of equity will relieve. "It is settled by the overwhelming weight of authority that if a certain sum is due and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day, specified, with interest thereon made payable during the interval at fixed times, annually or semiannually or monthly, and a further stipulation provides that, in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law." 1 Pom. Eq. Jur. § 439. We think, therefore, that this assignment of error is not well taken.

It is further contended upon the part of the appellant that the contract and dealings between the appellant and the appellee disclosed in the record were usurious. There is nothing upon the face of the deed of trust or of the bond to indicate that the contract between the parties under investigation was not a domestic contract. The appellant resides in Virginia. The appellee is a New York corporation, doing business in Virginia. The money was paid to the appellant in this state, and was to be expended in the improvement

of real estate situated in Virginia. If there was nothing more, it would be considered a domestic contract, but it appears by reference to article 16 of the by-laws of the association that "all remittances for admission, monthly and quarterly installments, fines, penalties, interests, and premiums, and all other payments, shall be made to the secretary of the association at their principal office in Geneva, N. Y." All the payments, therefore, under this contract, were to be made in New York by the terms of the laws of this association, of which the appellant was a member. He knew, or had, as appears from his own deposition, the means of acquainting himself with this by-law. As a member of the association, he must be taken to have contracted with reference to it, and, in addition to this, the parties were entering into a contract lawful in New York, but usurious in Virginia. The presumption in such cases is, not only that they contracted with reference to the laws of that state in which the contract was made payable, but with reference to the laws of that state which recognize the legality of the contract entered into. As was said in *Association v. Ashworth*, 81 Va. 712, 22 S. E. 522: "When a contract is made or entered into in one state, to be performed in another, it is, as a general rule, to be governed by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, interpretation, validity, and effect." "The general principle," says Chief Justice Taney in *Andrews v. Pond*, 13 Pet. 65, "in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the laws of the place of performance is higher than that of the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." The place where the contract under investigation was to be performed being the state of New York, it is governed by her usury laws. As appears from the proofs in this case, and from the opinion of this court in *Association v. Ashworth*, cited above, it is not usurious, according to the laws of New York, for building associations to demand and receive premiums, dues, and fines, although in excess of the lawful rate of interest. While we are, therefore, of opinion that this contract is unwise and improvident, that its operation is harsh and oppressive, yet, so long as foreign corporations are authorized by the states which create them to make such contracts, and are permitted by this state to do business within its borders, the courts have no choice but to enforce them.

We have been unable to discover any error to the prejudice of the appellant. Indeed the decree of the court below has so tempered the relief accorded to the appellee that the appellant has been required to do little, if anything, more than in equity and conscience he should

have been willing to do; and, the appellee upon its part having expressly waived its cross appeal, the decree complained of is affirmed.

(99 Ga. 151)

### ALLISON v. SUTLIVE.

(Supreme Court of Georgia. June 12, 1896.)

EVIDENCE — WHEN ADMISSIBLE — AGENCY — LIABILITY OF UNDISCLOSED PRINCIPAL.

1. One of the issues upon the trial being whether or not a particular person had engaged in a given business on his own account, and not as the secret agent of another, evidence tending to show the affirmative of this issue was properly admitted, though, as to other issues in the case, it may have been entirely irrelevant.

2. Where a principal transacts business through an agent, in the agent's name, the fact of agency being kept concealed, third persons contracting with the agent are entitled to the same rights and equities against the undisclosed principal as they would have against the agent, were he the real principal. Under such circumstances, the principal is bound by any contract which the agent makes within the scope of the agency.

3. There was no material error in any of the rulings or charges complained of, nor in refusing to charge as requested. The instructions given by the court were sufficient to fully guard all the rights of the losing party. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Clay county; J. M. Griggs, Judge.

Action by J. W. Sutlive against one Tumlin, in which the Bank of Ft. Gaines was summoned as garnishee. One Toombs and F. M. Allison were subsequently made parties to the garnishment proceedings. On a trial of the issue between Sutlive and Allison, as to whether the fund in the bank was subject to the former's judgment, there was a verdict for Sutlive; and, a new trial being denied, Allison brings error. Affirmed.

The following is the official report:

Sutlive brought suit in November, 1892, upon account, against Tumlin, and caused garnishment to issue and be served upon the Bank of Ft. Gaines. Toombs afterwards brought suit against said bank for the recovery of certain cotton. The bank filed its answer to the garnishment, stating that it had \$242.60, and a warehouse receipt for a bale of cotton; that Tumlin deposited a sum of money as a bonus, under an agreement with the bank, to pay for cotton which he would purchase; that, after some months of dealing, it had, at the date of service of the summons of garnishment, a balance of \$244.60, and the bale of cotton before referred to, and the proceeds of sale of cotton, to the credit of Tumlin; that Toombs had begun suit for the possession of the cotton and bonus of which the amount in the bank's hands was the proceeds. And it asked for such order as would protect it from loss. This answer was traversed by Sutlive. The bank also filed a motion stating that the fund shown by its answer to be in its hands was placed there by

Tumlin as his money and property, and praying that Toombs be made a party to the garnishment proceeding, and that he and Tumlin be required to interplead. An order was passed, making Toombs a party as prayed. He pleaded that no part of the money due by the bank was due Tumlin, but was due Toombs for the use of Allison. At the same time, Allison moved to be made a party, on the ground that the claim of Toombs against the bank had been transferred to him for a valuable consideration, and the motion was granted. Sutlive obtained judgment against Tumlin, in his original suit, on March 22, 1894, for \$268.16 principal and \$44.24 interest; and a week later, during the same term, judgment was rendered against the bank, in favor of Toombs, for the use of Allison, for \$487 principal,—the original action having been amended at that term so as to proceed as stated. Afterwards a trial was had upon the issues between Sutlive and Allison,—as to whether the fund was subject to Sutlive's judgment. The jury found in his favor, and Allison's motion for new trial was overruled.

Sutlive alleged that Allison's verdict and judgment were fraudulent; that when the garnishment was issued the cotton which produced the money named in the garnishee's answer was the property of Tumlin, and he, with intent to hide it, and to hinder and delay Sutlive in the collection of his debt, pretended that he was the agent of Toombs, his son-in-law, in the purchasing of the cotton, and Toombs transferred and assigned the claim for the purpose of further hiding and concealing the money; that the bank, knowing that the money was the property of Tumlin, permitted Allison to take judgment against it, without objection, and aided Tumlin and Allison to further attempt to hide the money, and to hinder and defeat the collection of Sutlive's judgment; that \$227.41 of the amount of Sutlive's judgment was expended by him, at Tumlin's request, to protect said cotton, and as part of the necessary expenses connected with the purchase and handling of the same, and Tumlin contracted to pay the same, for he was credited by Sutlive for that amount on the faith of the ownership of the cotton by him, and it would be a wrong and fraud on Sutlive for Toombs or Allison to take the cotton, or its proceeds, without paying the expenses incurred by Tumlin in buying, handling, and protecting it. Further, that the judgment in the trover suit, in favor of Toombs, for the use of Allison, should have been so molded as not to prejudice the rights of Sutlive; that when said suit was being tried the presiding judge announced to all parties that the judgment should not prejudice the rights of parties in the garnishment case, except only to fix a sum certain in the contest between Allison and the bank, but, in the face of this announcement and of the pleadings, Allison entered up judgment absolute, without reference to the rights of other parties, and the judge inadvertently signed

the judgment so entered, relying on plaintiff's counsel to write it in pursuance of his announcement.

There was testimony for Sutlive that the cotton that produced the fund in controversy was purchased by Tumlin in the fall of 1891. He was required to keep in the bank, during that fall, a bonus of \$2.50 per bale for such cotton as he purchased, and the bank paid for the cotton. He kept the deposit in his own name, and all the accounts between him and the bank relating to the cotton were kept in his name. In his dealings with the bank, he always claimed the cotton as his own; and the bank's cashier never heard of Toombs, in connection with the cotton, until about the time he brought suit against the bank, and never heard that Allison had any interest in it until about the time he was made a party to the suit. The bank always dealt with Tumlin as principal, and no agency for Toombs was disclosed by him. All of the principal amount of the judgment in Sutlive's favor, except \$85, was advanced by him to pay insurance premiums on the identical cotton in controversy, and he gave credit to Tumlin on the faith of this cotton, believing it was his cotton. The insurance policies were made payable to the bank as its interest might appear. Tumlin always represented to Sutlive that the cotton was his, and Sutlive never heard of any claim that Toombs set up to it until suit was brought against the bank. The policies covered all the cotton Tumlin bought in the fall of 1891, including the 137 bales in controversy. Sutlive could not say how many bales the policies covered, for they were issued to cover a money value, and not bales or pounds. Nor could he say whether or not he had the identical cotton which produced the fund in controversy when the policies were issued, and the premiums paid by him for Tumlin, nor how much or what part of the money he so advanced was for the insurance of the 137 bales that produced the fund in controversy. The policies were deposited with the bank, and had been lost or destroyed. Tumlin purchased 500 bales of cotton in the fall of 1891. He deposited in the bank, to cover his purchases, a bonus to the amount of \$490. One item he deposited was \$100 paid him by J. L. Sanders on his salary as a cotton buyer for Sanders. The largest sum he deposited at any time was \$150. The deposits were made at different times, and in small amounts. The cashier of the bank did not know where the bonus came from, nor whose money it was, but only that Tumlin deposited it in his own name, and as if it were his money. Other testimony for Sutlive will hereafter appear from the motion for new trial.

The evidence for the claimant, Allison, showed, in brief, that Tumlin, in buying cotton, was acting as the agent of Toombs, his son-in-law, who furnished him, during the seasons of 1890 and 1891, between \$2,000 and \$3,000 to purchase cotton. The bonus re-

quired to be deposited in the bank was Toombs' money. Not one dollar of Tumlin's money went into the purchase of the cotton. The 137 bales before referred to, which were the ones involved in the suit against the bank, were bought by him for Toombs. The accounts were kept by the bank in Tumlin's name for convenience and expediency in handling and trading the cotton, as Toombs had no objection to this. Tumlin had no interest in the cotton, except to manage it as best he could for Toombs. There never was any collusion between them, or between either of them, with Allison, to hinder, delay, or defraud Tumlin's creditors; but the cotton belonged to Tumlin, who in good faith transferred it to Allison as additional security for a debt he owed Allison. This debt was past due in 1892, and Allison called on Toombs for payment, the amount of it being over \$3,000. Toombs told him he had 126 bales of cotton, on which the bank had a claim for advances, after paying which Toombs' interest would be \$1,200 or \$1,500, which he agreed to hold and pay over to Allison when collected. He afterwards stated that it was not a good time to sell, and Allison agreed to extend the time of payment on condition that Toombs would give his notes for the debt secured by mortgage, and allow the proceeds of the 126 bales of cotton to go on the first note due. Toombs agreed to do this, and gave Allison two notes, dated November 17, 1892, for \$1,612.85 each, secured by mortgage, one of which notes fell due April 1, 1893. He also signed an agreement, in writing, stating that, in consideration that Allison had renewed the note and mortgage he held, Toombs agreed to pay over to him the proceeds of the 126 bales of cotton, after paying the bank the advances made thereon. He afterwards executed a written transfer to Allison of all his claim on the bank, to be credited, when collected, on the note held by Allison; said claim being about \$1,200, "now being sued in the hands of Kennon & Irwin. It is understood that the lawyer fees are to be deducted from the amount collected. This transfer is made as part of, and in continuation of, a previous contract in which I agree to pay over proceeds of my interest in cotton to F. M. Allison."

In addition to the grounds that the verdict was contrary to law and evidence, the motion for a new trial assigns error upon the admission of testimony, by Killingsworth, that, during the fall of 1891, Tumlin borrowed of him \$10, under a statement that he wanted it to use as a bonus to purchase cotton, and that witness lent him the money, but did not know what use he made of it, nor that he used it in purchasing the cotton producing the fund in controversy. Also, the testimony of West, that he made Tumlin a loan of the same amount during the same fall, under a like statement of Tumlin. And the testimony of Burnett, that

he was in the employment of Tumlin during the same fall; that Tumlin collected of Tom Whatley, in that fall, \$30 for bagging and ties that Tumlin had sold him for Blanchard, Humber & Co.; and that Tumlin deposited \$10 of it in the Bank of Ft. Gaines to pay bonus on cotton. The objection urged to this testimony was that it was irrelevant, because it was not shown that the money referred to went into the purchase of the cotton that produced the fund in controversy. Error is further assigned on the following instructions in the charge of the court: "If there was no collusion between Tumlin and Allison, or between Tumlin, Allison, and Toombs; if Tumlin got Toombs' money, and did not apply it to the purchase of the cotton as agreed to by them; and if you believe from the evidence that Tumlin put up the bonus, and that he was transacting the business as his own business, and it was his own business,—if you believe that from the evidence, you should find the fund subject to the *fi. fa.*, whether there was any fraud upon Allison's part, or Toombs' part. If Tumlin was the agent of Toombs, and his agency was concealed,—that is to say, if Tumlin was doing business with Toombs' money, and nobody knew it except Toombs and Tumlin,—then I charge you that Toombs is bound by any contract made by Tumlin within the scope of Tumlin's authority, and Toombs' money, so furnished, would be bound. If you believe from the evidence that Tumlin entered into a contract for insurance on certain cotton, not the property of Tumlin, but Toombs' property,—bought by Tumlin with Toombs' money,—and Tumlin's agency was concealed, and if you believe that the judgment which is the foundation of this *fi. fa.* against Tumlin was for premiums for insurance on the particular cotton in controversy in the other proceedings which have been referred to, you should find the particular fund in court subject to whatever you believe from the evidence to be premiums owing for insurance as part of the *fi. fa.* If you believe it was proper, on the part of Tumlin, to insure the cotton bought by him, I charge you, if that cotton received protection from that insurance, no matter who the cotton belonged to, it would be subject to that much of the *fi. fa.* shown to be owing for insurance premiums on that particular cotton. If the cotton was transferred and the title passed from Tumlin and Toombs to Allison in payment of an old debt, and Allison did not part with anything of value at the time of the transfer, Allison's equity was not established, and you should find in favor of the plaintiff the premiums due for insurance to protect the cotton." The court refused a request to charge as follows: "If Tumlin received Toombs' money, and did not actually use it in the purchase of said cotton, but put other money in the bank, instead, and purchased cotton, and bought this cotton, and agreed for Toombs to have

it, it became Toombs' property." Claimant demurred to so much of Suttle's pleading as set up that he extended credit to Tumlin on the faith of said cotton, upon the ground that the same was insufficient in law, and was an attempt to set up a lien on the fund for insurance. The court refused to sustain the demurrer, or to strike such pleading, which ruling is made one of the grounds of the motion for new trial. The remaining ground of the motion is that the judgment in favor of Toombs, for the use of Allison, against the bank, was conclusive evidence of claimant's title to the fund; there being no sufficient evidence to establish fraud or collusion, or to set aside and impeach said judgment.

John R. Irwin and W. C. Worrill, for plaintiff in error. J. D. Rambo, C. Wilson, W. A. Scott, and Harrison & Peeples, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 144)

STUDEBAKER BROS. MANUF'G CO. et al.  
v. KEY et ux.

(Supreme Court of Georgia. June 8, 1896.)  
FRAUDULENT CONVEYANCES—TRIAL INSTRUCTIONS  
—SUFFICIENCY OF EVIDENCE.

The general charge of the court substantially covered the requests to charge presented by the losing party, so far as the same were legal and pertinent; there was no error in the charges complained of; the evidence, though conflicting, warranted the verdict; and, on the whole, there is no cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Randolph county; N. L. Hutchins, Judge.

Action by Studebaker Bros. Manufacturing Company against L. E. Key and wife, with which other actions against defendant Key were consolidated. There was a verdict in favor of the wife, and a new trial was denied, and plaintiffs bring error. Affirmed.

The following is the official report:

L. E. Key, a dealer in carriages, furniture, etc., in October and November, 1891, executed to sundry creditors several mortgages upon his stock of goods, and made to his wife, Carrie S. Key, a bill of sale conveying a large portion of the goods in his possession, for the purpose of paying a debt claimed to be due by him to her. A number of other creditors caused attachments to be issued and levied, on the ground that Key was disposing of his property to avoid the payment of his debts and to defraud his creditors. He filed traverses of the grounds upon which the attachments issued, and Mrs. Key filed her claim to the property levied on, which had been conveyed to her. The plaintiffs filed their petition against Key and wife, whereunder all of the cases were consoli-

dated, and the issues therein made tried together. The jury, upon the evidence and charge of the court, found a verdict in favor of Mrs. Key, and the property claimed by her to be not subject to the attachments or the claims of the plaintiff creditors, who thereupon moved for a new trial, and, their motion having been overruled, they excepted. They alleged, in substance, that in the fall of 1891 Key bought very much more goods than he had previously bought; that trade was not good, and he could not have expected to find sale for them; that, besides his regular storehouse, he had enlarged a storage shed for wagons, and had it full, and had rented several vacant buildings, and had them full of new purchases, and also had a considerable amount at the depot; that he bought largely and recklessly, whenever and from whomever he could, to the amount of \$25,000 or \$30,000; that, in order to hinder, delay, and defraud his creditors, he conveyed by bill of sale to his wife, on November 18, 1891, all of the stock of goods contained in his main storehouse, together with all the wagons contained in the shed in the rear of said store, the stock so transferred amounting to about \$9,000; that it was transferred in bulk, without an inventory having been taken, and Mrs. Key's father was put in charge of the store and goods, to conduct the business as her agent; that Key also transferred the storehouses he occupied; and that there was no just or legal consideration for said transfer, but it was done to hinder, delay, and defraud plaintiffs and other creditors. It appears that the prayers of this petition for injunction and receiver were granted, and that the receiver sold the goods, and held the proceeds to await the result of the final trial. The court further granted a prayer of the plaintiffs, requiring Key to make out an itemized statement of the disposition he had made of cash receipts, notes, accounts, and all evidence of indebtedness connected with his business, and a complete statement of his business for the past two or three years. Answers were filed by all the defendants, denying the material allegations of the petition. The evidence was voluminous, and in some respects conflicting; but there was testimony supporting the contention of Mrs. Key that the consideration of the bill of sale to her was a just and valid debt due her by Key, arising from his having for several years used in his business her money, paid for rent of her farm, and that she took the same without participation in any fraudulent intent or notice or ground for suspecting the fraud.

The motion for new trial alleges that the verdict is contrary to law and evidence, and that the court erred in refusing to give the following instructions in charge to the jury, as requested: "Contracts between husband and wife, which retain in the family property that would otherwise go to satisfy honest creditors, are to be subjected to strict scru-

tiny,—a vigilant judicial police. When a creditor attacks a contract between husband and wife for fraud, all the evidence will cast on them the duty of showing the genuineness and good faith of the transaction, by such evidence as will or ought to satisfy an honest jury. If the evidence satisfies the jury that L. E. Key conveyed to his wife all the property he then had remaining; that a large part of the property conveyed had not been paid for by the husband; that the conveyance was made when the husband was in embarrassed or failing circumstances, or was made in contemplation of insolvency; that the conveyance was a sale by husband to the wife, and was a private sale in bulk for a price considerably less than the true value thereof, if it had been sold in the regular course of trade, and not in bulk; and that the sale was with the view to the wife's going into the business of merchandising as the successor of the husband in like business previously conducted by him, and was at a price considerably less than such property could have been bought for by her or by other merchants for the purpose of merchandising,—(a) these are each and all circumstances which the jury may properly consider in connection with all the other evidence in the case, in determining whether the transaction in question was bona fide or not; (b) they, if proved, are indicia or badges of fraud which may or may not be sufficient to authorize a verdict that the transaction was not bona fide, according as the jury may find that they are explained and overcome by the other evidence in the case or not. The jury should consider all the evidence in the case, and base their verdict upon the evidence as a whole. The jury may properly consider the fact, if the evidence shows it is a fact, which the jury must determine, that none of the persons who cultivated the lands as tenants, and none of the persons who paid rent either in money or cotton, have been called by Mrs. Key, or those representing her, as witnesses on this trial, in considering and passing on the bona fides of the transaction; also, the entries made by the husband on his notes given to his wife, made to prevent the notes from being barred by the statute of limitations, if the jury find this to be true from the evidence in the case. The duty rests on the husband and wife in this case to show, not only an honest debt owing by the husband to the wife and that the debt was for the exact amount, or substantially so, which was paid by the wife to the husband for the property she bought, but it is their duty, also, to show by clear and satisfactory proof that the property was priced to the wife at its full value. If the husband and wife have failed to show either of these facts by clear and unquestionable testimony, the jury ought to find the sale fraudulent. The jury should scrutinize the testimony by which these things are sought to be proved with great care."

Also, that the court erred in refusing to allow plaintiff to prove by H. O. Beall, that the property in controversy was worth, if sold at retail in Outhbert, 30 or 35 per cent. more than it was estimated at in the sale to Mrs. Key at the time of said sale. Touching this ground the court notes that the witness Beall, who was the receiver, testified without objection: "The sale would have footed up 25 per cent. more, in my opinion, if the buggies had been sold one at a time." Also: "I believe, if the furniture had been left in the hands of the receiver, and had not been obliged to sell at any particular price, that he could have realized 30 per cent. more for that than I did."

Error is assigned in that the court charged the jury the provisions of the Code making void any contract of a wife by which it is sought to make her separate property liable for the payment of a debt of her husband, or by which her property was pledged or sought to be pledged as security for his debt, because such charge was prejudicial to the plaintiffs, inapplicable to the case, and not warranted by the evidence. Upon the same grounds, error is assigned on the following instructions given by the court: "Since 1866 all property owned by the wife at the time of her marriage, or which she has inherited or acquired since, is her separate estate, and is not liable for the payment of any debt, default, or contract of her husband, and any sale of her separate estate made to a creditor of her husband in extinguishment of his debt shall be void. A debtor may give property to his wife, or to any one else, provided such gift does not render him insolvent, or leave him in the ownership of sufficient property to pay his debts." The court charged: "As affecting the question of value, in considering the question of value of the goods, you find and accept for your purpose the value of the stock as sold in bulk, and its reasonable market value at the time of the sale here." Assigned as error, because it restricted the jury to the evidence of the value of the goods conveyed by Key to his wife, sold in bulk, at a forced sale or sale under pressure, and not at their true market value, sold under favorable conditions and in due course of trade, and in effect excluded from the consideration of the jury all the evidence as to the real value of said goods, as shown by the persons appointed to make the inventory and appraisal of them,—one of them was the attorney of Mrs. Key,—and by the witness Beall, and by other testimony in the case.

Jesse W. Walters and Clifford Anderson, for plaintiffs in error. W. D. Kiddoo, W. C. Worrill, and Hood & Moye, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 164)

**BATES et al. v. SHELTON.**

(Supreme Court of Georgia. June 12, 1896.)

**CLERK OF COURT—ISSUE OF ATTACHMENT.**

A clerk of the superior court has no authority to issue an attachment sued out under the provisions of section 3297 et seq. of the Code, unless the judge, in granting the attachment, expressly so directs. Under a special order commanding the clerk to issue the writ, he may do so as the clerical servant of the judge, but in the absence of such an order he cannot, there being no provision of law authorizing him to issue writs of this kind. *Loeb v. Smith*, 3 S. E. 458, 78 Ga. 508, 510.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

Action by Bates, Kingsbery & Co. against T. G. Shelton. From a judgment dismissing the attachment, plaintiffs bring error. Affirmed.

The following is the official report:

Plaintiffs brought their petition against Shelton as a fraudulent debtor, alleging that he had made fraudulent mortgages and a fraudulent sale of all his property liable for the payment of his debts, for the purpose of evading the payment of the same, and especially the payment of his debts due plaintiffs, who were his creditors by account for the purchase money of goods. The petition was presented to the judge of the superior court at chambers, who thereupon passed an order, to wit: "Read and considered. It is ordered and adjudged by the court that attachment do issue in the above-stated case as prayed for." An attachment was thereupon issued by the clerk, an attachment bond was given by the plaintiffs bearing even date with the attachment, and the attachment was levied by the sheriff. Upon the return of the same, defendant demurred thereto for insufficiency. The court ordered that the demurrer be sustained, and the attachment be dismissed, on the ground that it was issued by the clerk without an express order by the judge for him to do so. Plaintiffs excepted.

Clarke, Hooper & Harrison, for plaintiffs in error. Miller, Wynn & Miller and R. F. Watts, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 159)

**MCNEAL v. TAYLOR.**

(Supreme Court of Georgia. June 12, 1896.)

**APPEAL—REVIEW—GRANT OF NEW TRIAL.**

This court will not reverse a judgment overruling a motion for a new trial, based on the general grounds that the verdict rendered was contrary to law and the evidence, when it appears that the only matters passed upon by the jury were exceptions of fact to an auditor's report, and that they found against the exceptions upon conflicting evidence.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

The following is the official report:

In April, 1887, E. Taylor proceeded by foreclosure and levy to enforce three mortgages on personality, given by George W. McNeal, who thereupon filed a bill in equity, under which he obtained an injunction against the enforcement of the levies until October 1, 1887. This bill, as amended, set up that Taylor had agreed with McNeal to extend the time for payment of the debts secured by the mortgages until October 1, 1887, in consideration that McNeal waived his right to direct the application to these secured debts of money he paid Taylor, and allowed the same to be applied to an unsecured account. On final trial the bill was dismissed at the cost of McNeal. Controversy between the parties was renewed by the filing of affidavits of illegality on the part of McNeal, setting up that the debts represented by the mortgage *fi. fas.* were paid and settled in full. The matter was referred to an auditor, who, after a hearing, filed his report January 5, 1888, in which he found against the defense of payment so set up. The evidence before him appears to have been directly conflicting. McNeal filed exceptions to the report June 6, 1888, which remained pending until February 5, 1895, when a verdict was rendered against the exceptions and in favor of the report. McNeal moved for a new trial, on the grounds that the verdict was contrary to law and evidence. The motion was overruled, and he excepted. The exceptions to the report are, in substance, that the same is contrary to the evidence, the preponderance of evidence showing that the debts were paid and discharged in full in 1885 and 1886, and that the auditor erred in allowing plaintiff to give oral testimony concerning his books of account and notes, defendant objecting that there was higher and better evidence of the fact sought to be proved; the testimony showing that all the claims plaintiff ever had against defendant were in writing, upon the books of account and notes, which writings were in plaintiff's custody.

L. J. Blalock, Allen Fort, and J. F. Watson, for plaintiff in error. Jas. Dodson & Son, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 143)

**COSBY et al. v. WEAVER.**

(Supreme Court of Georgia. June 8, 1896.)

**EXECUTORS—MISCONDUCT—APPOINTMENT OF RECEIVER FOR ESTATE—INJUNCTION—DISCRETION OF COURT.**

In view of all the evidence pro and con submitted at the hearing before the trial judge, this court is not prepared to hold that he abused

his discretion in denying the prayer for injunction and receiver.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Petition by Fannie E. Cosby and others against Ida J. Weaver, executrix of John C. Maund, deceased, to restrain defendant from disposing of any of the property of the estate, from collecting any rents or moneys due the estate, and from cutting cross-ties or timber from the land, and for the appointment of a receiver for the estate. There was a decree for defendant, and petitioners bring error. Affirmed.

The following is the official report:

The petition of W. W. Osborne and Frances Maund, Fannie Cosby, Jasper Turner (guardian for Earl and Ansel Maund, minor children of R. D. Maund, deceased), A. C. McCoy (next friend of Lydia and Lucy McCoy, minor children of Sallie McCoy, deceased), and W. W. Maund (trustee for Gusie, Edgar, Emmie, and Florence Huff, minor children of Julie E. Huff), against Ida J. Weaver (executrix of John C. Maund), alleged: They are the legatees under the will of John C. Maund, who died on January 21, 1891. His will was duly probated in February, 1891, and thereunder his daughter Ida (who has since married J. J. Weaver) and R. D. and W. A. Maund, were appointed executors, and Ida and R. D. Maund qualified as such. The will provided that all the estate should be set aside for the support of said Ida, and all the revenues arising therefrom be applied to her support so long as she remained unmarried, and, in case the revenues were not sufficient, then the executors were directed to sell any part of the estate that might be sufficient for the same; and, when the aforesaid conditions were complied with, all the estate should be sold, and the proceeds be divided into eight equal parts. Of these parts, Sarah Frances Maund, wife of A. P. Maund, who is one of the petitioners, should have one share; the children of Julie E. Huff, one share; R. D. Maund, two shares; Fannie E. Cosby, one share; Sallie McCoy, one share; Ida J. Maund, two shares; and Wesley A. and Osborne Maund, five dollars each. The will further directed that all testator's furniture and other personal property be given to Ida J. Maund. Testator afterwards made a codicil in which he annulled so much of the will as applied to his furniture and personal property, and directed that his daughters Sallie, Ida, and Fannie should share alike in his personal estate, except the furniture, which was given to said Ida, and directed that all the live stock and wagons, buggies, and agricultural tools should remain on the place, for the use of Ida, until after her marriage, and then to be divided between Sallie, Fannie, and Ida. Ida married Weaver in June, 1893, and by the terms of the

will the revenues of the estate no longer went to her for her support, and the shares of petitioners became due. R. D. Maund died in February, 1894, leaving said Ida the sole executor. At the death of testator he left a large estate of realty and personalty, the realty consisting of about 1,000 acres of land in Talbot county, and over 6,000 acres, known as wild land, in Coffee, Wayne, and other counties mentioned, in the state of Georgia, all of said lands being worth some \$7,000; and the personal property consisting of live stock, notes, accounts, etc., worth some \$2,000. Because the said Ida had not demeaned herself according to the law governing executors, petitioners, on September 24, 1895, filed their petition in the court of ordinary of Talbot county, in which they prayed that said Ida be required to give bond, or be removed from said trust. In the petition they alleged: She had made no annual return; that she had sold many cattle belonging to the estate, and appropriated the proceeds to her own use; that she is living on, and farming on, a large portion of the lands of the estate, without accounting for the rents, of the yearly value of \$500; that she has collected rents to the value of \$500, and applied the same to her own use; that she sold cross-ties from the land to the amount of \$500, and applied the same to her own use; that she has failed and refused to pay the debts of the estate; that she has failed and refused to pay taxes due on the lands of the estate; that she is proceeding to foreclose a mortgage for a large amount against the estate; and that she is insolvent, and incompetent to discharge the duties of executrix. She answered this petition, admitting that she had made no return, had not paid the taxes, and had collected rents and other indebtedness due the estate. Copy of the answer is attached. On the trial before the ordinary, she admitted that she had not paid the taxes upon some 6,000 acres belonging to the estate, although she produced deeds to the land to John C. Maund. The ordinary ordered that she give bond, and, in default thereof, that her letters be revoked. From this decision she appealed in forma pauperis, although in her answer she denied her insolvency, which answer was sworn to, and although the ordinary stated that there would be no costs in the case because he would require none of the estate. In her answer she claimed to have paid a larger sum in taxes than she actually has paid, and some of the taxes she claimed to have paid were paid before the death of John C. Maund, and the burial expenses were paid by R. D. Maund. While in her answer she claimed to have only received, of money belonging to the estate, \$422.93, she in fact received some \$1,000. She made the appeal from the decision of the ordinary solely for the purpose of remaining in possession of the property and paying no rent; of using all the live stock for the ben-

self of herself and husband; of selling the cattle, and applying the proceeds to her own use; of cutting cross-ties off the land, and using the proceeds for herself, of collecting the rents, and using the money for her own benefit, etc. She is utterly insolvent, and by bad management has damaged the estate some \$10,000, and is guilty of all the wrongs above complained of, and, unless restrained, will collect the rents, sell the cotton now in her possession, refuse to pay rent, dispose of the live stock, etc. The petition prayed for injunction restraining her from disposing of any of the property, from collecting any rents or money due the estate, from cutting cross-ties or timber from the land, for the appointment of a receiver for the estate, for general relief, etc.

Defendant answered: It is true that by the terms of the will after her marriage the revenues of the estate no longer went to her support, but it is not true that shares of the petitioner became due, because the testator died and his estate is still largely indebted, and she has not given her assent to any of the legacies, nor passed title to the same to any of the legatees, but holds the same to pay the debts if necessary. At the death of testator he left about 961 acres in Talbot county, but 352½ acres of this land was mortgaged, with power of sale, to the Georgia Loan & Trust Company, to secure a loan obtained from it by the testator, and the 352½ acres have been sold by it. Testator also left title deeds to a large number of lots of wild land, set out in the answer, and likewise a tax book showing the last time said lands were given in, since 1881, and those not appearing on said tax books he had ceased to pay tax on prior to 1881. Many of these lots (set out in the answer) were not on this tax book. He left deeds to no other land, and she does not know the value of the lands, but believes they are not worth more than \$1,500, as, when testator last gave them in for taxation, they were valued by him at from \$10 to \$50 per lot. The personality of the estate was worth less than \$1,233.14, and, at the time of her marriage, amounted to \$1,110, including interest on notes. In her answer to the petition in the court of ordinary, she did admit that she had made no returns, but said she stood ready to do the same, and to make a full accounting of whatever effects of the estate had come into her hands, and she had failed to make returns only because she believed that under the terms of the will she was not required to do so. She did not admit that she had not paid the taxes on the lands belonging to the estate, but she did pay taxes on all the lands which she had found a paper title to in the testator, and which he in his life gave in, and paid taxes on, up to the time of his death. The lands which she admitted she had not paid taxes on were lands as to which she only followed the

action of her testator. She did appeal in forma pauperis, but not because she was or is insolvent,—for she is fully solvent,—but because she was unable to make bond. She did pay the taxes for 1890 after the death of testator, and paid the taxes for 1892 and 1894, and she paid the burial expenses. She has received from all sources belonging to the estate the sum set out in her said answer, except \$100 received before her marriage, to which she believes she was entitled to defray her personal expenses. She only cut timber of the value of \$22.60 to make cross-ties, and had legal advice for cutting the same. It was cut from a pine lot on which there is an abundance of timber, and the sale of that used in cross-ties was advantageous to the estate to the amount of the \$22.60. She did not collect any money after her marriage on notes due to testator, but collected \$404.80 before that time, which was consumed in her support and paying debts of the estate, and in caring for part of petitioners. She occupies but little of the lands of the estate, and charges herself, and pays, a fair rental for the same. Outside of that cultivated by herself, she rents out the same at a fair price, and accounts to the estate therefor. There are but one mule and two milk cows, belonging to the estate, used by her, and she stands ready to pay therefor. She has charged herself with mule hire. R. D. Maund collected for one of the mules left by testator, which was killed by the railroad, if any has been collected, and it was never placed in her possession. The horse left by testator died in possession of a tenant to whom R. D. Maund had rented it. She has not sold any of the cattle belonging to the estate, since her marriage, and does not contemplate selling any. Testator had no hogs, and none have been bought for the estate since his death. She has charged herself with the value of the cross-ties cut. She is collecting rents, but is not selling the rent cotton for her own use. She will pay off the execution which has been issued against the estate, as soon as she is permitted to sell rent cotton, etc. She has only realized from all sources \$802, and has paid out, on the debts and necessary expenses of the estate, \$805.59. Under the will she was entitled to a support, and the plantation did not make her a support, and she used \$200 in that support, which was reasonable, as several of the children of some of plaintiffs stayed with her a considerable time. She did not charge herself with the cotton made in 1893, because she was not married until June of that year; but, if the court should hold that the estate was entitled to the rent cotton, it amounted to \$67, which she is ready and offers to pay. She has not paid all the debts of the estate, but this is the fault of plaintiffs. Soon after receiving her letters, she applied for leave to sell the lands of the estate for the purpose of pay-

ing its debts, but plaintiffs appealed from the decision of the ordinary to the superior court, and then to the supreme court. 94 Ga. 479, 20 S. E. 300. If she had been allowed by plaintiffs, she would have paid the debts, and settled up the estate, before now. She gave in and paid taxes on all the land testator gave in up to his death, until she looked into the matter and found that he had returned none of the lands that he had deeds to, except the Talbot county land; and, as said lands were claimed and taxes paid by other parties, she then ceased paying the taxes. Upon further investigation she found that the lands he had given in he had no titles to, and the taxes had been given in for years before his death by other claimants, and as she learned these facts she would quit paying. She appealed from the decision of the ordinary under the petition filed in his court by plaintiffs, for the sole purpose of carrying out the trust confided in her by testator. All the household and kitchen furniture belongs to her, under the will. All the creditors of the estate seemed to be satisfied with her management,—none of them are complaining,—and she does not believe the assets of the estate will amount to enough to pay the indebtedness.

On the hearing for injunction, plaintiffs put in evidence the will, the nature of which has been sufficiently above indicated. Also the pleadings in the court of ordinary, referred to in the petition and answer. Also the judgment and order of the ordinary, and the appeal therefrom in forma pauperis. Also a n. fa. for costs against R. D. Maund, executor, and Ida J. Maund, executrix, issued October 5, 1894, and unsatisfied. Also deeds from various parties to John C. Maund, conveying many lots of land located in various counties in the state. Also affidavits to the following effect: At the time of his death, testator had 2 mules, a horse, 2 two-horse wagons, 2 buggies, 14 head of cattle, 22 head of hogs, 2 bales of cotton, about 400 bushels of corn, and 4,000 or 5,000 pounds of fodder. He had also a considerable roll of money,—an inch or an inch and a half in diameter. Ida J. Weaver took possession of this money, and never told any member of the family the amount of it. The real estate situated in Talbot county, and the farms occupied and cultivated by Ida Weaver, have been in her possession since the fall of 1893, and are worth annually, for rent, four bales of cotton. The farm lands belonging to the estate in Talbot county are worth annually, for rent, 10 bales of cotton. Since the death of testator, F. L. Cosby paid Mrs. Weaver \$110 on a note the estate held against Cosby, and in 1892 F. L. and L. F. Cosby paid her \$100 for the interest testator held in a lot of land. On the trial of the case before the ordinary, Mrs. Weaver testified that there were only seven head of cattle on the place; and that there were just seven head on the place now; that the train

killed a mule in 1892 appraised at \$100, and she did not know whether the railroad had ever paid the estate. She testified further that she had paid no taxes on the lands belonging to the estate, lying outside of Talbot county, since 1891, nor had she returned the same for taxation since 1891, nor had she investigated the status of the land. F. L. Cosby boarded his family with her in 1891, and paid her \$94 in cash therefor. Thomas Clark rented lands belonging to the estate from Mrs. Weaver in 1893, 1894, and 1895, and paid her for each of said years 1,000 pounds of lint cotton, worth in 1892 7 to 8 cents a pound; in 1894, from 4½ to 6 cents; and in 1895, from 8 to 8½ cents. Her husband is cultivating a two-horse farm, reasonably worth 1,250 pounds of lint cotton. In 1894 he cultivated a one-horse farm worth two bales of cotton. These farms belong to the estate. He cut cross-ties off the land in the spring of 1894. On the trial before the ordinary, Mrs. Weaver testified that she had had entire control of the property since 1893. David Posey rented land from her in 1893, belonging to the estate, and paid her three bales of cotton rent, worth seven or eight cents a pound. He offered her three bales for the premises cultivated by her the same year. There were upon the place 10 or 15 head of cattle, and a yoke of oxen, belonging to the estate. That fall she sold one of the oxen. The lands belonging to the estate are worth four dollars per acre. Petitioners put in evidence receipts from the tax collectors of Dade, Worth, Bartow, Calhoun, Rabun, Lumpkin, Marion, and Irwin counties to John C. Maund for state and county taxes for 1890. Also tax receipts showing that the estate had paid taxes in 1891 on lands in the same counties, with the exception of Worth and Rabun, and with the addition of Ware. Plaintiffs put in evidence, also, the deed from the sheriff of Marion county to W. B. Short, conveying two lots in that county in February, 1892, sold under a cost execution against the executor and executrix of John C. Maund; the amount due on the execution being \$12.50, and the amount for which the land sold being \$18.50.

Defendant put in entries from a book kept by John C. Maund of the taxes he had returned in 1890, showing that he had paid the taxes on lots in Dade, Calhoun, Lumpkin, Irwin, Ware, Rabun, Worth, and Marion counties. Also a memorandum of the tax returns for 1891, made by Mrs. Weaver as executrix, showing that she returned for taxation and paid taxes on lands in Irwin, Rabun, Calhoun, Lumpkin, Ware, Worth, Bartow, Coffee, Dade, and Marion counties. Among the lots in Marion county were the two lots sold by the sheriff of that county to Short. Also evidence that she returned for taxes for 1892 lots in Marion, Irwin, Rabun, Calhoun, Lumpkin, Ware, Worth, Bartow, and Dade counties. Also affidavits: She cultivated only about 30 acres in 1894, and about 45 acres in

1895. One and a half bales of cotton for 1894, and two and a half for 1895, is a fair rent for same. Her husband did cut 452 cross-ties, but paid her, as executrix, therefor, five cents per tie. She has not sold any cattle during the past two years. She is renting out the lands for all they are worth, and the entire place is not worth more than six bales of cotton per year. A one-horse farm belonging to the estate has been rented since January, 1892, for 1,000 pounds of lint cotton per year. About 1887 testator employed one Ezzard to examine land located originally in Appling, Carroll, Cherokee, Dooley, Early, Irwin, Lee, Wilkinson, and other counties in Georgia, and to report on the same, and upon the titles thereto. He reported to testator that in his opinion it would not be advisable to continue paying taxes on said lands, as they were claimed adversely. After the death of testator, Ezzard advised said Ida not to pay taxes, for the same reason. Testator held at his death title deeds to four lots in Worth county which he had not given in for taxation, nor paid taxes on, for years before his death. He left title deeds, also, to various other lots located in different counties, none of which had been given in by him since 1881. A lot in Marion county was given in in 1887, and not since. He gave in for taxation in 1890, but for which he left no paper title, 32 lots in various counties of the state, including the two lots in Marion county sold by the sheriff of that county to Short. Mrs. Weaver gave in for taxation all the lands to which he left title deeds, and which he was giving in for taxation at the time of his death. She is fully solvent. The prayer for injunction and receiver was denied, and petitioners excepted.

Bull & Perryman, for plaintiffs in error.  
Henry Persons & Son and J. M. Matthews,  
for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 142)

#### RODGERS v. BLACK.

(Supreme Court of Georgia. June 8, 1896.)

##### APPEAL—ASSIGNMENTS OF ERROR.

A bill of exceptions which does not complain of any ruling or decision by the trial judge, and contains no assignment of error except the following: "And the defendant assigns said verdict and judgment as error, the same being contrary to law,"—is palpably without merit. As has been repeatedly ruled, a verdict cannot be thus reviewed in the supreme court. (Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by R. C. Black against E. P. Rodgers. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

Affidavit was made to foreclose a landlord's special lien, and issue was taken by counter affidavit. Under the evidence and charge of the court, the jury found a verdict for the plaintiff. Without moving for a new trial, defendant brought a bill of exceptions, with the assignment of error quoted in the head-note.

C. J. Thornton, for plaintiff in error. Miller, Wynn & Miller, and W. H. & E. R. Black, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 142)

#### DAVIS et al. v. BAGLEY, Sheriff.

(Supreme Court of Georgia. June 8, 1896.)

NEW TRIAL—GROUNDS—MISTAKE OF WITNESS—SUFFICIENCY OF SHOWING.

1. The mistake of a witness will not be cause for a new trial, unless it appears that a correction of it would probably cause a different verdict to be rendered at another hearing. A fortiori, a new trial will not be granted when it does not affirmatively appear that the witness did make a mistake. See *Brinson v. Faircloth*, 7 S. E. 923, 82 Ga. 185, 187, 188, and cases cited.

2. The evidence in the present case warranted the verdict, and it will not be set aside because, after the trial, the prevailing party, who had been sworn as a witness in his own behalf, admitted, as appears by his affidavit attached to the motion for a new trial, that he was "not certain" he had testified correctly as to a material matter, or because another witness, upon refreshing his memory after the trial, made an affidavit, also attached to the motion, from which it was inferable only that he had made a mistake in his testimony as to the same matter; there being at the trial other evidence, of a positive nature, sustaining the version then given of this matter by these two affiants. The showing embraced in these affidavits was by no means such as to render it probable that upon another trial a different result would be reached.

(Syllabus by the Court.)

Error from superior court, Chatahoochee county; W. B. Butt, Judge.

Action by Will Davis & Co., against B. F. Bagley, sheriff. There was a verdict for defendant, and, a new trial being denied, plaintiffs bring error. Affirmed.

The following is the official report:

The petition of Davis & Co. against Bagley, sheriff, alleged that on December 23, 1892, they foreclosed two mortgages on personalty, before Fussell, a justice of the peace in Chatahoochee county, returnable to the December term, 1892, of this court, the first mortgage being dated May 31, 1892, and being for \$75 principal, besides interest and attorney's fees, and the second being dated October 1, 1892, for \$60 principal, besides interest and attorney's fees; that the mortgage *fi. fas.* were put into the hands of the sheriff by petitioners, with instructions

to levy on the property embraced in the mortgages, and to raise the money due thereon; that in pursuance thereof the sheriff levied on and sold a mule embraced in the mortgages, realizing therefrom about \$60, which he refuses to turn over to petitioners. They prayed for rule nisi against the sheriff, directing him to show cause why he should not turn over the money to petitioners. The sheriff answered that it was not true that he sold the property under petitioners' *fi. fa.*; that on November 14, 1892, A. W. McGlann placed in his hands a mortgage *fi. fa.* for \$47.86 principal, and he levied that *fi. fa.* on the mule, which he sold for \$60; that on November 7, 1892, McGlann, being the landlord of Geddes, the defendant in the *fi. fa.*, sued out and put in his hands a distress warrant for \$124.35, which he levied upon all the property of Geddes raised on the land for 1892, which was only a small amount of produce, not sufficient to pay the rent claimed, and in order to stop expenses of sale, etc., Geddes, in respondent's presence, turned over to McGlann all of said produce, to be applied by him as a credit on the rent claimed; that this was done long before petitioners put any papers in his hands; that, on the second Friday of December, respondent sold the mule at public outcry under the mortgage *fi. fa.* of McGlann, transferee, for \$60, and after paying off said *fi. fa.* and costs there was left a balance of \$4.54, which he holds subject to the order of the court; and that, sometime after this settlement of said *fi. fa.* and costs and sale, the mortgage *fi. fa.* of petitioners was placed in his hands. Petitioners traversed this answer, alleging that at the time the *fi. fas.* of petitioners were put in the sheriff's hands the property had not been sold by any other process, and that after they had been put in the sheriff's hands the \$60 from the sale of the mule came into the hands of the sheriff, to which money petitioners are entitled. There was a verdict for defendant, and, the motion for new trial made by plaintiffs being overruled, they excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because since the trial defendant admits that he was not certain whether he had the mortgage *fi. fas.* of movants in his hands on the day of sale, or not, and that since the trial Fussell has refreshed his recollection, and says that the *fi. fas.* were not in his office on the day of sale, and at the time of sale. In support of this ground, movants produced the affidavit of B. F. Davis: He was present at the trial, and in connection with Will Davis, his son, represented movants. While the case was being tried he sent for Fussell, J. P., and asked him about the mortgage *fi. fas.* of movants, and if he knew whether the sheriff had them at the time of the sale, and Fussell then stated to him that he did not remember about them. For this reason,

Fussell was not introduced as a witness. Since then, Fussell, upon refreshing his memory, made the statement to deponent as set out in Fussell's affidavit. Also, the affidavit of Fussell: To the best of his knowledge and belief, the *fi. fas.* of Davis & Co. were not in the office of deponent at the time of the sale of the mule under the foreclosure of McGlann's mortgage; that the foreclosure of the mortgage of Davis & Co., with the *fi. fas.*, was issued on November 23, 1892, the day of sale, and before the sale; that Will Davis and the sheriff were together, and left deponent together, and afterwards the *fi. fas.* were returned to deponent by the sheriff. Also an affidavit of the sheriff: After due deliberation since the trial, he is not certain that, at the time of the sale of the mule, Davis & Co. had not, previous to the sale, and on the day of the sale, placed their mortgage *fi. fa.* in deponent's hands for collection. Also, affidavits as to the ignorance of movants and their counsel, until after the trial, that the sheriff and Fussell would testify as set out in their affidavits. There was no affidavit as to the exercise of diligence in preparing for trial.

L. McLester and C. J. Thornton, for plaintiffs in error. E. J. Wynn, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 141)

### RODGERS v. BLACK.

(Supreme Court of Georgia. June 8, 1896.)

#### APPEAL—REVIEW—GRANT OF NEW TRIAL.

A refusal to grant a new trial on the general grounds that the verdict was contrary to law and the evidence will not be reversed when it appears that the evidence offered by the prevailing party, though decidedly in conflict with that introduced upon the other side, was sufficient to support the verdict.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

The following is the official report:

On September 23, 1893, R. C. Black made affidavit for distress warrant against E. P. Rodgers,—that Rodgers was indebted to him \$450 for rent of land, \$375 of which was due, and that Rodgers was disposing of the crops raised on the rented premises without deponent's consent, and without having first paid his rent in full. Rodgers made counteraffidavit that the sum distrained for was not due; that the sum claimed to be due in Black's affidavit was not due; and that he (Rodgers) was not removing his goods from the premises. There was a verdict for plaintiff for \$443.17. Defendant's motion for a new trial, made upon the general grounds alone, was overruled, and he excepted, and brings error.

Upon the trial Black testified: "I rented the farm in Bellwood to Rodgers November 19, 1892, for 1893, for \$450, to be paid in monthly installments of \$37.50, taking from him 12 notes sued upon. At the same time we made a contract setting out what each of us was to do. When I sued out the warrant, defendant owed me for rent \$—— due and \$—— to become due, and I sued out the warrant for the whole amount of the rent because Rodgers was moving the crops raised upon the rented premises; and when I found Rodgers was moving the crops, I demanded payment of my rent from him, and he refused to pay, saying he had a right to dispose of the crops as he saw fit. He has paid me nothing on the rent, save a little milk I got from him for the Central Hotel, in which I was interested. I agreed for him to bring me as much milk as he could, and to allow it to go on his rent notes. To keep a record of the milk, I put a passbook in the kitchen, in which he was to enter the amount he would bring each day. I have the book with me, and it shows that the amount furnished was \$23.25, for which he is entitled to credit. When the distress warrant was issued Rodgers had disposed of one bale of cotton. I found he had brought two other bales to Poe's warehouse. I was there when the driver came up, and later Rodgers told me he would not turn the cotton over to me, but was going to sell it because he had a right to sell it. I also found that Barfield, who worked with Rodgers, had hauled a bale of cotton to the gin, and afterwards brought it to Columbus, and stored it at the warehouse of Jenkins & Davis in his own name, and that the cotton was raised on his place that year. I did not at any time refuse to allow Rodgers to get any cows from the Motley place. I had some five or six cows down there, and gave Rodgers an order for them when he asked for it. Rodgers did drive some dry cows down to the place at one time, and get some wet ones. Don't know how much milk Rodgers furnished the hotel, except what the passbook showed. There were thirteen cows on the place when Rodgers took possession, and though I only agreed to furnish him ten I let him have thirteen." Plaintiff introduced the 12 notes for \$37.50 each. Also the contract between him and Rodgers. In this contract Black rented the Bellwood place to Rodgers, and agreed to furnish ten cows, two colts, two mules, one one-horse and one two-horse wagon, and such tools as were on the place. He further agreed to loan Rodgers what corn he might have, and what cotton seed there was on the place; the corn and cotton seed to be returned to Black the next fall. He also agreed, if any fresh cows with young calves were on the Motley place, to allow Rodgers to exchange dry cows for fresh ones, by driving them to the Motley farm, and exchanging them for cows in milk, but did not agree to buy any cows, or to keep cows in milk, etc. Plaintiff also introduced the passbook.

Defendant testified: "I rented the lands for a dairy farm, and Black agreed, as the contract shows, to let me have such wet cows as he might have on the Motley place in exchange for dry ones on the rented place. I had dry cows all along during the year, and went to Black to get him to exchange wet ones on the Motley farm for them, at a time when he had cows in milk on the Motley place. I was to have had ten cows during the year giving milk, but only had five during January, five during February, six during March, five during April, four during May, and ten in May, June, July, and August. In September I had only six, in October five, and gave up the place in November. I therefore lost the average use of five cows for seven months. The profit I could have made on them was 25 per cent. per day for this time, above expenses, and I therefore claim I am damaged \$262.50 by Black's failure to furnish the cows. I went to him the latter part of January for some cows, and he gave me an order on the man in charge for some. I went and got five. One was in milk, and the others had calves in a few days after April, one in May, and three in June, of that year. I went to Black two or three times during the year, and asked him for orders for cows, which he refused. I only sold one bale of cotton, and that was with Black's consent. Black did not allow me credit for all the milk brought to the hotel. The book does not show all the entries. It was only placed in the kitchen March 17th, and I had furnished Black at least \$65 worth before that time, for which I have no credit. The five wet cows which were on the place stayed in milk four months, and the five got in January lasted until May, which made ten wet in February, March, and April. I only went one time to the Motley place. The second time I went to Black for an order was in August. Do not know, of my own knowledge, whether Black had wet cows on the Motley place or not. I kept the dry cows about all the year, though I got no benefit from them, and, under the contract, when I had dry ones, I could carry them to the Motley place and exchange them." Barfield testified: "I worked with Rodgers during the year on the Black place. He had only five cows in milk in January, and the same number in February, March, April, and May. In June, I don't know. Had ten wet the balance of the time. I carried a bale of cotton to J. & D.'s warehouse, and stored it in my name, which was afterwards levied on by Black. The cows brought from the Motley farm in January or February were all dry, except one, and stayed that way four or five months. Just exchanged dry cows for dry cows. Don't know what object Rodgers had in bringing dry cows from the Motley place. Rodgers asked Black for wet cows in May or June. The wet ones from the Motley place were not gotten until April, instead of January or February." Talbot testified: "I lived on the Motley place until March 1, 1893. When I

left there, Black had five or six cows there, and Maj. Radcliff had some. I was succeeded in the management of the place by Fletcher." Fletcher testified: "I took charge of the Motley place March 1, 1893. Was employed by Radcliff, who owned the place. During the year there were on the place at least twenty cows with young calves. Could not say whether Black owned any of them. Rodgers did not come to the place at any time after March 1st for any cows." Cotton testified: "Have been in the dairy business fifteen years. The profit to be made on the average cow, giving two gallons of milk per day, was seven and a half cents."

In rebuttal Black testified: "I didn't have but five or six cows on the Motley place, and gave Rodgers an order for cows whenever I had them. Gave him an order, about February 1st, for five wet cows on the Motley place, which was the only time Rodgers ever applied to me for an order for cows; and I never refused him whenever I had any wet cows on the Motley place." Radcliff testified: "I own the Motley place, and ran a stock farm and dairy on it. Most of the cattle belonged to me, but I told Black, my son-in-law, that I would let him have wet cows whenever he wanted them for any purpose from the Motley place."

C. J. Thornton, for plaintiff in error. Miller, Wynn & Miller, and W. H. & E. R. Black, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 139)

#### RODGERS v. BLACK.

(Supreme Court of Georgia. June 8, 1896.)  
LANDLORD AND TENANT—LIEN ON CROP—WHEN EXISTS—TRIAL—INSTRUCTIONS.

1. A landlord is not entitled to a lien upon his tenant's crop for supplies, unless the same are furnished by the landlord himself. If the tenant signed a promissory note for the price of the supplies, and the landlord, though he may have indorsed the same, or signed it as surety (doing this with the tenant's consent), was in fact the real purchaser, he would be entitled to his lien,—the truth of the matter being a question for the jury. If, however, the tenant was the purchaser in the first instance, and the landlord, without his knowledge or consent, upon a private understanding with the seller of the supplies, indorsed the tenant's note given for the same, there would be no lien. *Scott v. Pound*, 61 Ga. 579; *Swann v. Morris*, 9 S. E. 767, 83 Ga. 143; *Brimberry v. Mansfield*, 13 S. E. 132, 86 Ga. 792.

2. The defendant's request to charge, which, in effect, embodied the rule announced in the last sentence of the above note, was substantially covered by the charge given; and the refusal to charge the request was not, therefore, cause for a new trial, especially as the verdict seems to have been in accord with the preponderance of the evidence.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Affidavit filed by R. C. Black for the foreclosure of a special landlord's lien upon crops of E. P. Rodgers. There was a verdict for plaintiff, and, a new trial being denied, defendant brings error. Affirmed.

The following is the official report:

Black made affidavit for the purpose of foreclosing his alleged special landlord's lien upon the crops raised by Rodgers upon lands rented by Black to Rodgers for 1893, for supplies (guano of the value of \$100) which he claimed he furnished to Rodgers for the purpose of making a crop for 1893 upon the land rented. He alleged in his affidavit that the \$100 was not due, but that Rodgers was removing his crops from the premises, and that he had demanded payment of the \$100 from Rodgers after information received by him that Rodgers was so removing his crops, and that Rodgers refused to pay. By his counter affidavit, Rodgers averred that the debt was not due; that he was not removing, or attempting to remove, the crops; that Black never demanded payment of him of any amount due for supplies; and that he is not indebted to Black, in any sum, for supplies furnished, Black never having furnished him any guano or other things to enable him to make the crop. There was a verdict for plaintiff for \$100, and, defendant's motion for a new trial being overruled, he excepted. The motion was upon the grounds that the verdict was contrary to law, evidence, etc., and that the court erred in refusing to charge the following written request of defendant: "If you should believe from the testimony that there was an understanding between Black and Allen whereby Allen was to take Rodgers' note for the guano, and Black was to indorse the note, and Rodgers did not know of it, nor consent to or ratify it, and he (Rodgers) did give the note to Allen, and Black indorsed it, that would not give Black a special landlord's lien, and you should find for the defendant." Also, that the verdict was contrary to the following charge which was given to the jury: "If you believe from the testimony that the plaintiff, R. C. Black, was nothing more than security or indorser upon the note of E. P. Rodgers for the guano, then he would not be entitled to a special lien, as landlord, for supplies furnished."

C. J. Thornton, for plaintiff in error. Miller, Wynn & Miller and W. H. & E. R. Black, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 138)

**ADAMS v. GOODWIN.**

(Supreme Court of Georgia. June 8, 1896.)

**CHATTEL MORTGAGE—ASSIGNMENT—WHAT CONSTITUTES—FORECLOSURE—EXECUTION—RETURN—FILING OF PAPERS—PRACTICE.**

1. An entry upon a chattel mortgage, in the words, "For value received, we hereon transfer the within *fi. fa.* to," followed by the name of a particular person, and signed by the mortgagee, operated as an assignment of the mortgage to the person designated.

2. An execution, signed by a justice of the peace, commanding the levying officers addressed to have the money "at our next justice court," was returnable to the justice's court of the district in which that magistrate presided.

3. Where an affidavit to foreclose a chattel mortgage, and the mortgage itself, have been handed to a justice of the peace, this is a sufficient "filing" of these papers with that officer.

4. In this case the mortgage *fi. fa.* substantially followed the affidavit of foreclosure, and the foreclosure was properly had in the name of the assignee of the mortgage.

5. The affidavit of illegality was entirely devoid of merit.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Execution issued out of justice court, on the application of T. J. Goodwin, upon a chattel mortgage executed by Jordan Adams. Defendant's motion to quash the *fi. fa.* was overruled, and he brought certiorari to the superior court, where it was overruled, and he brings error. Affirmed.

The following is the official report:

On April 2, 1892, Adams executed a mortgage to W. J. Weekes & Son for \$10, with interest, due May 2, 1892, on a cow and her calf, and a coat and vest. This mortgage, as attached to the petition for certiorari, bears an indorsement of transfer, for value received, of the within *fi. fa.* to T. J. Goodwin, signed by Weekes & Son, and dated May 25, 1892. On May 3, 1892, Goodwin made affidavit before a magistrate that Adams was indebted to him on the annexed mortgage \$10 principal, and 80 cents interest to date. Upon this affidavit an execution was issued by the magistrate, directing that of the cow and calf, there be made the \$10, and interest and costs, "which sums T. J. Goodwin lately recovered before me of the said Jordan Adams in the foreclosure of a mortgage bearing date of April 2, 1892, made to W. J. Weekes & Son and transferred by them to T. J. Goodwin; and have you the said several sums of money at our next justice court, to render to T. J. Goodwin." This execution was dated May 3, 1893. Adams made affidavit of illegality upon several grounds, those relied on being: First because the *fi. fa.* is void, as it was not made returnable to any district or any court in any county; second, because the affidavits of foreclosure and mortgage were not filed with the justice of the peace (or in his office) who issued the *fi. fa.*; third, because the *fi. fa.* did not follow the affidavit of foreclosure; fourth, because the mortgage

was foreclosed in the name of Goodwin, when the title was in Weekes & Son, and the same has never been transferred to Goodwin. When the case was called for trial before the magistrate, defendant moved to dismiss the levy and quash the *fi. fa.* upon the grounds set out above, which motion was overruled. Plaintiff introduced the mortgage, with the entry of transfer thereon, the affidavit of foreclosure, and the *fi. fa.* Defendant objected to these papers (the ground of objection not being stated), and again moved the court to quash the *fi. fa.* Goodwin testified that the amount claimed was due and unpaid, and the magistrate rendered judgment for plaintiff. The defendant took the case to the superior court by writ of certiorari, alleging that all of said rulings were error, and that each and every ground of illegality was good, and should have been sustained. The certiorari was overruled, and defendant excepted.

J. J. Bull, for plaintiff in error. Henry Persons & Son, for defendant in error.

**PER CURIAM.** Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 138)

**SLAYTON et al. v. ETHERIDGE et al.**

(Supreme Court of Georgia. June 8, 1896.)

**PURCHASE BY ADMINISTRATOR—SETTING ASIDE SALE—LACHES.**

The decision of this court in this case, rendered at the March term, 1894 (19 S. E. 818, 94 Ga. 496), holding that the court below erred in granting an injunction, also in effect adjudicated that the plaintiffs were not entitled to the other relief sought by their petition, for the reason that the same was filed too late. This being so, and the amendment subsequently made to the petition not materially strengthening it, there was no error in dismissing it on demurrer.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Petition by Lula Slayton and others against C. A. Etheridge, survivor, and others, to set aside an administrator's sale. From a judgment dismissing the petition on demurrer, petitioners bring error. Affirmed.

The following is the official report:

The petition of Lula Slayton, Abbie Bankston, and Elizabeth Swint against Etheridge, survivor, et al., alleged: A. B. Bankston died intestate in 1864, leaving petitioners and their mother, Emily F. Bankston, his only heirs at law. At the February term, 1866, of the court of ordinary of Harris county, Emily F. was appointed his administrator, and accepted the trust. In 1866 she married W. C. Davis, and her letters abated, and in January, 1867, Davis was appointed administrator de bonis non, and accepted the trust; and at the March term,

1870, he was, by the court of ordinary, appointed the guardian of petitioners. At the time of the death of their father, he owned the east half of lot 261 of the northwest corner of lot 261, containing 67½ acres, the west half of lot 260, the southwest quarter of lot 287, the east of lot 244 and 80 acres off the western portion of lot 245 containing in the aggregate 511¼ acres, all in the Twentieth district of Harris county. Emily F. had dower set apart to her, the east half of lot 261 and the western portion of the west half of lot 260 being assigned to her as dower. At their father's death, petitioners were quite small and of tender years, and they did not know when Davis was appointed administrator or guardian, and do not know whether their father owned any personal property, but they are informed and believe that he owned personally of the value of some \$2,000. Davis, as administrator, obtained leave to sell all the land except that set apart as dower, and on the first Tuesday in January, 1870, exposed it for sale. He confederated with his brother John M. Davis, and procured the latter to purchase the land for him, and in pursuance thereof John M. bid off the land at \$3,280, and W. C., as administrator, made John M. a deed, and on the same day and at the same time John M. deeded the land to W. C. John M. did not pay a cent to W. C., and W. C. paid nothing to John M., but it was a fraudulent combination to put the title in W. C. and defraud petitioners. W. C. went into possession of the land under this fraudulent arrangement, and has used and received the rents and profits ever since, of the yearly value of \$500. Recognizing that the land was the right and property of petitioners, W. C. deeded to petitioners Lula Slayton, and Abbie Bankston, and placed them in possession of, a portion of the land. In April, 1879, J. N. Beard obtained a judgment against W. C. Davis for \$275.80, from which execution has issued, which has been levied upon the land. Petitioners do not know the residence of Beard, but he is represented by his attorney of record of Harris county, where the judgment was obtained. In October, 1884, Slade & Etheridge obtained a judgment against W. C. Davis for \$340.70, from which execution has issued, and been levied upon the land. Slade has died, and the execution is now controlled by Etheridge, survivor. In October, 1886, Flournoy & Allen obtained judgment against W. C. Davis for \$515.90, and execution has issued, and been levied upon the land. Hudson & Johnston have obtained a judgment for \$— against W. C. Davis, from which execution has issued. Hudson has died, and the execution is controlled by Johnston, survivor. There were but few debts against the estate of Abner Bankston at his death, and there was enough personalty to pay them, and the land could have been equally divided be-

tween his heirs at law. Lula Slayton and Abbie Bankston interposed a claim to 67½ acres of lot 260, levied on under the fl. fa. of Slade & Etheridge, but Slade, survivor, confederated with the sheriff, and L. L. Stanford caused the sheriff to sell the land in March, 1893, and at the sale petitioners gave notice that it was their land, and that their claim was pending, yet the sheriff sold the land, and Stanford bought it for \$205, it being worth at the time some \$700; and the sheriff made a deed to the wife of Stanford, and placed Stanford in possession, and they received the rents and profits of the yearly value of \$150. W. C. Davis and the sureties upon his bond as administrator and guardian, and John M. Davis are all insolvent. W. C. and John M. Davis reside in Harris county, where the petition was filed. The deed from W. C. to John M. Davis, and the deed from John M. to W. C., do not describe the land accurately as to numbers, but do as to the boundaries. Flournoy & Allen have all the lands advertised for sale under their execution, except said 67½ acres, for the first Tuesday in September next; and, unless restrained, petitioners will lose the property. They prayed that the deed from W. C. to John M., and from John M. to W. C., be canceled, and the title be decreed to be in petitioners; that W. C. account for the rents of the land and the estate of his intestate; that the sheriff's deed to Stanford be canceled, and the Standfords account for the rents and profits of said land; that the Standfords be restrained from disposing of or incumbering the land until the final hearing; that the judgment creditors of Davis, above mentioned, be restrained from proceeding with their execution against the land until further order, and, upon final hearing, that the injunction be made perpetual; and for general relief and process. By amendment they alleged that W. C. has never been discharged from the administration or guardianship; that the deed by him, as administrator, to John M., and the deed from John M. to him, have never been recorded; that they did not know of the existence of said deeds and said fraud until a short time before the filing of their original petition; and that W. C. made the deed to them named in their original petition in 1886 and in 1888. The original petition was filed August 29, 1893. The defendants, except W. C. and J. M. Davis, demurred to the petition and amendment generally. Further, because the alleged causes of action appear to be barred by the statute of limitations, and it further appears that petitioners have not pursued their remedies within a reasonable time. Further, because substantial relief is only sought and expected from these defendants, who are bona fide creditors and purchasers and innocent of the alleged fraud. Further, because the petition appears to be the result of a conspiracy be-

tween petitioners and W. C. Davis to defeat the other defendants, judgment creditors of said Davis, out of their just debt, and to relieve him therefrom. Further, because the petition is multifarious, in that it alleges different grievances and seeks different remedies against different defendants. Further, because petitioners appear to have adequate relief at law. The demurrer was sustained, and petitioners excepted.

B. H. Walton, Little, Wimbish, Worrell & Little, and C. J. Thornton, for plaintiffs in error. J. M. Mobley, B. F. McLaughlin, and Goetchins & Chappell, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 139)

ALLEN et al. v. WILKERSON.  
(Supreme Court of Georgia. June 8, 1896.)  
NEGOTIABLE INSTRUMENTS—SURETIES—WHO ARE  
—DISCHARGE—USURY.

1. One who, without receiving any of the consideration for which a promissory note was given, signed it as a surety for another, was none the less a surety, and did not become a principal merely because, in consideration of his signing, the creditor released an existing mortgage he held against the other maker of the note. Such a transaction amounted to no more than a substitution of one form of security for another.

2. Under the evidence, and in view of the law laid down by this court in *Lewis v. Brown*, 14 S. E. 881, 80 Ga. 115, cited approvingly in *Vandiver v. Wright*, 19 S. E. 990, 94 Ga. 698, the verdict in the surety's favor was right.

3. The verdict rendered in this case being beyond question for an amount fully as large as the plaintiff, under the evidence, was entitled to recover against the principal debtor, and the surety having been properly discharged, it was error to grant the plaintiff a new trial.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by A. E. Wilkerson against James Allen and John T. Allen. There was a verdict for defendant John T. Allen and against James Allen for a part of the amount demanded, and plaintiff was granted a new trial. Defendants bring error. Reversed.

The following is the official report:

Wilkerson sued James Allen and John T. Allen upon a promissory note, signed by them, dated February 3, 1891, due October 1, 1891, payable to Wilkerson, for \$248.60, with interest and attorney's fees. The note contained waiver of homestead. James Allen pleaded not indebted. J. T. Allen pleaded that he was not a principal, but a surety. He further pleaded that, at the time his principal made the note, plaintiff computed interest at 12 per cent. per annum, and added it to the principal, and put it in the note as principal; that at the date of the note \$29.83 was added to the amount

then due, which sum was usurious, and should be deducted from plaintiff's demand; and that, by reason of the fact that plaintiff had embraced and charged usury in the note, this defendant, being only a surety, should be discharged from any further liability. Defendants pleaded: On March 13, 1890, James Allen borrowed from plaintiff \$400, and plaintiff charged him \$17.85 interest, when the interest at the legal rate, 7 per cent., was \$15.15, and should be deducted. At the same time plaintiff charged him \$50 as commissions on 40 bales of cotton, when plaintiff was not a cotton factor or commission merchant, or in the warehouse business, and said charge was for the purpose of obtaining usury on the \$400 borrowed. On October 30, 1890, defendant owed plaintiff, for mules and cash, \$924.35, when he charged defendant and added to his account \$5.25, \$1.81 of which was usury, and should not be collected. At the same time plaintiff charged him \$1.20 interest on \$884.35 for six days, 22 cents of which sum was usury, and should not be collected. On December 22, 1890, plaintiff charged him interest of \$5.88 for one month on \$472, when the legal rate would have been \$2.37, and \$3.71 should be deducted. On February 3, 1891, James Allen owed plaintiff a balance on said amounts, including all usurious charges, of \$248.60, and gave his note for said amount, with J. T. Allen as surety,—the note sued on. Hence the usury charged makes the sum of \$57.19, which should be deducted from said original amount. James Allen also pleaded that when, in 1890, he bought two mules for \$260, and gave his note, they were charged on plaintiff's books at \$310.50, and \$50 of said sum was usury. He pleaded usury as to some other small sums, and further pleaded that on February 3, 1891, he and plaintiff had a final settlement, and, after deducting the usury charged and collected of him, he owed plaintiff \$162.10 principal, when he gave the note sued on with J. T. Allen as surety for \$248.60, of which \$105.25 was usury. Upon the first trial of the case there was a verdict for plaintiff for \$124.25 principal, with interest and attorney's fees. A motion for new trial was made by defendant, and was granted. Upon the second trial there was a verdict for the defendant John T. Allen, and against James Allen, for \$73.09 principal, with interest. Plaintiff moved for a new trial, and, his motion being granted, defendants excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in charging: "If John T. Allen voluntarily went to the plaintiff, Wilkerson, and agreed to sign the note sued on if the plaintiff would release a mortgage against his father, James Allen, and he did thus sign, and Wilkerson released the mortgage against his father, then John Allen would be a principal on the note, and not security." Because the ver-

dict was contrary to the following portions of the charge: "Should you find that John T. Allen was a son of James Allen, and that he signed the note in order to get A. R. Wilkerson to release a mortgage against his father's property, and Wilkerson did release the mortgage, that would be a good consideration, and John T. Allen would be a principal on said note, and you should find against both James and John T. Allen as principals for whatever sum you might find to be due, if any, on said note. If John T. Allen signed the note with his father in consideration that Wilkerson would release the mortgage upon the property of James Allen, then I charge you that John T. Allen would not be released from the payment of the note, except as to the amount of usury, if you should find there was any usury in the note."

Bull & Perryman, for plaintiffs in error.  
J. H. McGehee, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(39 Ga. 136)

SWIFT MANUF'G CO. v. HENDERSON.

(Supreme Court of Georgia. June 8, 1896.)

GARNISHMENT—EXEMPTION—WAGES—WHAT CONSTITUTES.

1. The word "wages" means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service, or a fixed sum for a specified work; that is, payment may be made by the job. The word "wages" does not imply that the compensation is to be determined solely upon the basis of time spent in service. It may be determined by the work done. *Ford v. Railroad Co.*, 7 N. W. 126, 64 Iowa, 728. And see 28 Am. & Eng. Enc. Law, "Wages," 513, note; *Id.* 515, note; *Rood, Garnishment*, § 89; *Selders' Appeal*, 46 Pa. St. 57; *Hamberger v. Marcus*, 27 Atl. 681, 157 Pa. St. 136, 137.

2. Accordingly, where the compensation of an ordinary laborer in a factory is so many cents per "hank" for every hank he makes, payable biweekly, this compensation is "wages," and as such exempt from the process of garnishment.

3. The judge erred in refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from superior court; Muscogee county; W. B. Butt, Judge.

Action in justice court by M. L. Henderson against one Pittman, in which the Swift Manufacturing Company was summoned as garnishee. There was a judgment against the garnishee, who petitioned to the superior court for a writ of certiorari, which was refused, and the garnishee brings error. Reversed.

The following is the official report:

The Swift Manufacturing Company presented to the judge of the superior court

their petition for certiorari, alleging: On March 15, 1895, Henderson sued Pittman in the justice's court, and on the same day had summons of garnishment issued to petitioner. Petitioner answered that, at the time of the service of the garnishment, they were indebted to defendant \$6.60 as daily wages, and since then had become indebted to him \$13.65, also as daily wages, which indebtedness, being for daily wages, is exempted by law from the process of garnishment. Plaintiffs traversed this answer, denying that the sums were due to defendant for daily wages. The case went by appeal to a jury in the justice's court. From the evidence before the jury the following appeared: The summons was served on the garnishee March 15, 1895. Pittman was then working as a day laborer for the garnishee, and receiving 85 cents a day. On March 18th the contract the garnishee had with Pittman was changed, and it paid him 11 cents a hank, and required him to make not less than eight hanks a day, for which he was to receive 88 cents, and for all over and above the eight hanks he made he was to be paid 11 cents a hank. The wages he received for the day's work depended upon the amount of hanks he turned out. It was his business to run a frame, and it required constant manual labor to run it. He did the same kind of work at 11 cents a hank he was doing when he was paid at 85 cents a day; the only change made in the contract being the manner in which he was to be paid. He could not substitute any one in his place. He turned out an average of eight hanks a day. The garnishees paid their hands every two weeks. Pittman was paid at the same time all the others were paid. The \$13.65 was made by Pittman under the 11 cents a hank contract, except \$1.70. The justice of the peace charged the jury that, if the garnishee had Pittman employed at a stipulated sum per day, his wages would not be subject, but if he was doing contract work at so much a piece or hank, as had been testified about, then his wages would be subject. The jury found against the garnishee \$3.65, which was the amount of the judgment Henderson had obtained against Pittman. The petition alleged that the magistrate erred in charging as above set out, in that the charge was contrary to law, and was equivalent to directing a verdict against petitioner, and that the verdict was contrary to law and without evidence to support it. The judge refused to sanction the petition and grant the writ, to which ruling petitioner excepted.

Miller, Wynn & Miller, for plaintiff in error. W. H. McCrory and J. El. Chapman, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 135)

**BAKER v. ADAMS.**

(Supreme Court of Georgia. June 8, 1896.)

**LOST INSTRUMENT—SECONDARY EVIDENCE—NECESSITY OF PROOF OF SIGNATURE—APPEAL—HARMLESS ERROR.**

1. It being fairly and reasonably inferable from the evidence of the plaintiff, as a witness in her own behalf, that a paper offered in evidence was a copy of another paper which had been signed by her, and attested by two witnesses since deceased, and the lost original having been accounted for, and the copy being relevant to the issue, the latter was admissible in evidence over an objection that there was no proof of the existence and execution of the original. The handwriting of the subscribing witnesses to an inaccessible paper could not possibly be proved, and even before the passage of the act of 1895, amendatory of section 3837 of the Code (Acts 1895, p. 31), the maker's evidence, admitted without objection, as to the signing of a paper, was some proof of its execution.

2. This being an action for land, which the plaintiff's evidence established her right to recover, and the defendant's alleged title depending upon the question whether the plaintiff had or had not executed a deed conveying the property to the defendant's vendor, and the jury, after a fair submission of this issue, having resolved it in the plaintiff's favor, upon evidence amply warranting them in so doing, the verdict, irrespective of the errors alleged, ought not to be disturbed, especially as the improvements made by the defendant were set off against the rents; this being, under the facts as found by the jury, all the equity to which he was entitled.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Jeanette Adams against Wesley Baker. There was a verdict for plaintiff, and an order denying a new trial, and defendant brings error. Affirmed.

The following is the official report:

Jeanette Adams sued Wesley Baker for a tract of land in Columbus, known as "Lot No. 289," on the west side of formerly Troup street, now Third avenue, and mesne profits of \$500 per year from January 1, 1889; the suit being brought April 12, 1893. Petitioner claimed title under deed from William L. Stapler, October 8, 1867. Defendant pleaded not guilty. Further, that the property sued for is his property; that the fee-simple title and possession of the lot were acquired by him, for value, by purchase from Mary G. Flewellen, under two separate deeds, the first of March 30, 1889, for the south half of the lot, and the second of April 15, 1890, for the north half; that at the date of his purchase the only improvement upon the lot was a dilapidated, two-room house, unfit for habitation, and for which he received no rent; that during the latter part of 1891 he built upon the lot five two-room dwelling houses, and a small storehouse, all of the value of \$1,050, and has also paid large sums for taxes and insurance. Further, that he was a bona fide purchaser, for value, of the property, without notice of any defect in the title, or of any claim of plaintiff thereto, and the possession

of the property was at the date of his purchase, and had been for many years before, in Mary G. Flewellen, as the owner and holder of a fee-simple title thereto. He prayed that, if plaintiff be found entitled to recover, he might be allowed the sums he had expended for improvements, and that the property be sold, and from the proceeds he be repaid the sums so expended by him, after deducting therefrom the value of the premises before the improvements were placed thereon, and interest thereon. Further, prescription of seven years in himself and Mrs. Flewellen. Further, that the improvements were placed upon the property with the full knowledge of plaintiff that defendant was making the improvements upon the premises as his own property, and she failed to give him any notice of any claim of right and title thereto by her, which conduct was a fraud upon defendant; and she now resides out of the state of Georgia, and has no property in Georgia out of which defendant could recover compensation for his improvements. Further, if she ever had title, it was only a life estate. He prayed: (1) If it should be found she only had such life estate, and is entitled to recover upon such title, that she first pay to him the value of his improvements and expenses. (2) If she has such life interest, that the premises be sold, and the value of her life estate, without the improvements, be first paid to her, and the balance paid to defendant. (3, 4) That the value of her life interest be ascertained, and defendant be allowed to reclaim the premises upon paying her the value of her life interest; and for general relief. There was a verdict for plaintiff for the premises in dispute, and that the mesne profits set off the improvements. Defendant's motion for new trial was overruled, to which ruling he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in admitting in evidence, over defendant's objection, the instrument of writing attached to plaintiff's interrogatories, and called a "trust paper," and which was as follows: "(Copy.) Columbus, Georgia. I hereby appoint Mrs. Mary Freeman, a resident of Muscogee county, a trustee to take control of, and exercise all due discretion as she may think beneficial to, such property, being one house and lot situated in the lower end of Troup street, in the city of Columbus, and state of Georgia, until my return to claim the same. Jeanette X Adams. Witness: Isham Cooper, B. D. Casey." Defendant objected to this evidence upon the ground that it had not been sufficiently identified, nor its execution proved. Further, because it came from the custody of plaintiff; the subpoena duces tecum, and the affidavit of Mary Flewellen (formerly Freeman) on the back thereof, being before the court, that the paper has never been in her possession. Further, because the paper was a copy, and so appeared upon its face,

and no proof of the execution or existence of an original had been submitted. It appears that plaintiff testified, among other things: "I lived in Columbus so long I did not keep any account. I have lived in Little Rock 17 years, as near as I can tell. The deed of trustee paper will show. Look on that paper, and it will tell you better than I can. I gave possession of the [land] to Mary Freeman under the paper of trusteeship, until I returned. I never executed any paper to her, or any one, conveying the land, except the trustee paper. I left the land with her, and she was to make it pay the taxes, and a debt of \$14 that I owed for the lightning rod. I think Isen Cooper wrote the trustee paper. He got two others to witness it. The paper shows their names. I can't read and write, and can't tell the trustee paper from any other paper; but I gave to the commissioner, to be filed as exhibits to my depositions, all the papers that I have about it, and one of them is the trustee paper." A witness for plaintiff testified that "Isam Cooper and B. D. Casey are both dead, by what people say." The so-called trustee paper was indorsed, "Copy trusteeship for Mary Freeman," and was identified as an exhibit to the deposition of plaintiff, by the commissioner who took the deposition. The subpoena to Mary Flewellen required her to produce the original of the paper, and she made affidavit that such paper was not in her power, etc., and never had been. Error in admitting in evidence the books introduced as state and county tax digests, defendant objecting thereto upon the ground that the evidence showed that the books offered were copies, and not the books used by the tax collectors, but were filed by the receiver with the ordinary, and upon the further ground that the testimony showed it to be the custom of the tax receivers to simply copy the returns from one year to another, and it did not appear that the returns from 1876 to 1889 had been made either by plaintiff or Mary Freeman. It appears that defendant testified that he had paid the taxes and insurance ever since he bought the property from Mary Flewellen. Mary Flewellen testified that after plaintiff left she (witness) paid the taxes on it all the time until she sold it to defendant; that she did not have it changed on the tax books, did not know anything about that, but just told them what property it was she wanted to pay the taxes on, and paid the taxes every year to Mr. Moore and Mr. Andrews, just as they told her the amount; and that she returned the property in her own name. It further appeared that the city tax assessors assessed the property, previous to 1889, to plaintiff. Andrews, state and county tax collector most of the time since 1876, identified the books shown to him as copies of the tax receivers' digests from 1876 to 1889, inclusive, which were deposited in the office of the ordinary, and testified further that the books shown were not those from which he collected the

taxes; that, when parties failed to give in their property for tax, it had been the custom for the tax receivers to copy the return of the property as it appeared on the tax digest for the year before, and witness collected it from whoever brought the money, according to the way it appeared on the digest furnished him by the receiver; that he had no recollection of ever having seen plaintiff, and, as far as he could remember, Mary Freeman always paid the tax on the property returned as Jeanette Adams'. Error in admitting in evidence, over defendant's objection, the books on which the entries of the city assessors were made; defendant objecting that it appeared from the testimony that it was the custom of the assessors to copy each year the entries of previous years as to the parties to whom property was assessed, unless they were notified to change the assessment by parties. The record does not show that the books on which the entries of the city assessors were made were introduced, but does show that the city tax digests, which are copied from the assessors' books, and by which the city taxes are collected, were introduced, and that there was evidence that, unless changes were made in the names of the parties by themselves, the property was put down in the same name as on the previous year's digest by the assessors, and so copied on these. Moore, who had been clerk of the city council for about 30 years, testified that plaintiff had been paying taxes on the property for many years before Mary Freeman commenced to pay them, and that Mary Freeman continued to pay the taxes after plaintiff had ceased to do so, just as the lot had stood on the tax books in plaintiff's name until 1889. Error in admitting in evidence, over defendant's objection, the paper purporting to be a tax receipt issued by J. A. Fraser, tax collector, to plaintiff for the year —, defendant objecting upon the ground that said paper was not sufficiently identified, there being no evidence of the handwriting of Fraser; none that he was tax collector, or that the receipt was issued by him. The only receipt purporting to be signed by Fraser was a receipt to plaintiff, dated September 6, 1875, for state and county taxes for 1874. Moore testified that Fraser was state and county tax collector in 1875.

Error in refusing to submit to the jury certain issues of fact which had been prepared under direction of the court, and agreed to by defendant's counsel, and which the court had stated to counsel he would submit to the jury, but plaintiff's counsel insisted there was no necessity for issues; said issues being as follows: "First. Did or did not Jeanette Adams make a title to the premises in dispute to Mary Freeman (or Flewellen) in 1876, by deed? Second. If Jeanette Adams did make a title to the premises in dispute, in 1876, to Mary Freeman, then did Jeanette Adams, after the entry of

Baker on the premises, stand by, and, knowing of Baker's entry and possession, did she knowingly permit Baker to improve the property, without disclosing her title? Third. If you answer the second question affirmatively, then go further, and answer these questions: (1) What was the value of the property at the time Baker went into possession? (2) What was the value of the rents of the property from the time Baker went into possession to present time? (3) What was the value of the improvements made by Baker?" The above issues had been prepared at the suggestion of the court pending the argument, but the court did not submit them, in his charge, in the words as formulated above. Error in refusing to submit to the jury certain additional issues of fact requested by defendant's counsel, said issues being as follows: "If the jury should find that Wesley Baker was a bona fide purchaser, without notice, and that plaintiff knew of the improvements placed thereon by him, and did not disclose her title, then what is the value of the life estate of plaintiff in the premises? (2) If the jury should find that Wesley Baker was a bona fide purchaser of the premises, without notice, and that plaintiff knew of the improvements placed thereon by him, and did not disclose her title, then what was the value of the life estate at the time Wesley Baker took possession thereof?" The above issues were handed the court pending the argument. Error in charging: "It is insisted upon the part of the plaintiff that this title was vested in her by one Stapler, and she has introduced a deed from Stapler to herself, by which the property was conveyed to her, and at her death it goes to her daughter Indiana Winter. The court charges you, upon the introduction of that deed, both claiming under the same grantor, that, nothing more appearing, Jeanette Adams would be entitled to recover the premises in dispute, together with whatever mesne profits has been shown to you under the testimony." Error in charging: "If you believe from the testimony that this deed conveying this property to Mary Freeman was made by her,—by Jeanette Adams to her,—and the same was afterwards destroyed, then parol testimony would be admissible for the purpose of showing that fact, provided that they had first shown the deed had been executed properly, and witnessed by two witnesses. It is insisted that that is true. If that is a fact, you believe that to be true,—and you are to look to all the circumstances and testimony in the case to see if that is true,—then you need not go any further, and answer the first question in the affirmative, and that ends the case." The court, in said charge, telling the jury that, if the facts enumerated were shown to be true, they should answer the first question in the affirmative, but failing to submit to them such question or issue of fact, and failing to in-

struct them that, if they should find the facts as enumerated in said charge to be established, they should find a verdict for the defendant. Error in charging: "On the other hand, if you do not believe that this title passed out of Jeanette Adams into Mary Freeman; if Wesley Baker, finding Mary Freeman in the possession of the property, exercising acts of control and ownership over it, purchased it in good faith, believing she was the owner of the property, he went forward under that belief, and made these valuable improvements upon this property,—then he would be entitled to set off the amount of his improvements (the value of his improvements) against the mesne profits. And if Jeanette Adams (she or her agent) at the time stood by, and permitted these improvements to be made, then the defendant would be entitled to have the life estate sold, as first stated, for the purpose of reimbursing him for whatever amount his improvements exceeded the mesne profits." The court failing to instruct the jury that they might find the value of the life estate from the testimony, or that they might return a verdict that the life estate be sold for the purpose of reimbursing the defendant for his improvements. Error in charging: "It is insisted upon the part of the defendant that Mary Freeman, acting as an agent of Jeanette Adams, stood by and permitted this to be done [referring to the improvements placed upon the property by the defendant]. The court charges you, if you believe from the testimony in this case that Mary Freeman was simply to take charge of this property, and to hold the same until Jeanette Adams could return and call for it, and that she afterwards appropriated it to her own use, then notice to her would not be notice to Jeanette Adams. Then she had exceeded her authority as an agent, by attempting to appropriate it to her own use by making a title to Wesley Baker. That being a fact, she repudiated her agency, and notice to her would not have been notice to Jeanette Adams." Error in charging: "If he [referring to Wesley Baker, the defendant] knew that Jeanette Adams had once owned this property, he ought not to have dealt with her as an agent of Jeanette Adams. Before dealing with an agent, or any other party, it would have been the duty of Wesley Baker to have inquired into the extent of her authority or her power as an agent; and, if he failed to do so before purchasing this property, he would not stand in the nature of an innocent purchaser, and would not be entitled to set off the value of his improvements, further than as against the mesne profits." Error in charging: "But if you believe from the testimony that Jeanette Adams, by virtue of her agency created in Mary Freeman, put it into the power of Mary Freeman to mislead Wesley Baker, causing him thereby to make these improvements, and practiced a fraud upon him in that particular, then he would have a right

to set off all in excess of the amount of mesne profits against the life estate in the estate, if you find that was a fact." The court, in said charge, failing to instruct the jury to find the value of the life estate, or to find by their verdict the value of the improvements, or to find by their verdict that the life estate should be sold so as to reimburse the defendant for the value of his improvements, if they should find the facts as enumerated in said charge. Error in charging: "If you find that there was fraud of the sort named practiced upon him, in determining this question as to whether or not Jeanette Adams is entitled to recover the property, you will find from the testimony in this case what the mesne profits were worth. Then you must find the value of his improvements, and you would set off the value of his improvements against the mesne profits, and the amount in excess." Error in charging, at the close of the charge: "If you find for the plaintiff, the form of your verdict would be, 'We, the jury, find for the plaintiff the premises in dispute.' On the other hand, if you believe, as I have charged you before, that Jeanette Adams made a title to Mary Freeman, you need not go any further, and the form of your verdict would be, 'We, the jury, find for the defendant.'" Error in failing to instruct the jury as to the form of the verdict upon the equitable pleas.

McNeill & Levy, for plaintiff in error.  
Goetchins & Chappell, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(33 Ga. 533)

**WILLIAMS v. GREENWICH INS. CO. OF NEW YORK.**

(Supreme Court of Georgia. June 8, 1896.)

INSURANCE—ACTION ON POLICY—LIMITATION.

This case is controlled by the decisions of this court in *Melson v. Insurance Co.*, 25 S. E. 189, and in *Maril v. Insurance Co.*, 25 S. E. 189 (decided at the present term).

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Edwin Williams, for the use of Kyle & Co. and Rodger's Sons, against the Greenwich Insurance Company of New York. There was a judgment sustaining a demurrer to the petition, and plaintiff brings error. Affirmed.

The following is the official report:

On July 5, 1894, Williams, for the use of Kyle & Co. and Rodger's Sons, brought this action on a fire insurance policy against the Greenwich Insurance Company. Upon the call of the case, defendant demurred to the

petition, and proferet having been tendered by plaintiff, in his petition, of the policy sued on, the same, by consent of counsel and of the court, was presented and read,—for the sake of the demurrer, being considered as part of the petition. The portion of the policy material to a clear understanding of the issue raised by the demurrer, and passed upon by the court, was as follows: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or of equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." In his petition plaintiff alleged that he filed his action on the policy against defendant, to recover said insurance, in the city court of Columbus, on June 10, 1892, and the same was nonsuited in said court on July 2, 1894, upon motion of defendant, whereupon petitioner paid the costs, and renewed this, his suit upon the policy. It further appeared from the averments of the petition that the fire occurred on October 3, 1891. The demurrer relied upon was that the renewed suit was not filed in 12 months from the date of the fire, and therefore the action was barred. The demurrer was sustained, and to this ruling plaintiff excepted.

Brannon, Hatcher & Martin, for plaintiff in error. Van Epps, Ladson & Leftwich, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 134)

**BULL v. EDWARD THOMPSON CO.**

(Supreme Court of Georgia. June 8, 1896.)

PRACTICE—NOTICE TO PLAINTIFF TO PRODUCE—EFFECT OF NONCOMPLIANCE—ACTION ON NOTE—EXHIBITS—EVIDENCE—RELEVANCY.

1. The mere failure of a plaintiff to produce writings in response to a notice served under section 3509 of the Code does not entitle the defendant to a judgment as in case of nonsuit. There must first be an order of court requiring the party notified to produce the papers, and a failure or refusal to comply therewith, and the court should not grant such an order when the defendant's counsel refuses to state how the papers in question are material. *Parish v. Machine Co.*, 7 S. E. 138, 79 Ga. 682; *Gold Mines v. Findley*, 11 S. E. 775, 85 Ga. 431; *Stiger v. Monroe* (last term) 25 S. E. 478.

2. There was no error in refusing to dismiss an action pending on the appeal in the superior court from a justice's court, on the ground that the promissory note sued upon, instead of a copy of the same, was attached to the original summons by which the action was begun.

3. In the trial of such an action there was no error in refusing to allow the defendant, who was the maker of the note, to testify to the contents of a lost written memorandum signed by himself, and handed to the plaintiff at the time the note was executed and delivered, it not being insisted that this memorandum constituted any part of the contract be-

tween the parties, or was accepted by the plaintiff as such.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by the Edward Thompson Company against J. J. Bull, in justice's court. There was a judgment for plaintiff both in that court and on appeal to the superior court, and defendant brings error. Affirmed.

The following is the official report:

Suit was brought by the Edward Thompson Company against Bull, in a magistrate's court, on a promissory note given by Bull to plaintiff for \$68.10, dated January 30, 1891, and due November 15, 1891. The case was taken by appeal to the superior court. When the case was called in that court, defendant moved for a judgment of nonsuit against plaintiff, on the ground that plaintiff "had failed to comply, and failed to produce" all of the letters and papers called for by the notice served on plaintiff, specifically described in the affidavit of defendant, made and filed as by statute provided. The notice does not appear in the record or bill of exceptions. The affidavit of defendant was: "The balance of letter dated March 11, 1892, that he has reason to believe that the same is in the power, possession, or control of said Edward Thompson & Co., and that it is material to the issue. And affiant further says that his reply to letter of date June 6, 1892, he has reason to believe, has been in existence, and that the same is in the power, possession, and control of said Edward Thompson & Co., and that it is material to the issue. And affiant further says that Edward Thompson & Co. has been notified to produce said papers through his attorney at law, J. H. McGehee, and has failed to produce the above papers." The motion was overruled on the ground that defendant's counsel refused to state wherein the letters referred to were material. The court stated that defendant could prove the contents of the letters, if relevant, and counsel refused to do so. To the refusal to sustain the motion, defendant excepted. Defendant then demurred to the summons, and moved to dismiss the case, upon the ground that no copy of the contract, note, debt, or cause of action was attached to the summons. This demurrer and motion the court overruled because the original note sued on was attached to the summons. To this ruling, also, defendant excepted. Plaintiff put in evidence the note sued on, and closed. Defendant testified that the note was given for 24 volumes of the American & English Encyclopedia of Law; that, at the time it was given, 16 volumes had been delivered, and the others were to be delivered as published, for which he was to pay plaintiff \$6 per volume; and that he gave his note for the balance due on the volumes already delivered. Defendant then offered to prove by

himself that he subscribed to plaintiff for the 24 volumes, and at the time he did so he gave to plaintiff a paper or statement dated at the time, to-wit, February —, 1890, and stated therein as follows: "1 to 6 S. E. Reporter, taken at \$12.00, Jackson, Ga., Index, taken at \$3.25, and \$25.00 on the first 11 vols., and such as may be issued after the 11th, and before October 15th, 1890, payable on said last date, and balance due for vols. then issued payable Jan. 15th, 1891; and then for such as issued October 15th, 1891, then on delivery,"—signed by defendant; that at the same time plaintiff gave to him a paper stipulating that defendant should give plaintiff the note in evidence, and, in consideration thereof, plaintiff was to furnish him the 24 volumes; that said contract or agreement had been lost, and after diligent search he was unable to find it; and that the note was given in pursuance of, and in accordance with, that contract. To this evidence plaintiff objected upon the ground that it tended to add to and vary the written contract sued upon, and because the testimony related to a transaction prior to the giving of the note, and was irrelevant. The objection was sustained, and to this ruling, also, defendant excepted. Defendant then closed, and plaintiff moved the court to direct a verdict for plaintiff for the amount of the note. This the court did, and to this action of the court defendant excepted.

J. M. Matthews, Henry Persons & Son, C. J. Thornton, J. H. Worrill, and A. J. Perryman, for plaintiff in error.

J. H. McGehee, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(36 Ga. 130)

BRINKLEY et al. v. SANFORD et al.  
(Supreme Court of Georgia. May 23, 1896.)  
WILLS—RECORD OF PROBATE—WHEN ADMISSIBLE  
—JUDGMENT—CONCLUSIVENESS ON PENDENTS  
LIFE PURCHASER.

1. Where a will was probated in common form upon the affidavit of a single witness, and admitted to record, it is no objection to the admissibility in evidence, after the expiration of more than seven years from the time of such probate, of a duly-certified copy of such will, that the affidavit upon which the probate was allowed may not have been in all respects legally sufficient.

2. One who, during the pendency of an action for the recovery of land, purchases it at a sheriff's sale of the same as the property of the defendant under a general tax execution against him, takes subject to the pending action, is concluded by a judgment subsequently rendered therein in the plaintiff's favor, and on the trial of an action by the latter against such purchaser for the recovery of the land the record of the former suit is, of course, admissible in evidence against the defendant.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

Action by J. W. A. Sanford and others against Jack Brinkley and another. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

The following is the official report:

John W. A. Sanford, Eugene M. Sanford, and Theodore G. Sanford sued Jack Brinkley and L. C. Perry for 1,500 acres of lands in Laurens county, describing them, and alleging them to be known as the "Jesse Sanford Lands," and descending to John W. A. Sanford by the will of Jesse Sanford, dated July 14, 1818, and to plaintiffs, as remaindermen in common after the life estate of their father, John W. A. Sanford. They further alleged that they recovered said lands at the October term, 1879, of Laurens superior court, Jack Brinkley being one of the defendants. The present suit was commenced on July 8, 1884. Upon the trial, after the introduction of evidence on both sides, the court directed a verdict for the plaintiffs. To this ruling, and to others hereafter stated, defendants executed.

The plaintiffs first tendered in evidence a certified copy of the will of Jesse Sanford, to which defendants objected on the ground that it had not been admitted to probate, there being no order of probate upon it; and upon the ground that it was admitted to record upon the affidavit of one of the subscribing witnesses, who failed to testify that the witnesses to the will signed the same in presence of the testator, or at his request. The court overruled the objection and admitted the will, stating that it had been regularly probated in common form. This will purports to have been made on July 14, 1818, by Jesse Sanford, of Baldwin county, following whose signature appears the entry: "Signed, sealed, and acknowledged in presence of" three persons signing as witnesses. Then follows an affidavit by Sterling Bass, one of these witnesses, "that he saw David Thomas and John Moore sign the same as witnesses, and that he himself signed the same as witness, and that each of them saw Jesse Sanford sign and seal the same as his last will." This is dated March 5, 1827, and bears test in the name of "R. A. Green, Clerk C. C." Then follows an entry of record, March 9, 1829, signed by the same person as clerk. The second item of this will is: "I lend unto my son John W. A. Sanford, during his natural life, all the lands which I hold or claim in Laurens county, \* \* \* which, after his death, shall descend to his lawful child or children; but, in the event of his having no such child or children, the property aforesaid then to revert to my estate, and be equally divided among my children." The plaintiffs then offered in evidence the record of a suit brought by them on September 6, 1877, the same being an action of ejectment for the same premises as

are here involved, against Robert Wayne, as guardian for Orilla Troup Vigal (lunatic), and against Jack Brinkley and others, as tenants in possession; in which suit verdict and judgment appear to have been rendered in favor of the plaintiffs against the defendants on October 16, 1879, for the premises in dispute. To this record defendant objected, on the grounds that Brinkley was dead, and a mere nominal party, and that the same was sought to be used against the administrator of Perry (who had died pending the present suit, his administrator having been made a party defendant), and that Perry was not a party or privy to the verdict and judgment so rendered. There being no proof of Brinkley's death, the court overruled the objection. Plaintiffs introduced the interrogatories of Edwin Holmes, taken on January 31, 1887. He testified: "I know the parties. I reside in Laurens county, about a mile from the premises in dispute. Am now in my seventy-ninth year. I have known the premises in dispute for sixty or seventy years. The land [giving boundaries] contains 1,500 acres, and has been known as the 'Sanford Land.' Defendant Jack Brinkley is in possession of it, and was in possession on July 8, 1884. The annual rental for it since 1879 is 600 pounds of lint cotton. When I first knew the place, Jesse Sanford was in possession. Subsequently it passed into the possession of Governor Troup, and since his death J. A. Vigal, Robert Wayne, L. C. Perry, and Jack Brinkley, up to the present. Robert Wayne moved the fencing for a mile and a half, and placed the same on other lands. Do not recollect the date of said removal, but think it was ten or twelve years ago. Jesse Sanford, Gov. Troup, and, after his death, John A. Vigal, Robert Wayne, L. C. Perry, and Jack Brinkley, each occupied and cultivated the land, sold the timber, and rented out the same. The cutting of the timber was allowed while in the possession of Robert Wayne." John W. A. Sanford, one of the plaintiffs, testified: "We are grandchildren of Jesse Sanford, and children of J. W. A. Sanford, for whom I was named. Jesse Sanford died February 18, 1827. My father, J. W. A. Sanford, died September 12, 1870. We are his only heirs at law. I first claimed this land by letter some time after the death of my father. Robert Wayne was trustee for Mrs. O. T. Vigal. The letter was written to him, but he was not representing me here at all. I employed McKinley to represent me here, and I think he engaged or associated Stanley, and he brought the suit to recover the land. We had no agent here looking after the land after my father died, except our attorney, Stanley, whom I recognized as such after the bringing of the suit in 1877. I do not remember when I engaged McKinley, but certainly before the suit against Wayne in 1877. Nobody returned the lands for me from 1870 to 1877, that I know of. Wayne held the land for Mrs. Vigal, who was in possession, I presume.

I only paid the taxes on the land one year, but do not remember whether it was before or after the suit was brought. Stanley notified me that the taxes were due for that year, and I sent the money. I did not have the land returned for taxation, and I do not think my brothers did. I know the one in California did not. I have no recollection of returning it. The plaintiffs in the suit brought in 1877 are the same as in the present case." The plaintiffs having closed upon the foregoing evidence, defendants moved for a nonsuit, "upon the ground that they had failed to show that Perry was claiming in privity of title with Jesse Sanford in any way to bind him by the judgment in the case of Sanford v. Brinkley, under which judgment was a recovery in favor of the Sanford heirs." The motion was overruled.

Defendants introduced a tax execution dated January 26, 1878, commanding that of the goods and chattels, lands and tenements of Robert Wayne, guardian for Mrs. O. T. Vigal, the sum of \$36 be made, "it being the amount of her tax for the year 1877." Upon this execution was an entry of levy, February 25, 1878, upon the lands in dispute, signed by the sheriff; also an entry of "notice given," bearing the same date, but not signed, and not stating to whom the notice was given; also an entry signed by the sheriff, stating that "the above levy" was sold by him before the courthouse door on June 4, 1878, and was knocked off to W. B. Jones & Co., the highest bidders, for \$90; and that, after paying \$10 costs and \$36 in satisfaction of the execution, the overplus "was ordered held up by R. A. Stanley, attorney for T. G. Sanford et al., remainder-men." The sheriff thereupon made a deed conveying the land to W. B. Jones & Co., upon the back of which deed an entry was made on April 6, 1879, signed by W. B. Jones & Co. and the members of said firm, stating that, "For value received, we hereby transfer the within deed, with all the rights therein contained, to L. C. Perry & Co." The deed was recorded July 2, 1879. Defendants introduced the testimony of M. L. Jones, one of the firm of W. B. Jones & Co.: "L. C. Perry & Co. paid me what we paid for the land. The reason we transferred the property before the twelve months expired, we thought that Wayne had a right to the deed. Mr. Conner led us to believe it. I do not remember that Perry told us that he was making the transfer for Wayne. He might have done so. I do not remember the conversation had with Perry. Do not remember that any one was present except Conner, nor what was said about it. I thought Conner was attorney for Wayne. Am not prepared to swear that he was. It was a mere vague opinion. If I knew who represented Wayne as attorney then, I do not remember now. L. C. Perry and J. M. Reinhart composed the firm of L.

C. Perry & Co. Reinhart lived in New York. He lived here before 1879." Dennis McLendon testified: "I was the sheriff that sold the land in dispute. I know where it lies. My recollection is that the larger portion of it has never been cleared, a portion being in the swamp. A large portion, a mile or more out from the river, is not cleared. I mean to say, a mile in the woods. I cannot now tell what portion is in cultivation and what in the woods. There are several ponds on it, some of them 30 or 40 acres in size. They might be ditched, and reduced to a state of cultivation. I do not remember what portion of the land was in cultivation. The sale was fair, and everybody had an opportunity to bid. Mrs. Vigal owned a good deal of land in this county. They wanted me to make the money out of the *fi. fa.* on the land of the parties. I went to Wayne, and he pointed out this tract of land. I do not recollect that I started to levy on other land to make this money before I levied on this. There was a right smart stir about the sale. I lived seven miles from the land, on the opposite side of the river. I do not know where the boundaries are. Do not know that the ponds are on the land, only as I have been told. My brother-in-law lived near the land, and he showed me the line between the Sanford and Smith lands. I suppose the land is now worth \$2 per acre. It was worth at least \$1 an acre then. I think the timber had been cut off it in 1878. If Stanley withdrew the notice to hold up the overplus of the proceeds of the tax sale, I do not remember it. I think he got in possession of the money. Do not think he was the attorney of Wayne. Do not recollect who Wayne's attorney was, nor that Stanley gave notice on the day of sale that the land belonged to Sanford. He gave notice to hold up the money. I do not recollect that I told Robert L. Rodgers, attorney, that the overplus was turned over to Wayne. I had a conversation with him. Do not recollect what I told him. My recollection is, Stanley controlled the money. Mrs. Vigal was the daughter of George M. Troup. I cannot tell what a fair valuation of this land would be at a tax execution sale. It would not bring as much at such sale as it would at private sale. It brought a fair price at that kind of sale. While I do not think it sold at its value, yet it brought as much as land usually does at such sales or sales of that character. I consider it a fair valuation at a tax sale."

John M. Stubbs, Roberts & Burch, and Harrison & Peeples, for plaintiffs in error. A. F. Daley and Felder & Davis, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 145)

**SANFORD v. BATES et al.**

(Supreme Court of Georgia. June 12, 1896.)

**WRITS—RETURN OF SERVICE—IMPEACHMENT—PRO-  
CEDURE—JUDGMENT—ATTACK BY ILLEGALITY.**

1. The truth of a return of service entered upon a declaration by a sheriff, stating that he had served the defendant with a copy of the declaration and process by leaving the same at his most notorious place of abode, cannot be called in question without traversing the return and making the officer a party to the traverse. Such traverse may and must be filed by the defendant at the first term after notice of such entry is had by him. In the absence of such traverse, the entry of service is conclusive.

2. A judgment rendered by a court without jurisdiction is void, and can be treated by the defendant as a mere nullity; but he cannot, when he has been served, go behind such judgment by an affidavit of illegality. Code, § 2671; *Hartsfield v. Morris*, 15 S. E. 363, 89 Ga. 264.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Execution in favor of Charles K. Bates and others, survivors, against V. T. Sanford, was levied, and defendant interposed an affidavit of illegality, which was dismissed, and defendant brings error. Affirmed.

The following is the official report:

An execution in favor of Bates et al., survivors, against Sanford, based on a judgment of June 11, 1889, in the city court of Floyd county, was levied on certain property. The defendant interposed an illegality on the grounds: (1) He was never served with any process and copy of the declaration in the case, and did not appear either in person or by any authorized agent or attorney; nor has he had his day in court before the rendition of said judgment against him; nor did he have any notice or knowledge of the same until long after the judgment was obtained. (2) At the time the suit was brought, and up to the time the judgment is claimed to have been rendered, he resided in Green county, Ga., and not in the county of Floyd, and the city court of Floyd county had no jurisdiction of his person to render the judgment against him. Upon the trial of the illegality, plaintiffs introduced the execution, with entries thereon, the declaration and process, with entries thereon, and the judgment upon which the execution issued. Defendant offered the following evidence: At the time of the filing of the suit he was not a resident of Floyd county, nor was he in said county during 1889 (the suit was brought in January, 1889), but resided and was in Green county; that he had no notice of the suit, did not plead to the same, did not appear in person or by any one authorized to appear for him, and was not represented in the court. All of this evidence was objected to by plaintiffs, and was rejected by the court. The court, on motion of plaintiffs, upon an inspection of the record, held that it appeared that the declaration alleged the defendant lived in Floyd

county; that the entry of the deputy sheriff of Floyd county on the process showed that service had been perfected by leaving a copy of the declaration and process "at his most notorious place of abode," and that defendant was thereby concluded, unless he filed a traverse of the return of service, which must be done at the first term after he had notice of such service; that the allegation as to the jurisdiction falsified the officer's return, and such officer was a necessary party when his return was attacked; that a want of jurisdiction, the proceedings being regular upon their face, should have been set up by plea at the first term of the court before judgment; that the record, by inspection, showed that the court had jurisdiction to render the judgment; that, inasmuch as there was no traverse filed to the return of service, defendant could not go behind the judgment by illegality; that, under the record, defendant could not attack the jurisdiction of the court by illegality; and that the evidence offered was inadmissible, and ought to be ruled out. Whereupon the court rejected the evidence and dismissed the affidavit of illegality.

Defendant assigns error as follows: (1) The jurisdiction of the city court of Floyd county extends only to the limits of that county, except where otherwise expressly provided by law. A judgment rendered upon promissory notes and accounts against a citizen of Green county by a Floyd county court is without jurisdiction, and therefore absolutely null and void, and can be attacked in any court where and at any time it becomes material to the interest of the party to consider it. This illegality made the question of jurisdiction, and is one of the modes provided by law for so doing; and the court erred in holding this record was conclusive, unless attacked by traverse of the officer's return of service. (2) The allegations of a declaration and simple return of service do not, per se, constitute or give jurisdiction, and this is especially true where the return of service is not personal. The jurisdiction of a court can be attacked without a traverse of return of service that is not personal. To render a judgment valid there must be jurisdiction, not only of the subject-matter, but of the person. The return of service by leaving at his most notorious place of abode gives no jurisdiction of a person who resides in another jurisdiction. If it does, then the property of a citizen located in a different county than his residence can be subjected to levy and sale, by an entry of a ministerial officer, without any notice to defendant that any suit was pending either against him or his property. A marked distinction exists between proceedings in rem and in personam, and the jurisdiction of courts therein. (3) Had there been personal service on Sanford in this case, then the record would have concluded him, unless he had pleaded to the jurisdic-

tion before judgment, or traversed the return, if not true, after judgment, at the first term after notice of such service. And it is insisted the court erred in holding the jurisdiction of the court could not be attacked by illegality unless there was a traverse to the return of service, the record disclosing that the service was not personal or the judgment one in rem. (4) Sanford alleged the court rendering the judgment levied had no jurisdiction so to do; that at the time of beginning the suit, up to and after the date of the judgment, he lived in Green county, and not Floyd county; that he had no notice of any such suit, did not appear or plead to the same, did not authorize any one nor did any one appear for him or represent him. This was all refused by the court, upon examination of the record, wherein the declaration recited Sanford lived in Floyd county, and the ministerial officer entered a return on the process that he had served the defendant by leaving a copy of within "at his most notorious place of abode," holding this was conclusive, and would not lie against the same. This ruling was error.

McHenry, Nunnally & Neel, for plaintiff in error. C. Rowell, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 145)

MATTHEWS v. DONOVAN et al.

(Supreme Court of Georgia. June 12, 1896.)

INJUNCTION—DENIAL ON CONFLICTING EVIDENCE—ABUSE OF DISCRETION—APPEAL—RECORD—PRESUMPTIONS.

The question whether or not an injunction should be granted depending upon the meaning of a written lease, which was, in its terms, ambiguous, and the evidence offered pro and con to show what its real meaning was being conflicting, this court will not overrule the discretion of the trial judge in denying the injunction. While some of the evidence offered in behalf of the prevailing party may not have been strictly relevant and legal, it cannot be definitely determined from the bill of exceptions whether the trial judge considered and acted upon the same or not.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Petition by George N. Matthews against W. O. & W. J. Donovan. From a decree for defendants, plaintiff brings error. Affirmed.

The following is the official report:

Matthews brought his petition against W. O. & W. J. Donovan to restrain them from cutting the sawmill timber on a tract of land in Montgomery county. Defendants, by their answer, alleged that they were the owners of the turpentine and sawmill timber on the land, which was acquired by them from W. & T. J. Pritchett on February 15, 1895, who acquired the same from P. A. McQueen, common gran-

tor, on September 15, 1888. The injunction prayed for was refused, and to this ruling plaintiff excepted, and made other exceptions, hereinafter to be noted. At the hearing it was admitted that both plaintiff and defendants claimed under McQueen, and that the true title went down to and in McQueen. Further, that the real and only issue was whether or not the written instrument made on September 15, 1888, by McQueen to William & T. J. Pritchett, conveyed the sawmill timber on the land, in addition to the use of the trees for turpentine purposes. Petitioner introduced a deed dated November 8, 1895, by McQueen to him, conveying 76 acres of the land in controversy, in consideration of \$800, properly executed, and recorded November 12, 1895. Also, a deed dated November 16, 1892, by McQueen to A. B. Small, to the balance of the land in controversy, properly executed, and recorded December 14, 1892. Also, a deed by Small to plaintiff, dated December 9, 1895, properly executed, and conveying the land deeded to Small. Also, affidavit of W. H. Hancock: He is acquainted with the leases taken usually by turpentine operators, and those taken by sawmill men for turpentine purposes and sawmill timber purposes. When a turpentine operator leases timber for turpentine purposes, the lease usually includes the necessary timber for cooperage and still purposes, but does not include the sawmill timber. On the contrary, turpentine operators and sawmill men make distinct and separate leases for the separate purposes for which they desire the use of the timber, and that the term "and timber," following a clause in the lease conveying timber for turpentine purposes, means only the amount of timber necessary for the successful prosecution of a turpentine business, and does not mean the timber for sawmill purposes. Also, similar affidavit of S. A. Kinnard and others, who further deposed that, when it is intended by the lessor to convey timber for turpentine purposes and sawmill purposes at the same time the turpentine privilege is conveyed, such purpose is plainly expressed, and, if any reservations of timber are made in such leases, they only refer to size of trees to be cut, and that a lease, in terms, "the turpentine and timber," made to one operating solely as a manufacturer of naval stores, is intended only to mean that such timber shall be used in the due course of the naval-stores manufacturing business, and does not convey the timber for sawmill purposes. Affidavit of McQueen: He leased the land in controversy to William & T. J. Pritchett for turpentine purposes, in consideration of one dollar per acre. The lease was only intended to convey to the Pritchetts the timber on the land for turpentine purposes, allowing them to cut such trees as they might need for cooperage, in the prosecution of their turpentine business, while working the timber for turpentine purposes. It was expressly understood between him and them that the lease was to them, and they were to cut and

box the timber for turpentine purposes themselves, and not sell or dispose of the lease to any person. That the words "and timber," in the lease, only included such of the timber as they needed for cooperage and other purposes necessary to the prosecution of their turpentine business, and did not convey any right to the sawmill timber. The price paid for the turpentine privilege so leased was the average market price for timber for turpentine purposes only. At the time of making the lease the timber on the land was worth two dollars per acre for sawmill timber purposes, in addition to the one dollar per acre for turpentine privileges.

Defendants introduced the lease. This lease was by McQueen to the Pritchetts of "180 acres of pine land," giving the boundaries, "for turpentine and timber purposes only for and during the term of five years from time of cutting said boxes, at the rate of \$1.00 per acre." "The parties of the second part agree to use said land and timber for the purposes herein mentioned only, and that they will not injure nor destroy said timber any more than is necessary for the full enjoyment and prosecution of the business or purposes hereinbefore mentioned," etc. On this lease was a written transfer of the same by the Pritchetts to defendants "for sawmill purposes, turpentine privileges excepted." Defendants introduced the affidavit of Peter Clifton that McQueen said to him about November 1, 1895, that he had sold to plaintiff his home place in Montgomery county, and as soon as the lawsuit was determined he (McQueen) would get \$150 more, and that plaintiff knew or thought there would be a lawsuit on the property, and held the above amount as protection against loss to him. Affidavit of W. T. Rhodus: He was present when the trade between McQueen and the Pritchetts was agreed upon, witnessed the contract, and heard described by the parties the details of its terms, and the scope and extent of the same, which embraced all the turpentine and sawmill timber on the land, and was so agreed upon, understood, and accepted by all the parties at the time, and so acted upon by them since the same was made. Affidavit of J. A. Riddle: On September 30, 1888, he heard McQueen acknowledge that the sawmill and turpentine timber on the land was leased and sold by McQueen to the Pritchetts. Affidavit of A. H. McCrimmon: He knows, from admissions of McQueen since the sale by him, that McQueen had in good faith sold the turpentine and sawmill privileges on the land to the Pritchetts, and, although McQueen cut some of the timber on the land, yet, when objected to by the Pritchetts, McQueen desisted from the cutting, admitting Pritchetts' ownership thereof, and agreed to give them certain other timber in payment for what was cut.

This transaction occurred about March, 1890. Affidavit of W. O. Donovan: According to his knowledge and belief, Matthews, at the time of the purchase from McQueen of the land, had knowledge of the fact of the sale of the sawmill timber thereon by the Pritchetts to the defendants, and before said purchase, and also the sale by McQueen previously made to the Pritchetts. Affidavit of T. J. Pritchett: By the terms of the sale by McQueen to them, their purchase being of the sawmill and turpentine privileges, they were to have five years from the date of boxing the timber to use and remove the same. The timber was boxed in March, 1893, by them, through their assignee. Subsequent to September 15, 1888, —about March, 1890,—McQueen wrongfully commenced cutting the timber on the land for sawmill purposes. So soon as deponent discovered this, he made his protest to McQueen, who then and there admitted the ownership of the timber in the Pritchetts, claimed that the cutting was done through mistake of some employé, at once desisted from further cutting, and gave the Pritchetts timber on other land in compensation for the timber so cut out by him. McQueen well knew then, and at the time he sold the land to plaintiff, that he had parted with the sawmill timber, and has often so admitted the same to deponent and others. Plaintiff also had full knowledge of such fact before he bought the land from McQueen, and that the Pritchetts had sold the sawmill timber to defendant long before plaintiff's purchase. Plaintiff objected to all the affidavits introduced by defendants, on the ground that they could not alter, add to, or vary the terms of the written lease; that there was no ambiguity in the lease, and it was not shown that there had been any omission in drawing the contract of lease, and that it was not just as it was intended that it should be. He objected to the affidavits of Clifton, Rhodus, McCrimmon, and Pritchett on the grounds that they were hearsay, and nothing said by McQueen could bind plaintiff, unless plaintiff was present. He objected to the affidavit of Donovan because it was not certain, but only as to what he believed, and not what he knew. He assigns error on the consideration of any affidavit that tended to add to, vary, or contradict the plain, unambiguous terms of the lease. Further, as to the construction of the lease by the court, which made it a sale of timber, instead of a simple lease of the pine trees for turpentine purposes.

W. L. Clarke and J. H. Martin, for plaintiff in error. Jno. M. Stubbs, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 144)

**G. D. WITT SHOE CO. et al. v. BORDEAUX et al.**

(Supreme Court of Georgia. June 12, 1896.)

**APPEAL—BRIEF OF EVIDENCE—NECESSITY.**

This court cannot undertake to determine whether or not there was an abuse of discretion in refusing to grant an injunction and appoint a receiver when there has been a total disregard of the law as to the method of bringing evidence to this court; the document purporting to be a brief of the same consisting of numerous deeds, affidavits, itemized accounts, and other papers, none of which are in any manner abbreviated, and many of which are manifestly useless for the purpose of reviewing the judgment sought to be reversed.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action between the G. D. Witt Shoe Company and others and G. W. Bordeaux and others. From a judgment for the latter, the former bring error. Dismissed.

Williams & Williams, for plaintiffs in error J. B. Geiger and T. L. Holton, for defendants in error.

**PER CURIAM.** Writ of error dismissed.

**ATKINSON, J.**, providentially absent, and not presiding.

(47 S. C. 225)

**STATE ex rel. BARTLESS et al. v. TOWN COUNCIL OF BEAUFORT.**

(Supreme Court of South Carolina. July 16, 1896.)

**COSTS ON APPEAL—PROCEEDINGS FOR PROHIBITION—ATTORNEY'S COSTS.**

1. Costs on appeal in proceedings for prohibition are allowable under Rev. St. 1893, § 2551, which expressly provides that costs "shall be allowed in all classes of cases, legal or equitable, \* \* \* on appeal to the supreme court."

2. If Act 1892, 21 St. at Large, 80 (Rev. St. 1893, § 2552), abolishing attorney's costs in certain cases, but providing that said act shall not apply to "causes now pending," the proviso includes a motion to tax costs made after the passage of the act, in an action begun prior thereto; such motion being merely incidental to the main cause, not a new and independent proceeding.

Appeal from common pleas circuit court of Beaufort county; Aldrich, Judge.

Proceeding in prohibition, on the relation of W. H. Bartless and others, against the town council of Beaufort. From a judgment confirming the clerk's taxation of costs on appeal, respondent appeals. Affirmed.

W. J. Verdier, for appellant. Elliott & Elliott, for respondents.

**McIVER, C. J.** This is an appeal from an order made by his honor, Judge Aldrich, on a motion to correct the taxation of certain costs made by the clerk in the above-stated case. This order affirmed the taxation of costs as made by the clerk, except

as to one item, which was disallowed, and the defendant appeals upon the following grounds: "(1) Because the circuit judge erred in sustaining the taxation of costs made by the clerk; (2) because the circuit judge erred in holding that the respondent was entitled to the items of costs allowed in said taxation; (3) because the circuit judge erred in holding that the respondent was entitled to any costs."

It is very possible that these exceptions are too general to demand consideration from the court, as they do not point out any specific errors on the part of the circuit judge, unless it be the third, which may possibly be regarded as sufficient to raise the question whether, in a case like the present, any costs at all can be allowed. But, waiving this, inasmuch as no such point is raised by the respondent, and as it is desirable that the practice in this respect should be settled, we will not decline to consider what we understand, from the argument, to be the questions intended to be presented. For the purpose of a proper understanding of these questions, a brief statement of the facts is necessary; and as the statement prefixed to the argument of appellants' counsel seems to be fair, and full enough for all practical purposes, we will adopt that statement, which is as follows: "This was an application for a writ of prohibition in April, 1892, on the relation of Bartless and others, in the name of the state, against the town council of Beaufort. The circuit judge granted the application, and the town council of Beaufort appealed to this court, which rendered its decision March 31, 1893, reversing the court below, and refusing the writ. Upon the filing of the remittitur from this court, the town council of Beaufort had their costs on appeal taxed by the clerk of circuit court, in regular course, whereupon the relators below, Bartless and others, excepted to the circuit court from said taxation, circuit court confirmed taxation made by clerk. Subsequently the town council of Beaufort, deeming the action of relators below, in excepting to said taxation, an appeal from clerk to circuit court, applied to clerk to tax their costs as on appeal from inferior court or jurisdiction. Clerk refused, holding that he had no power to do so. Exception was taken to circuit court, which reversed clerk, and ordered taxation. The relators below appealed, and this court sustained the appeal, and reversed circuit court. 22 S. R. 719. Bartless and others, relators below, then applied to clerk to tax their costs of appeal, which clerk did. The town council of Beaufort then excepted to circuit court, which confirmed clerk's action, and the town council of Beaufort appealed to this court." No question is raised as to any of the items of the bill of costs allowed, and the only question which has been discussed in the argument here is whether the re-

lators were entitled to any costs at all. The claim for costs is denied upon two grounds: (1) Because, this being a proceeding for prohibition, no costs are allowed by any statute. (2) Because the costs allowed being attorneys' costs accruing since passage of the act of 1892 (21 St. at Large, 30), incorporated in Rev. St. 1893, as section 2552, abolishing attorneys' costs in certain cases, no such costs can be allowed in this case.

To determine the first question, we need not go behind the act of February 9, 1882 (17 St. at Large, 1063), which contains the following provision: "The following costs shall be allowed in all classes of cases, legal or equitable: For the plaintiff's or defendant's attorneys \* \* \* on appeal to the supreme court fifteen dollars; on argument in supreme court, twenty dollars." And the same provision is now incorporated in section 2551 of the Revised Statutes of 1893. So that, whatever may have been the law as to costs in proceedings for prohibition prior to that act, and whatever may now be the law as to costs in such proceedings in the circuit court, it is quite certain that the costs allowed in this case, which were not costs on appeal to the supreme court, were expressly authorized by the statute, which expressly declares that such costs "shall be allowed in all classes of cases, legal or equitable, \* \* \* on appeal to supreme court." The case, therefore, of *State v. County Treasurer*, 10 S. C. 40, besides being a case of mandamus, was decided before the passage of the act of 1882, and is not applicable; and the case of *State v. County Com'rs of Edgefield Co.*, 13 S. C. 597, likewise cited by counsel for appellant, is also inapplicable, for the reason that the costs there claimed were not costs "on appeal to supreme court," as that was not an appeal, but a proceeding in the original jurisdiction of the supreme court. It is clear, therefore, that the first objection is untenable.

The only remaining inquiry is that presented by the second question above stated, to wit, whether this case falls within the purview of the act of 1892, above referred to, abolishing attorneys' costs in certain cases. That act reads as follows: "That all acts in relation to attorneys' costs be, and the same are hereby repealed: provided, that this act shall not apply to causes now pending, or existing liquidated contracts,"—which phraseology had been changed, when incorporated in section 2552 of the Revised Statutes, so as to read as follows: "The costs of attorneys as provided for in the three preceding sections shall only apply to causes pending, or existing liquidated contracts, on the twelfth day of January, 1893. No other costs shall be allowed attorneys." But we do not see that this change of phraseology affects the question with which we are at present concern-

ed. Inasmuch as it is not, and cannot be, pretended that this was an action on an existing liquidated contract, the only question is whether this case falls within the other branch of the exception contained in the proviso to the original act, to wit, whether it was a cause pending at the time the statute went into effect. It is conceded that this proceeding was commenced in April, 1892, prior to the passage of the act in question; and it certainly was pending at the time, not only of the passage of the act of December 22, 1892, but also when the 20 days expired, to wit, on the 12th day of January, 1893, after which the act went into effect; for the final decision on the merits was not rendered until the 31st of March, 1893, as appears from the statement of appellants' counsel, copied above. It is clear, therefore, that this case falls directly within the very letter of one of the exceptions contained in the proviso to the act of 1892. It is contended, however, that this taxation of costs now under review was a new proceeding, and therefore not covered by the exception contained in the proviso. We cannot accept that view. In the first place, the language of the proviso affords no countenance for any such view, for the act does not declare that attorneys shall not be entitled to costs for any proceedings instituted after the passage of the act; but, on the contrary, it expressly declares that the provisions of the act shall not apply to causes then pending, and as to such causes the law remained as it was prior to the passage of the act. Besides, we do not consider that a motion for the taxation of costs in an action or other legal proceeding is a new proceeding; but, on the contrary, it is only one of the steps incident to, and growing out of, such action or proceeding, and not a new or independent proceeding. It seems to us, therefore, that the second objection to the allowance of costs in this case is likewise untenable and without foundation. The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 75)

#### STATE v. PORTERFIELD.

(Supreme Court of South Carolina. July 11, 1896.)

#### DISPENSARY ACT—CONSTITUTIONALITY—GOVERNOR —RIGHT TO ACT AS MEMBER OF BOARD— CONSTRUCTION OF STATUTE.

1. Section 1 of the dispensary act of January 2, 1895, prohibiting, under penalty, the sale of intoxicating liquors in the state by any person except as permitted by said act, is constitutional.

2. The dispensary act of January 2, 1895 (section 2), which makes the governor a member ex officio of the state board of control, does not violate Const. 1868, art. 3, § 3, declaring that no person, while governor, shall hold any other office or commission at one and the same time.

3. Even if the governor were disqualified to act, that fact would not destroy the board; nor would the destruction of the board, nor the

elimination of said section 2, which creates the same, in any wise affect the provisions of the same act forbidding the sale of intoxicating liquors without a license.

Appeal from general sessions circuit court of Newberry county; Earle, Judge.

Robert W. Porterfield was convicted for selling intoxicating liquors without a license, and appeals. Affirmed.

M. A. Carlisle and Sampson Pope, for appellant. O. L. Schumpert, for the State.

JONES, J. The appellant, Robert W. Porterfield, at the November term, 1895, of the court of general sessions for Newberry county, was indicted for selling intoxicating liquors without a license. On the call of the case, defendant's counsel moved to quash the indictment, on the grounds (1) that "said indictment is based upon the dispensary law, approved January 2, 1895, and the said law is contrary to the constitution of the state of South Carolina;" (2) "said law is in conflict with the constitution of the United States"; (3) that "said law is contrary to the principles of Magna Charta and of the common law of England in force in this state before the adoption of a constitution." The motion to quash was overruled. The trial then proceeded, and defendant was found guilty, and sentenced. He now appeals, and alleges error in the circuit court in refusing to quash the indictment on the grounds above stated.

It is sufficient for this case to say that section 1 of the dispensary act of January 2, 1895, prohibits, under penalty, the sale of intoxicating liquors in this state by any person except as permitted by said act, and that the constitutionality of such prohibitory legislation is beyond question. In *State v. Town Council of Chester*, 39 S. C. 318, 17 S. E. 752, having under consideration the dispensary act of 1892, this court was unanimous in reaching the conclusion "that the said act being in effect an act to regulate the sale of spirituous liquors, the power to do which is universally recognized, it is quite clear that there is nothing unconstitutional in forbidding the granting of licenses to sell liquors except in the manner prescribed by the act." Likewise, in this case, we hold that there is nothing unconstitutional in the dispensary act of January 2, 1895, in forbidding, under penalty, the sale of intoxicating liquors except as prescribed in the act. See, also, *State v. Aiken*, 42 S. C. 222, 20 S. E. 221. This being so, it follows, as a matter of course, that there was no error in the circuit court in refusing to quash the indictment, and it would be improper and useless to proceed to consider whether any other section of the act conflicts with any provision of the state or United States constitution, because the exceptions are entirely too general to warrant so extensive a range of investigation, and useless, because, if so much of the act as forbids the sale of intoxicating liquors, for which offense the defendant is indicted, violates no

constitutional provision, it is irrelevant to ascertain if some other section, which does not concern this case, and upon which section 1 in no wise depends, is or is not constitutional. For example, it is argued that the dispensary act of 1895 is unconstitutional, because section 2 of said act, making the governor a member ex officio of the state board of control, violates section 3 of article 3 of the constitution of 1868, which provides that "no person, while governor, shall hold any other office or commission (except in the militia) under this state, or any other power, at one and the same time." Now, while it is clear that membership by the governor ex officio of a board created to carry out the provisions of an act of the legislature is not a holding of any other office or commission, in the sense of the constitution, since he performs the duties assigned him as a member of the board by virtue of his office as governor, yet, even if he admitted that the governor was disqualified to act, that fact would not destroy the board of which he was attempted to be made a member; nor would the destruction of the entire board, or the elimination of section 2, which provides for such board, in any wise effect the provision of the act forbidding and punishing the sale of intoxicating liquors without a license or permit, as provided in the act. So with other points made in the argument in behalf of appellant,—that the dispensary act of 1895 is unconstitutional because not a valid police law, because the state cannot engage in business for profit, because it violates the interstate commerce clause of the United States constitution and acts of congress thereunder, because it violates the fourteenth amendment of the United States constitution, etc.; they do not affect the only question now properly before this court, viz. whether the indictment for selling intoxicating liquors without a license or permit can be maintained under the dispensary act in question. See, however, *State v. Aiken*, 42 S. C. 222, 20 S. E. 221, where all these questions were considered in reference to the dispensary act of 1893, and decided against the contention of appellant. The judgment of the circuit court is affirmed.

(47 S. C. 126)

#### GOFORTH v. GOFORTH.

(Supreme Court of South Carolina. July 14, 1896.)

#### RESULTING TRUST—EVIDENCE—LIMITATION OF ACTIONS—INFANCY OF PLAINTIFF—RIGHTS OF DEFENDANT.

1. In partition, where defendant claimed as sole owner, alleging that plaintiff had the title to half the tract as trustee for her benefit, it appeared that the land was purchased with money of defendant, that she had requested her husband to purchase the land for her, but that he had taken the title in defendant and plaintiff jointly, plaintiff being defendant's stepson. Held, that the evidence was sufficient to establish a resulting trust in favor of defendant.

2. In 1878 defendant instructed her hus-

band to purchase certain land for her, she paying the purchase price out of her own estate. The deed was taken in the names of defendant and plaintiff, her minor stepson, jointly, but this did not become known to defendant until 1885. In 1893 plaintiff attained his majority, and began suit for partition. *Held*, that the statute of limitations as to defendant's right to plead, as a defense in partition, a resulting trust in plaintiff in her favor, began to run from the time plaintiff attained his majority, and not from the time defendant first became cognizant of the fraud.

Appeal from common pleas circuit court of York county; Townsend, Judge.

Action for partition brought by William P. Goforth against Martha Goforth. There was judgment for defendant, and plaintiff appeals. *Affirmed*.

The following are the report of the referee, the decree of the court, and exceptions of appellant:

Report of Referee: "To the Honorable, the Presiding Judge: The above-stated cause having been referred to me by his honor, Judge Benet, to try all the issues of law and fact, and to report on the same to this court, I beg leave to submit the following as my report: I held a reference at Blacksburg, S. C., on the 10th day of September, 1895. Present, the attorneys of record. The testimony taken is herewith respectfully submitted. (1) I find as a matter of fact, that in the year 1878, Martha Goforth, the defendant herein, constituted and appointed her husband, H. P. Goforth, her agent, to purchase for her the tract of land described in the complaint, and, further, to have title to said land made to her; that he, as agent for the said defendant, did purchase the said land, and did cause the deed, made in 1878, to be made to Martha Goforth and William P. Goforth, her stepson, a minor of the age of six or seven years. The entire consideration, as admitted, was money belonging to Martha Goforth, and which she had obtained from her father's estate,—this, with the exception of a small amount which was derived from the crops made on the land described in the complaint. The said deed was put on record in the proper office in the county of York on the 22d day of April, 1878. Some time after the deed was executed, certainly before 1885, the defendant, Martha Goforth, was informed of the manner in which and to whom the deed had been executed, and she and her husband had repeated quarrels over the execution of the deed in the manner set forth above. Martha Goforth, H. P. Goforth and W. P. Goforth resided on the land from the time of its purchase until about the year 1885 or 1886. The rents and profits were collected by H. P. Goforth, and used by the family until 1890. In 1891 the rents were divided between H. P. Goforth and Martha Goforth. W. P. Goforth at no time made any demand on the defendant, so far as the testimony shows, for any

rents or profits, nor did he make any claim of interest in the land until the year 1893, when he demanded partition of the premises. I find no testimony going to show that Martha Goforth ever acquiesced in the making of the deed to W. P. Goforth and herself, nor that she ever considered said W. P. Goforth a tenant in common with herself. I further find that the plaintiff attained his majority in the year 1893. From the above facts, I conclude that, when the deed to the property mentioned in the complaint was made to the plaintiff and the defendant herein, there resulted a trust of one-half interest in this land, of which trust the plaintiff became trustee and the defendant the cestui qui trust. (2) That although the defendant had actual notice of the fraud perpetrated on her by her husband in favor of the plaintiff, a minor, for more than six years before the commencement of this action, yet could this not inure to the benefit of the plaintiff, and thereby give currency to the statute, until the said minor attained his majority. (3) That upon the plaintiff attaining his majority in 1893 and having then adopted the fraud of his father, the statute would begin to run in his favor, both as trustee of the resulting trust as well as a participant in the fraud perpetrated on the defendant as aforesaid. (4) That, this action having been commenced within six years from the currency of the statute, the claim set up by the plaintiff that the defendant's rights are barred cannot be sustained. (5) That the defendant, having proven conclusively her claim to the beneficial interest in the entire tract of land set out in the complaint, and she not having been barred by the statute of limitations, is entitled to have the deed before mentioned corrected, and to the decree of this court declaring the defendant the sole and exclusive owner in fee-simple of the aforesaid lands. It is therefore recommended that the order of this court do issue requiring the plaintiff to surrender the said deed to this court and that it be corrected in the particulars herein set forth."

Decree: "This is an action for the partition of a tract of land. The plaintiff claims an undivided half of said land and alleges that the defendant owns one undivided half and no more. The defendant denies the tenancy in common, and alleges, among other things, that the land was purchased with her money, and that the deed was fraudulently made, without her knowledge and consent, to William P. Goforth and herself, jointly, instead of to herself alone, and hence that William P. Goforth has no title or interest whatever in said land; and she asks that the complaint for partition be dismissed, and that the said deed be reformed, so as to vest the title to said land in her, the defendant, solely and alone. The plaintiff, in his reply to the defendant's answer, denies that the defendant

has ever been the sole occupant of said land, and alleges that the plaintiff and the defendant have occupied the said land together ever since said deed was made, and have also used the said rents in common during that time until now. He also alleges knowledge on the part of the defendant of the alleged fraud more than six years prior to the commencement of this action, and pleads the statute of limitations. It was referred to W. W. Lewis, Esq., to pass upon all the issues of law and fact and to report any special matter. The referee took the testimony and made his report, and the case comes up before me now on exceptions to said report by the plaintiff. Certain objections were made at the different references to the introduction of testimony, and exceptions taken to the rulings of the referee, as appears from the proceedings, but these exceptions are not brought before this court, nor is any allusion made to them in the exceptions, except so far as they may be involved in exceptions to certain findings of fact by the referee. The first exception of the plaintiff is as follows: 'The referee erred in holding that there was a resulting trust in favor of the defendant, when the same was not pleaded as a defense in the defendant's answer.' The objection here is that allegations in the answer of the defendant are not sufficient to support such finding. There is no complaint that the testimony does not support such findings. The exception involves, therefore, a construction of the answer in that respect. The answer alleges, in substance, that the land was purchased with her money, under instructions from her to her husband to have the deed made to her alone, but that her husband violated her instructions in respect to the deed, without her knowledge or consent, and had it made to her and William P. Goforth jointly. This, I would say, is a sufficient allegation of a resulting trust; and I agree with the referee that the testimony supports his finding as to such trust. The second exception of the plaintiff is as follows: 'The referee found, as a matter of fact, that the deed in controversy was properly recorded in the office of R. M. O. for York county, S. C., in the year 1878; that before 1885 the defendant Martha Goforth was informed of the manner in which and to whom the deed was executed. And the referee should have held, as a matter of law, that the statute of limitations began to run against the defendant from the discovery of the fraud, which was more than six years from the commencement of this action.' If the defendant had chosen to institute an action to set aside the deed, or to reform it, it would have been necessary for her to commence her action within six years from the discovery of the fraud; but, as she chose to wait till her rights under the deed were assailed, she was not bound by the statute of limitations (*Amaker v. New*, 33 S. C. 28,

11 S. E. 386), and hence I agree with the referee again in his findings. The third exception of the plaintiff is as follows: 'The referee erred when he held, as a matter of law, that the discovery of the fraud by the defendant did not give currency to the statute until said minor attained his majority, whereas, the referee should have held that the statute of limitations started against the defendant from the discovery of the fraud by the defendant, notwithstanding the age of the plaintiff.' I think the referee erred in this finding, if he referred to an action by the defendant. As to any action which the defendant might desire to bring, the statute commenced to run at the time of the discovery of the fraud, irrespective of the age of the plaintiff; but, as to any defense she might desire to set up, whenever she should be assailed by the plaintiff, the statute did not apply, and, of course, did not run against her. In this case the defendant chose the latter plan of protecting her rights. Plaintiff's fourth exception is as follows: 'The referee erred when he held that the plaintiff adopted his father's fraud, and that the statute did not begin to run until 1893, or against the resulting trust until that date.' I agree with the referee that the plaintiff adopted his father's fraud; otherwise, he could not have instituted this action. And what I have already said in regard to the statute of limitations is sufficient as to when the statute began to run. Plaintiff's fifth exception is also answered by what has already been said, and is overruled. Plaintiff's sixth exception is as follows: 'That he erred when he held that the defendant is the sole and exclusive owner in fee simple of the aforesaid land, whereas, he should have held that one-half of the land, for the reasons heretofore stated, belonged to the plaintiff.' I agree entirely with the referee in this finding. It is therefore ordered, adjudged, and decreed: First, that the complaint be dismissed, and that the plaintiff pay the cost of this action; second, that W. W. Lewis, Esq., the referee in this case, execute and deliver to the defendant, Martha Goforth, a deed of conveyance under the form required by law, to the one-half undivided interest in the land claimed by the plaintiff, as set forth in this action, using in said deed apt and suitable words to convey to and vest in her, her heirs and assigns, forever, the fee-simple title to said half interest, and reciting therein so much of the deed from Thomas Mullinax, Frances Mullinax, and Mary A. Sherer to Martha Goforth and W. P. Goforth, and of these proceedings, as will explain the reasons and necessity and authority for making deed by the court as hereinbefore directed."

Exceptions of Appellant: "(1) It was an error when his honor, D. A. Townsend, held that there was a resulting trust established in favor of the defendant; but, if he was correct in this, it being an implied or re-

sulting trust, he should have held that this defense was not available to the defendant on account of the statute of limitations. (2) This being an action in equity, wherein the referee and the circuit judge held that the defendant had knowledge of the fraud more than six years before the commencement of this action, and that at the time there was a plaintiff who could sue and a defendant who could be sued, he erred when he did not hold that a cause of action had then accrued to the defendant, and because the defendant did not sue within six years from the accrual of the cause of action,—the discovery of the fraud,—she was barred by the statute of limitations. (3) He erred when he held: 'If the defendant had chosen to institute an action to set aside the deed, or to reform it, it would have been necessary for her to commence her action within six years from the discovery of the fraud; but as she chose to wait till her rights under the deed were assailed, she was not bound by the statute of limitations.' Whereas, he should have held that the defendant was the actor in attacking the deed for fraud,—was first to assail its validity in equity,—and should have done so within six years from the discovery of the fraud. (4) He erred when he held that the statute of limitations did not begin to run, until the plaintiff adopted his father's fraud (1893), against the fraud or resulting trust. (5) He erred when he held that the defendant was the sole and exclusive owner of all the land described in the complaint, whereas, he should have held that one-half of it belonged to the plaintiff herein, for the foregoing reasons."

N. W. Harden, for appellant. W. B. De Lach and Finley & Brice, for respondent.

GARY, J. This is an action for partition of the land described in the complaint. The plaintiff alleges that he and the defendant each are seised and possessed in fee of one-half of said land by reason of a deed of conveyance executed in March, 1878, and recorded in April, 1878. The defendant in her answer alleges that the said deed was fraudulent and void, in that it was made to her and the plaintiff jointly, instead of to her alone; that her money was used in paying for the land, and that therefore there was a resulting trust in her favor. The plaintiff replied, pleading the statute of limitations as to the resulting trust and the fraud. The facts in detail are set out in the report of the master and decree of his honor, the circuit judge, which, together with appellant's exceptions, will be incorporated in the report of the case. The exceptions raise substantially but two questions, to wit: (1) Was there a resulting trust? (2) Even if there was a resulting trust, could the defendant interpose such defense when more than six years had elapsed after discovery of the fraud?

The first question depended upon the facts

as developed by the testimony, after a careful consideration of which, we fully concur in the findings of fact by his honor, the circuit judge; and we more readily do so since the master, in his report, reached the same conclusions. The exceptions raising this question are therefore overruled.

The second question is disposed of by the cases of *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, and *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255. These cases, by their reasoning and authority, so fully rule the case before the court against the appellant that we deem it only necessary to refer to them to sustain the conclusions herein announced. The exceptions raising the second question are also overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(48 S. C. 1)

### STATE v. MURPHY.

(Supreme Court of South Carolina. July 11, 1896.)

CRIMINAL LAW—TRIAL—PROCESS FOR WITNESS—COMMISSION TO TAKE TESTIMONY—CONTINUANCE—JURY—ADMISSIONS—IMPEACHING TESTIMONY.

1. It is not error, in a prosecution for a felony, to refuse to issue a compulsory process for a witness who is shown to be a resident of another state, and beyond the court's jurisdiction.

2. In criminal cases, a commission to take the testimony of a witness in another state on behalf of a defendant can only be issued by consent of the state's solicitor, which cannot be compelled by the court.

3. A motion for a continuance to enable a defendant to procure the testimony of a witness residing without the state is addressed to the discretion of the court.

4. Under Rev. Civ. St. 1893, § 2403, providing that, if it appears to the court that a juror is not indifferent in a cause, he shall be placed aside, it is not an abuse of discretion for the court to order a juror to stand aside, without presenting him to the defendant, where the juror states on his voir dire that he is related to the defendant, is not sure he could be impartial, and asks to be excused.

5. Statements made by a defendant to a third person may be proved as admissions by the testimony of a witness who overheard them. Such testimony is not secondary evidence, nor is it inadmissible because the witness heard part only of the conversation.

6. It is not error to permit a witness to testify that he would not believe another witness under oath where he states that he knows his general reputation, though he is unable to state the particular reputation of the witness for veracity.

7. An exception to the admission of testimony not objected to when offered cannot be considered on appeal.

Appeal from general sessions circuit court of Orangeburg county; Buchanan, Judge.

Daniel O. Murphy was convicted of murder, and appeals. Affirmed.

Malcolm I. Browning, for appellant. W. St. Julien Jervy, for the State.

JONES, J. At the May term, 1895, of the court of general sessions for Orangeburg

county, appellant, Daniel C. Murphy, was convicted for the murder of Robert Copes, the county treasurer, and was sentenced to be hanged on the 26th day of July, 1895. He appeals, alleging that the circuit court erred (1) in refusing to grant process to compel attendance of a witness residing in Georgia; (2) in refusing to grant a commission to examine said witness, and to compel the solicitor to consent thereto; (3) in refusing to continue the case until the attendance or testimony could be procured; (4) in requiring a juror to stand aside, and not permitting him to be presented to the defendant; (5) in admitting the testimony of a witness as to a conversation, overheard by said witness, between the defendant and another; (6) in allowing a witness for the state to testify that he would not believe a certain witness for the defendant upon his oath, the state's witness not knowing the general reputation of the defendant's witness for truth and veracity; (7) in admitting the testimony of a state's witness as to statements by a witness for defendant, without laying proper foundation therefor.

1. Upon information of the materiality of any witness within this state, the accused, in felonies, may have process to compel the attendance of such witness in his behalf. Rev. Cr. St. §§ 24, 45. But there is no authority for the issuance of compulsory process for a witness out of the jurisdiction of the courts of this state. Such a writ would be wholly nugatory beyond the limits of the state, and, of course, could be ignored and disobeyed by all persons with impunity. There was no error, therefore, in refusing to attempt such a thing.

2. In criminal cases there is no statute in this state authorizing the issuance of a commission to take testimony of a witness out of the state, as in civil cases. While such commission might be issued in a criminal case by consent of parties (*State v. Bowen*, 4 McCord, 254), the court has no authority to issue such commission without consent of parties. Since the accused has the constitutional right "to meet the witnesses against him face to face" (Const. 1868, art. 1, § 13), it is clear that neither the courts nor the legislature could authorize such examination of witnesses against him, on motion of the solicitor for the state, without his consent. Perhaps this, together with considerations of the danger of perjured testimony, the improbability of securing prompt action, and the opportunity for delay such mode of examination of witnesses abroad would afford to parties charged with crime, accounts for the failure of the legislature to provide for examination of witnesses beyond the limits of the state in behalf of the accused. Such examination must depend upon the consent of parties, and the solicitor and not the court represents the state in the matter. We know of no power which the court has to compel the solicitor to consent. It is clear the solicitor would

not be subject to punishment for contempt of court if he refused consent. A compelled consent is no consent at all. The power to compel consent could only mean power to dispense with consent. This would lodge the right of consent in this matter in the court, and not in the solicitor. The court has power to continue a case from time to time to allow opportunity to procure the attendance of witnesses who may be out of the state in behalf of the accused. The exercise of this power might have effect to induce the solicitor to make choice between a continuance of the case from time to time and a consent to the taking of the deposition of defendant's witness out of the state. But this power would not be exercised for this purpose except upon a strong showing that justice could not be otherwise subverted. In the case of *State v. Bowen*, 4 McCord, 254, Judge Nott said: "In Chitty's Criminal Law it is said: 'When a witness resides abroad, or is about to leave the country before trial, he may, by consent of both parties, be examined on interrogatories. But this cannot be done if the defendant refuses, because the evidence is not the best which the case admits. And when a party in a case where consent is necessary refuses to grant it, the court will put off the trial, to give time for the attendance of the witnesses.' 1 Chit. Cr. Law, 612. And in the case of *Mostyn v. Fabrigas*, Cowp. 174, Lord Mansfield mentions the case of a woman who, being indicted, alleged that her witnesses resided in Scotland; and that she could not compel them to come up to give evidence. The court compelled the prosecutor to consent that all the witnesses might be examined; and declared that they would put off the trial of the indictment from time to time forever, unless the prosecutor had so consented." In the case of *State v. Smith*, 8 Rich. Law, 461, Judge Johnson said: "I remember one instance in which the late Mr. Justice Nott ordered a prosecution to be stayed, unless the prosecuting officer would consent to take the examination of a witness who resided out of the state, by commission, on his being *fully satisfied* that his evidence was material to the defense of the accused; and, upon a *clear case* made, I am disposed to think that precedent deserved to be followed." Italics ours. The question, then, resolves itself into the question whether, under the circumstances, the circuit court, in refusing to continue the case, committed such error as would warrant the court in reversing the judgment below. This brings us to the third ground of appeal.

3. A motion for a continuance is addressed to the discretion of the court, as this court has many times held (*State v. Atkinson*, 83 S. C. 107, 11 S. E. 693; *State v. Wyse*, 33 S. C. 582, 12 S. E. 556); and its rulings thereon will not be reviewed, except in a clear case of abuse of discretion. This is the rule held generally in other states. Clark, Cr. Proc.

418, and cases cited. In the case of *Latimer v. Latimer*, 42 S. C. 209, 20 S. E. 159, Mr. Justice Gary, delivering the opinion, said: "The only limitation upon this discretionary power of granting a continuance is that the discretion must not be abused. The grounds of appeal from an order granting a continuance will only be considered for the purpose of determining whether there has been an abuse of discretion, in the light of all the circumstances." In the case of *Woolfolk v. State* (Ga.) 11 S. E. 818, the court held that there was abuse of discretion in overruling a motion for continuance on the ground of the absence of a witness in the state of Texas. In *State v. Smith*, 8 Rich. Law, 460, the court refused a new trial asked for on the ground that the circuit judge refused to continue a case on account of the absence of a witness in Georgia. In *State v. Files*, 3 Brev. 304, the court held that the affidavit of a defendant in a criminal case, stating the absence from the state of material witnesses in Tennessee, is no ground to postpone a trial. In this case the defendant was not brought to trial until the term after the indictment was found. He had counsel at the first term in January, and was not brought to trial until the May term following. So far as the record discloses, the solicitor was given no opportunity to consent to or refuse the examination by commission of the witness in Georgia, and was first apprised of the defendant's wish in this matter, after the opening of the May term, by the motion to compel his consent to the issuance of a commission, and the postponement of the trial until a return of the commission could be made. A very careful examination of the showing made for a continuance, in the light of all the circumstances, discloses no abuse of discretion in the refusal of the motion for continuance.

4. The juror Corbett, examined on his voir dire, stated that he was related to the defendant; did not know the exact relationship, but thought they were cousins; that he was not sure but that his relationship would interfere with his impartiality as a juror; and asked to be excused. The juror was stood aside, and was not presented to the defendant. Section 2403, Rev. Civ. St. 1898, in reference to examination of jurors on voir dire, provides: "If it appears to the court that a juror is not indifferent in the cause he shall be placed aside as to the trial of that cause, and another shall be called." This matter, therefore, is addressed to the discretion of the court (*State v. Williams*, 31 S. C. 257, 9 S. E. 868; *State v. Merriman*, 34 S. C. 33, 12 S. E. 619), and, in the absence of abuse of discretion, this court will not interfere (*State v. Wyse*, 32 S. C. 56, 10 S. E. 612). There was no abuse of discretion here.

5. It was competent for the witness Souley to state the conversation he overheard, or that part of the conversation he overheard, between the defendant and another person. The rule that, when a party's declarations

or admissions are given in evidence against him, the whole that was said at the time on the same subject must be taken together; does not render incompetent evidence of a conversation overheard between such party and another, notwithstanding the witness did not hear the whole conversation. *State v. Covington*, 2 Bailey, 569. The testimony of a bystander who overheard such conversation is not secondary evidence (*Peeples v. Smith*, 8 Rich. Law, 90), and the bystander may prove such part of the conversation as he heard (*State v. Gossett*, 9 Rich. Law, 428).

6. There was no error in allowing the witness Wannamaker to testify that he would not believe the witness Jones upon his oath. He testified, substantially, that he knew Jones' general reputation; that he thought general reputation included veracity; that his general reputation was not good; that, while he did not like to specify veracity, yet from his general reputation he would not believe him on his oath.

7. The testimony of the witness Lightsey as to statements made by the witness Jones was not objected to at the time. An exception for admission of testimony not objected to when offered cannot be considered on appeal. *Minton v. Pickens*, 24 S. C. 592. The judgment of the circuit court is affirmed, and this case is remanded to the circuit court in order that a new day may be assigned for the execution of the sentence heretofore imposed.

(47 S. C. 187)

**SULLIVAN HARDWARE CO. v. WASHINGTON et al.**

(Supreme Court of South Carolina. July 16, 1896.)

**RIGHT TO JURY TRIAL—COUNTERCLAIM.**

In a suit to foreclose a mortgage given to secure the purchase price of machinery, defendant is not entitled to a trial by jury on a counterclaim for damages arising from a breach of warranty.

Appeal from common pleas circuit court of Laurens county; Townsend, Judge.

Action by the Sullivan Hardware Company against J. W. Washington and others. From an order overruling defendants' motion to transfer the case for trial by jury, they appeal. Affirmed.

Ferguson & Featherstone, for appellants, Johnson & Richey, for respondents.

McIVER, C. J. This was an action to foreclose a mortgage on certain machinery, given to secure the payment of the sum of money mentioned in a note given for the purchase money of such machinery. The defenses set up in the answer were failure of consideration, and breach of the warranty that such machinery was sound and suitable for the purpose for which it was purchased by defendants. The defendants also pleaded a counterclaim for damages sustained by

reason of the failure of the machinery to come up to the warranty, whereby defendants lost time and business, consequent upon such breach of warranty. To this counterclaim, plaintiffs replied, denying the allegations upon which it was based. The case was docketed on calendar 2, and when called for trial by his honor, Judge Townsend, the defendants claimed that they were entitled to a jury trial of the issues raised by their counterclaim, and moved that the case be transferred to calendar 1, for the trial of such issues. This motion was refused, and defendants appeal, imputing error to the circuit judge in refusing this motion. So that the single question presented by this appeal is whether the defendants, in a case like this, were entitled to a trial by jury of the issues presented by their counterclaim.

Appellants base their claim upon the ground that a counterclaim is, in effect, a complaint for the recovery of the money alleged therein to be due, and is in the nature of a cross action; and, thus being an action for the recovery of money, must be tried by a jury, unless a jury trial be waived. Section 274 of the Code. It seems to us that the question thus presented is so conclusively determined by the recent case of *McLaurin v. Hodges*, 43 S. C. 187, 20 S. E. 993, as to obviate the necessity of further discussion. In that case the plaintiff instituted his action for the foreclosure of a mortgage, and the defense set up by the defendant was usury, as well as a counterclaim for double the excess of the usurious interest received by the plaintiff on the mortgage debt. There, as here, defendant claimed the right to a trial by a jury of the issues presented by the counterclaim. But the court there held that as the defense and counterclaim affected directly the amount due on the mortgage, and was not a defense separable from plaintiff's equitable cause of action, the defendant was not entitled to a trial by jury of the issues presented by the counterclaim, but that all the issues in the action were triable under the rules and practice of the court of equity. In that case Mr. Justice Pope, in delivering the opinion of the court, laid down the rule in the following explicit language: "The principle which must enter into a defense to an equitable cause of action, to give the defendant the right to demand a trial before a jury, is that it exists as a separate and distinct matter from plaintiff's equitable cause of action. If it is not separate and distinct therefrom, it must, for its trial, be subject to the same forum in which the plaintiff's cause of action is triable." This principle is directly applicable to the case under consideration, for it is quite manifest that the defense here set up is not a separate and distinct matter from plaintiffs' equitable cause of action, but, on the contrary, lies directly at the foundation of the plaintiffs' equitable cause of action, and constitutes a part of the very same transaction. Indeed, if the de-

fendants should be allowed to have the question as to whether there was a breach of the warranty tried by a jury, the practical effect would be to deny to the plaintiffs their unquestionable right to have such question tried by the forum in which their equitable action was properly brought and was pending. The judgment of this court is that the order appealed from be affirmed.

(47 S. C. 161)

#### STATE v. PICKETT.

(Supreme Court of South Carolina. July 11, 1896.)

INTOXICATING LIQUORS—TRANSPORTATION WITHIN STATE—VIOLATION OF DISPENSARY ACT—INDICTMENT—SURPLUSAGE—CONSTRUCTION OF STATUTES—JURISDICTION OF TRIAL JUSTICE.

1. Dispensary Act 1895, § 1, prohibits the "transportation" of alcoholic liquors; and section 33 prohibits the transportation of such liquors "from place to place within the state," and provides a different penalty for violation thereof; and section 37 provides that any person "handling contraband liquors in the nighttime" shall be liable to still different punishment. *Held*, that an indictment charging that defendant, "in the nighttime, did transport alcoholic liquors," contrary to the act, was not under section 37; the words "in the nighttime" being surplusage.

2. It appearing from the evidence that the transportation of the liquors was between points within the state, the indictment will be taken as brought under section 33 of the act. Gary, J., dissenting.

3. Dispensary Act 1895, § 1, prohibits the "transportation" of alcoholic liquors, under a penalty of not less than 3 nor more than 12 months at hard labor in the state prison, or a fine of not less than \$100 nor more than \$500, or both fine and imprisonment, in the discretion of the court; and section 33 provides that no person shall "transport from place to place within this state . . . any liquors or liquid containing alcohol, under a penalty of \$100 or imprisonment for thirty days for each offense." And under the constitution of 1868 the penalty provided in the former section excludes jurisdiction from a trial justice, and the penalty provided in the latter section gives exclusive jurisdiction to such justices. *Held*, that the sections are not conflicting, but that the latter is an exception to the former, rendering all prosecutions for transporting liquor from place to place within the state within the exclusive jurisdiction of trial justices.

Appeal from general sessions circuit court of Greenville county; Berret, Judge.

William Choice and James Pickett were indicted for transporting liquors contrary to the dispensary act. Defendant Choice was acquitted, but defendant Pickett was convicted, and appeals. Reversed.

C. F. Dill, G. W. Dillard, and Jos. A. McCullough, for appellant. Solicitor Ansel, for the State.

JONES, J. At the November term, 1895, of the court of general sessions for Greenville county, the defendants were indicted as follows: "That William Choice and James Pickett, late of the county and state aforesaid, on the twentieth day of June, in the year of our Lord one thousand eight hun-

dred and ninety-five, with force and arms, at Greenville Courthouse, in the county and state aforesaid, in the nighttime, did transport alcoholic liquors, about 2 gallons, in a keg, contrary to the dispensary act," etc. William Choise was acquitted. James Pickett was found guilty, and sentenced to six months' imprisonment, or a fine of \$100. Pickett appeals. The circuit judge instructed the jury that the charge in the indictment that the transportation was "in the nighttime" was not material. He was requested to charge the jury "that if they believe the defendants were transporting from place to place within this state contraband liquors, in a cart or other vehicle, of the quantity alleged, in the daytime, the case would be one triable by a trial justice, and this court would not have jurisdiction." This the judge refused, stating that he had already charged that the time was immaterial. The exceptions raise practically two questions: First, whether the words "in the nighttime" are material in an indictment for transporting alcoholic liquors in violation of the dispensary law; and, second, whether the circuit court has jurisdiction to try the offense of transporting alcoholic liquors from place to place within the state.

There are three sections of the dispensary act of 1895 that are necessary to be considered. Section 1, so far as relates to the present inquiry, prohibits the transportation of alcoholic liquors under a penalty of not less than 3 nor more than 12 months at hard labor in the state penitentiary, or a fine of not less than \$100 nor more than \$500, or both fine and imprisonment, in the discretion of the court. Section 33 provides "that no person \* \* \* shall \* \* \* transport from place to place within this state by wagon, cart, or other vehicle, or by any means or mode of carriage, any liquors or liquids containing alcohol, under a penalty of one hundred dollars or imprisonment for thirty days for each offense upon conviction thereof as for a misdemeanor." Section 37 provides that "any person handling contraband liquors in the nighttime \* \* \* shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment for not less than three months, nor more than twelve months, or by a fine of not less than one hundred dollars, nor more than five hundred dollars."

Now, whether there was error in the charge of his honor that the words "in the nighttime" are immaterial in the indictment depends entirely on whether the indictment is under section 37, above; for, if the indictment is under section 37, it is quite evident that it is essential to charge and to prove that the handling of contraband liquors was in the nighttime, for so it is expressly written in the statute. But the indictment does not charge the defendant with handling contraband liquors, but with transporting alcoholic liquors, etc. It will be observed that sections 1 and 33, above cited, prohibit and punish

the transportation of alcoholic liquors, and that section 37 prohibits and punishes the handling of such contraband liquors. Unless, therefore, "transporting" and "handling" mean the same thing, or are equivalent words, it is manifest that the indictment must be referred to either section 1 or section 33, for it charges the "transporting" of liquors, and this is the descriptive word in these sections. "Transport" means to carry, bear or convey from one place or country to another; while "handling" is the act of touching, holding, moving, or managing with the hand. It is clear that there may be a handling of alcoholic liquors which could not with any propriety be described as a transportation thereof. For example, pouring liquors from a blind tiger jug at night might be punished, under section 37, as a handling of contraband liquors in the nighttime, but that could hardly be called a transportation of liquor (however "transporting" the effect might be). We think the indictment which charged a transportation must be referred to one of the sections above which relates in express terms to the act of transporting. This being so, the words "in the nighttime" are surplusage, and, as the circuit judge correctly ruled, are immaterial. The offense of "transporting" alcoholic liquors in violation of the dispensary law in no wise depends on the time of day or night it is committed.

There is an apparent conflict between section 1 and section 33. In the former, the punishment prescribed excludes the jurisdiction of a trial justice; in the latter, the punishment prescribed is such as gives the court of trial justice exclusive jurisdiction. (Observe that this question arises under the constitution of 1868, in force at the time of the trial of this case.) The scope of section 1 is much greater than that of section 33, and covers a wider range of subjects. In section 1 the "transportation" prohibited is more general than the "transporting" referred to in section 33. In the latter the transporting of alcoholic liquors from place to place within the state is forbidden; whereas in the former the transportation may not only cover transporting from place to place within the state, but covers also a transportation from a place outside the state to a place within the state, or a transportation from a place within the state to a place without the state. In such cases, Endlich on Interpretation of Statutes (section 215) gives the rule of construction thus: "If there are two acts or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision." Adopting this same rule of construction, Chief

Justice McIver, in City Council of Charleston v. Weller, 34 S. C. 361, 13 S. E. 629, said: "The well-settled rule is that, in construing an act, it must be considered as a whole, and such a construction must be adopted, if possible, as will give full force and effect to each one of its provisions. If they are apparently inconsistent with each other, such inconsistency must, if possible, be reconciled, in order to give full force and effect to the legislative will, as expressed by the words they have used." The paramount object in the construction of all statutes, whether penal or otherwise, is to ascertain the legislative will. Here, then, the particular intent, making transporting of alcoholic liquors from place to place within the state punishable only within the jurisdiction of a trial justice, as presented in section 33, must be regarded as an exception to the more general intent expressed in section 1. Therefore, it follows that all offenses of transporting such liquors from place to place within the state are exclusively within the jurisdiction of courts of trial justice. Const. 1868, art. 1, § 19; Id. art. 4, § 18; State v. McKettrick, 14 S. C. 346; State v. Harper, 6 S. C. 464; State v. Cooler, 30 S. C. 109, 9 S. E. 692. The indictment in this case, and the evidence offered to support it, show that the transportation of alcoholic liquors charged as in violation of the dispensary law was wholly within the state, and must be referred, under the conclusions hereinabove reached, to section 33; and it follows that the offense charged was within the exclusive jurisdiction of a trial justice. The judgment of the circuit court was therefore erroneous, and the same is reversed.

GARY, J. The words "in the nighttime," in the indictment, are mere surplusage, and the appellant was properly tried and convicted, under section 1 of the dispensary act. Entertaining this view of the case, I cannot concur in the conclusion reached by the majority of the court.

(47 S. C. 117)

**COLUMBIA WATER-POWER CO. v. COLUMBIA LAND & INVESTMENT CO.**

(Supreme Court of South Carolina. July 14, 1896.)

**EJECTMENT—STATUTORY NEW TRIAL.**

Under Code Civ. Proc. § 98, providing that all actions for the recovery of land, or the possession thereof, are limited to two "actions" for the same, and requiring the costs of the first action to be paid before the second action is brought, the dismissal of a second action for failure to pay the costs of the first action precludes the plaintiff from bringing another action for the recovery of the land.

Appeal from common pleas circuit court of Richland county; Witherspoon, Judge.

Action by the Columbia Water-Power Company against the Columbia Land & Invest-

ment Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Abney & Thomas and Bachman & Youmans, for appellant. W. H. Lyles, for respondent.

POPE, J. This action was commenced on the 6th day of July, 1895, in the court of common pleas for Richland county, in this state, by the service of a summons and complaint. The answer was served on the 23d day of July, 1895. The action came on for trial at the November term, 1895, of the court of common pleas, as aforesaid, before Judge Witherspoon, under the following circumstances (and this word "circumstances" will include here the pleadings, proofs, and admissions and stipulations of counsel for both sides of this controversy): On the 5th day of September, 1892, the plaintiff above named commenced its action against the defendant above named for the recovery of two lots of land within the limits of the city of Columbia, in this state; and after issue joined in said action, on the 12th day of July, 1893, the plaintiff took from the court of common pleas for Richland county, in said state, an order discontinuing said action. Thereafter, to wit, on the 15th day of August, 1893, the same plaintiff commenced its action, by summons and complaint duly served, against the same defendant, to recover the same lots of land. To this action the defendant duly appeared and made answer, in which, in different ways, the defendant denied that the lots of land sued for were the property of the plaintiff, but claimed as its own, both by possession and title, the said lots of land, and also set up in said answer that plaintiff was not entitled to maintain said action because said plaintiff had not complied with the requirements of the law of this state governing a second action for the recovery of land. Upon all the issues the parties went to trial, and the plaintiff prevailed. Thereupon the defendant appealed from such judgment in favor of the plaintiff to the supreme court. By the judgment of the supreme court upon said appeal, the judgment of the circuit court in favor of the plaintiff was reversed, and the complaint was dismissed; and, on the application by petition of the plaintiff to said supreme court for a new hearing, the supreme court dismissed such petition for a new hearing. 20 S. E. 378, 540. Thereupon, on the 6th day of July, 1895, the above-named plaintiff began its new action, by summons and complaint, against the above-named defendant, for a recovery of the same said lots of land. The seventh defense of the answer of the defendant to this last action is as follows: "For a seventh defense, this defendant alleges that heretofore, to wit, on the 5th day of September, 1892, the plaintiff above named duly commenced an action against the defendant above named for the

recovery of the possession of the said property described in the complaint, and on the 12th day of July, 1893, plaintiff took from the circuit court of common pleas for said county and state an order discontinuing said action, and that, thereafter, to wit, on the 15th day of August, 1893, the plaintiff above named duly commenced its second action against the defendant above named for the recovery of the possession of the same real property described in the complaint, which action was terminated adversely to the plaintiff by a judgment of the circuit court, in pursuance of a decree of the supreme court of the state of South Carolina, dismissing the plaintiff's complaint." The following agreement was then entered into by and between the attorneys of record of the plaintiff and defendant, to wit: "It is agreed by and between counsel for the plaintiff and for the defendant in the above-entitled cause that the said cause is to come up for trial at the present term of the court, before his honor, the circuit judge, without a jury, upon the seventh and eighth defenses pleaded in defendant's answer, for the purpose of the consideration of these defenses, and for this purpose only. In this trial, as to these defenses, plaintiff is to be regarded as having proved prima facie title to the land in dispute, and payment by it, before commencing this action, of all costs of the prior litigation; and defendant is restricted, in its attempt to overthrow the plaintiff's case so assumed as proved, to the grounds stated in the seventh and eighth defenses. The defendant is to be allowed to introduce in evidence the records referred to in said two defenses; the printed copy of the decree of the supreme court, as found in 42 S. C. 488, 20 S. E. 378, 540, and the record and order of said court upon the petition filed for a rehearing, also there found, to be considered as a part of said records. Plaintiff to be limited, in its reply to defendant's testimony, to such portions of said records as defendant may not have introduced. It is further stipulated and agreed that if the presiding judge shall sustain the said defenses, or either of them, he shall enter an order dismissing the complaint, but it is agreed that plaintiff shall reserve its right of appeal from said order. And in case he shall overrule both defenses, or in case of a successful appeal from his order sustaining either of said defenses, the said cause shall stand for trial at the next or some subsequent term of this court on the first defenses of the answer, which are unaffected by this agreement, the defendant reserving its right of appeal from such portion of the order as may not have been previously passed upon on appeal until the final determination of the cause on circuit."

At the hearing, which came on before his honor, Judge Witherspoon, at the fall, 1895, term of the court of common pleas for Richland county, in said state, the foregoing agreement of counsel was read.

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Thereupon the following admissions and introduction of records were made: "Mr. Lyles (attorney for defendant): It is admitted that the land described in the complaint in the present action is the same land that was described in the complaints in the records now to be introduced. You agree to that? Mr. Youmans (attorney for plaintiff): Yes. Mr. Lyles: And that the parties are the same, and the subject-matter the same, except so far as the records may show a difference. The defendant introduces judgment roll No. 7,158 of the clerk of the court of common pleas for Richland county, and calls attention to the following papers: Summons and complaint; answer; judgment for the plaintiff, of the land in dispute. The date of the filing of summons and complaint is 15th August, 1893. Also, from the same record, an original summons and complaint, filed 23d September, 1892, and answer filed 24th September, 1892, and an order of the court discontinuing the action, passed on the 11th July, 1893. The complaint was served on the 5th September, 1892. We then introduce record 7,893, from the office of the clerk of the court of common pleas for Richland county, consisting of the judgment of the supreme court, and order of the circuit court making the judgment of the circuit court, and a formal judgment entered up by the defendant against the plaintiff for the costs of the action. We offer, also, the opinion of the supreme court in one of the cases entitled here as found in 42 S. C., 20 S. E., and also the order of the supreme court upon a petition filed for a rehearing, and also a copy of the petition for rehearing. Defendant now closes. Mr. Youmans (attorney for plaintiff): We introduce in reply only such parts as have been left out. The Court: I understand the whole record is in. Mr. Youmans: Yes, sir; the plaintiff now closes."

After argument, Judge Witherspoon passed the following order and judgment: "Under a written agreement between counsel, this cause was submitted to me to consider the seventh and eighth defenses pleaded in defendant's answer. After a full consideration of the evidence submitted under said agreement, and the argument of counsel, I conclude that the matters set out in the seventh defense constitute a good and valid defense to plaintiff's action, and that the plaintiff's complaint should therefore be dismissed. I further conclude that the plaintiff is not estopped by the plea of res adjudicata set up in the eighth defense. It is therefore ordered and adjudged that the plaintiff's complaint herein be dismissed, November 9, 1895." From this judgment the plaintiff now appeals, upon five grounds: (1) That the allegation in said seventh defense, to wit, that on August 15, 1893, the plaintiff duly commenced its second action against the defendant for the recovery of possession of the same real property de-

scribed in the complaint, was disposed of by the decree of the supreme court introduced in evidence by the defendant. (2) That this decree of the supreme court adjudged that what said seventh defense erroneously styles a "second action duly commenced" was without authority, could not be brought, and was not the second action contemplated by section 98 of the Code, for the reason that a statutory condition precedent, essential to the bringing of a second action, to wit, the payment of the costs of the first action, had not been complied with by plaintiff. (3) That the supreme court having so adjudged, and said statutory condition having been complied with prior to the bringing of this action, his honor should, as a matter of law, have overruled said seventh defense. (4) That what said seventh defense erroneously styles a "second action duly commenced" was not terminated, as erroneously alleged in said seventh defense, by a judgment of the circuit court in pursuance of the decree of the supreme court, but had already been dismissed by said decree, as a matter which the court of common pleas had not jurisdiction to entertain. (5) That, the records introduced by the defendant showing that plaintiff had not had the second action to which he is limited by section 98 of the Code, the present action is that second action, and his honor erred, as a matter of law, in holding to the contrary, and, on such holding, dismissing the complaint.

Before we enter upon a consideration of this appeal, we deem it proper to state that we have intentionally omitted any reference to the eighth defense of the answer. It in no wise affects, or is affected by, this appeal. The only matter before us is that of the seventh defense. The second subdivision of section 98 of the Code of Procedure is thus stated: "Sec. 98. (1) \* \* \* (2) The plaintiff in all actions for the recovery of real property on the recovery of the possession thereof is hereby limited to two actions for the same, and no more: provided that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a non-suit or discontinuance therein." It was with reference to this very portion of our Code that Mr. Chief Justice McIver, as the organ of this court, in 42 S. C. beginning at page 495, 20 S. E. 380, declares: "So that, before a second action can be brought for the recovery of real property, two conditions must be complied with: First, the costs of the previous action must 'be first paid'; and, second, the second action must be brought within two years from the termination of the first action either by the 'rendition of the verdict or judgment in the first action' or 'the granting of a non-suit or discontinuance therein.'" The judgment of this court in that case, which

will be found at page 500 of 42 S. C., page 382, 20 S. E., was in these words: "The judgment of this court is that the judgment of the circuit court be reversed, and that the complaint be dismissed." An examination of the case whose judgment has just been cited discloses, from its very terms, that it was confined to the question as to whether the payment of costs set out in section 98, supra, of the Code was, when demanded by the defendant in his answer, a condition precedent to the plaintiff's right to maintain a second action. The question which the appellant now presses upon this court is this: Was the action which was dismissed by this court in its judgment in 42 S. C. 500, 20 S. E. 382, the second action referred to in section 98 of our Code? It seems to us that this question may be settled by the terms and provisions of our Code of Procedure. Section 1 of our Code provides: "Remedies in the courts of justice are divided into: (1) Actions. (2) Special proceedings." Section 2 of our Code defines an action as follows: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of right, the redress or prevention of a wrong, or the punishment of a public offence." It admits of no doubt, in the light of this clear yet simple definition of an action by our Code, when applied to the admissions of counsel incorporated in the case, that the form of proceeding adopted by the plaintiff was that of an action. But go a step further under the light of our Code. How is an action commenced in our courts of justice? Section 120 of the Code provides, "An action is commenced as to each defendant when the summons is served upon him. \* \* \* Section 148 of the Code of Procedure provides, "Civil actions in the courts of record of this state shall be commenced by the service of a summons." Section 149 of the Code sets out carefully the parts of a summons. When we turn to the case, we find that the plaintiff (appellant) on the 15th day of August, 1893, filed his summons and complaint in the second action, and the defendant duly answered the same. So that under the plain provisions of the Code the second proceeding of plaintiff was an action. But the appellant insists that, though technically this was an action, yet, as the supreme court of the state has held that the plaintiff was not entitled to maintain such action, it should not be construed as a second action allowed a plaintiff who seeks to recover real property under the second subdivision of section 98. An inspection of the record in 42 S. C. 489-500, inclusive, 20 S. E. 378, will make it evident that the proceeding is there repeatedly referred to as an action. Again, in case after case we have held that in construing a statutory provision, or other writing, it is proper always to construe it with reference to the provisions of law bear-

ing on the subject-matter treated of in the statute or other writing. Under this view, we must suppose that the general assembly, when, in the year 1879, it adopted the provisions of law relating to the second action for the possession of real property, now set out in section 98 of the Code, used the word "action" as it was defined in the Code which had been adopted in the year 1870. All that the judgment of this court, as set out in 42 S. C., 20 S. R., supra, attempted or did, was to hold that the defense relied upon by the defendant, that plaintiff was not entitled to maintain his action because he had failed to pay the costs, which was required to be done by the section 98, supra, was valid. Suppose the defendant had failed to rely upon the particular defense referred to, and it had happened that the defendant had no other valid defense; would not the plaintiff have been entitled to its judgment? Certainly it would, and this would have been a second action for the recovery of the possession of real property. Is there to be a different rule for the plaintiff as against a defendant? Thus it is manifest that the first and second exceptions are not tenable.

So far as the third exception is concerned, it may be disposed of by saying that there is no provision in the statute for bringing a third action upon the payment of the costs of the first action. In other words, we mean to say that in our judgment the action commenced on the 15th August, 1893, was the second action, and that commenced on the 6th July, 1895, is really a third action, and that no such third action has any warrant in law for its being instituted. So far as the fourth exception is concerned, it seems to us immaterial that the circuit court formally adopted the judgment of this court as its judgment. It need not have formulated any expression concerning our judgment. It was controlling.

The fifth exception is overruled by reason of what we have already held. It is the judgment of this court that the judgment of the circuit court be affirmed.

(47 S. C. 215)

JACKSON v. CHEROKEE MEDICINE CO.  
et al.

(Supreme Court of South Carolina. July 16, 1896.)

ENFORCE STOCKHOLDER'S LIABILITY—UNPAID SUBSCRIPTIONS—ALTERATION OF CORPORATE RECORDS—ESTOPPEL.

A creditor of a corporation, who was also a stockholder, but who, without authority, erased from the corporate records his name and his unpaid subscription, cannot enforce against the other stockholders any liability on their unpaid subscriptions.

Appeal from common pleas circuit court of Greenville county; Benet, Judge.

Action by Nannah Jackson, alias Nannah

Orew, against the Cherokee Medicine Company and others. The case was referred to a master, and all creditors of the defendant company were invited to present their claims. From a judgment disallowing the claim of T. A. Honour, Jr., he appeals. Affirmed.

The following are the material portions of the master's report:

"The plaintiff alleges that the Cherokee Medicine Company is a corporation under the laws of this state, and that said corporation is indebted to her in the sum of \$39.78 on a judgment recovered by her on the 17th day of October, 1894, in the court of N. H. Davis, Esq., a trial justice for Greenville county, and that said corporation owes many other debts, and is insolvent. She further alleges that the defendants named in the complaint have each subscribed to the stock of the corporation, and have paid only 15 per cent. of their subscriptions. All the defendants except the Cherokee Medicine Company answer, denying the allegations of the complaint, and for a second defense set up that their subscriptions for stock in said company were procured by misrepresentations. The master finds that the Cherokee Medicine Company was incorporated under the laws of this state on the 20th of July, 1894, and the defendants subscribed for stock in said corporation as follows, the stock being divided into shares of \$100 each, to wit: Marion E. Leach, two shares; J. O. Fitzgerald, two shares; A. B. Brown, one share; C. E. Wideman, two shares; O. E. Watson, two shares; W. J. Graham, two shares; L. O. Richey, one share; J. T. Blassingame, one share; James H. Payne, one share; James S. Curston, one share; L. A. Kettle, one share; J. M. Geer, one share; Clarence A. Smith, one share; P. R. Cox, one share; W. L. Kellett, one share; and J. F. Richardson, one share. Clarence A. Smith has paid nothing on his subscription. The other defendants have each paid 15 per cent. of their stock, leaving 85 per cent. of the same unpaid. The plaintiff's judgment is attacked on the ground that it does not appear by affidavit that no answer or demurrer was filed with the trial justice before entry of the judgment in her favor in the trial justice's court. It is insisted that this is necessary to the validity of the judgment, inasmuch as the same was rendered by default. It is also insisted that the affidavit made before the trial justice that the plaintiff was apprehensive of losing her debt if the usual time for answer was allowed, and on which the summons was made returnable in less than 20 days, was insufficient, in that the facts therein set forth were not enough upon which to base such action, or raise such apprehension in the mind of the plaintiff. The trial justice entered up this judgment under the usual practice in courts of trial

justices, and the objections raised do not render this judgment void. At most they are only irregularities, such as cannot be attacked except by a direct proceeding to set aside the judgment. The master therefore finds that the judgment of the plaintiff is a valid claim against the defendant the Cherokee Medicine Company; that this judgment was transcribed to the circuit court of this county before the commencement of this action, and execution duly issued thereon; that the sheriff of said county has returned the same wholly unsatisfied, and the same remains wholly unpaid. The order of reference provides that the creditors of the Cherokee Medicine Company may establish their claims against it in this action. Under the call for creditors made by the master pursuant to this order, the plaintiff presented a contract made by her with C. E. Hicks and T. A. Honour, Jr., under the name of the Cherokee Medicine Company, on the 1st day of April, 1894, by which they agreed to employ her for one year at a salary of \$8.33 per month. This contract provided that, in case of failure of the company to perform its part of the same, it should forfeit and pay to the plaintiff the sum of \$25. Peter Crow presents a similar contract, providing for a like forfeiture, the only difference in his contract being that he was to receive \$12 per month. These contracts were assigned by the said Hicks and Honour to said corporation in July, 1894. The corporation assented to this assignment, as did also the plaintiff and the said Peter Crow. These last-named parties entered into the employment of the corporation under these contracts, and continued in its employ till the 24th of September, 1894, when it suspended business, and refused to give them further employment; thereby violating the terms of said contracts, and rendering the corporation liable to the plaintiff for the forfeiture of \$25, and the said Peter Crow for a like sum. The said Peter Crow has also presented and proven a judgment recovered by him in the court of trial justice, on which there is a balance due to him of the sum of \$8.25, with interest on the same from the 15th of October, 1895. This judgment is based on a debt which the said corporation owed him for services rendered. Under the call for creditors above mentioned, C. E. Hicks and T. A. Honour, Jr., have presented claims. They say that they each owned \$1,000, or 10 shares, of paid-up stock in the corporation, and that its property has been exhausted in the payment of its debts, and claim contribution from the other stockholders to equalize their loss. T. A. Honour further claims that the corporation is indebted to him in the sum of \$11 for services rendered, and that the said C. E. Hicks presents a claim for services for the sum of \$18 and the further sum of \$225 on account of a contract entered into by the corpora-

tion with him on the 24th of September, 1894, by which it agreed to employ him from the 1st of October, 1894, to the 1st of January, 1895, at a salary of \$75 per month, and claims that said corporation wrongfully suspended business on the 28th of September, 1894, and refused to carry out its contract with him, and that he held himself in readiness to perform his part of said contract till the 1st of January, 1895. The master finds that said Hicks and Honour did each have certificates from said corporation showing that each had 10 shares, of paid-up stock therein, and they still hold these certificates, and submit them in evidence in this case. The master also finds that these parties performed the services which they claim to have performed, and that the balances which they claim have not been paid. He also finds that the corporation entered into such contract with said Hicks to pay him for services to be rendered from the 1st of October, 1894, to the 1st of January, 1895, at the rate of \$75 per month, and that said corporation suspended business on the 25th of September, 1894, and that said Hicks held himself in readiness to perform his part of that contract. But from the evidence in this case the master is constrained to find that neither Hicks nor Honour can recover anything against the defendants herein as shareholders in said corporation. The subscription list contains the contract of the parties, and is the basis of the claims against them. This subscription list was put in evidence, and it appears on its face that the same has been altered, said alterations consisting of the erasures of the names of said Hicks and Honour therefrom. It appears that said Hicks and Honour each subscribed for 2 shares of stock in this corporation, outside of the 10 shares of paid-up stock issued to each of them. Neither of them has paid anything on these shares. It appears that, some time after the stock had been subscribed and the company organized, Hicks erased his name from this subscription list by scraping off the same, and that Honour, subsequently thereto, erased his name therefrom by drawing a pen through the same. These erasures were made without the knowledge or consent of the corporation, or any of its authorized agents or officers, and without the knowledge or consent of the defendants in this action. These alterations were material, inasmuch as they reduced the assets of the corporation, and increased the pro rata liability of the other shareholders for its debts. As soon as these alterations were discovered by the company, it suspended business and refused to pay said Hicks and Honour the balance due and refused to employ them any longer. In view of this testimony the master holds that the refusal of the corporation to carry out its contract of employment with Hicks was not wrongful, and that, the alterations

in this subscription list being material and prejudicial to the rights of the other shareholders, Hicks and Honour cannot use the same as evidence in their favor. He therefore finds that said Hicks and Honour have no right of action against the defendants in this case, shareholders in said corporation, and can recover nothing against them. These alterations, however, do not affect the rights of the other creditors of the corporation, but this corporation and the defendants, shareholders therein, excepting the defendant J. F. Richardson, are liable to said creditors. \* \* \* The defendant J. F. Richardson subscribed for one share of the stock on condition that the same should be paid by him in printing for the company. He is not liable on this share, and cannot be called on to pay any part of the debts of the company till the other corporators and shareholders are in default and shown to be unable to respond. The master further finds that the corporation has no property, except the formulas purchased by it from Hicks and Honour, and the unpaid portions of the shares of stock in the same, subscribed by the defendants herein, as above reported, and that said corporation is insolvent. The master respectfully recommends that the formulas above mentioned be sold, and the proceeds of sale applied to the debts of said corporation, after first paying the costs of this action; that in the event of failure of proceeds of such sale to pay said debts and costs, then judgment be entered against each of said defendants, except the defendant Richardson, for the respective amounts proved by each of said creditors as aforesaid, and their costs herein, to the extent of the amount unpaid on share or shares subscribed for by each of them; and that plaintiff have leave to issue execution therefor."

T. A. Honour, Jr., one of the creditors and stockholders of the Cherokee Medicine Company, excepted to the above report on the following grounds:

"(1) Because the master erred in finding that said T. A. Honour, Jr., by erasing his name from the subscription list for 2 shares of unpaid stock in the Cherokee Medicine Company, had thereby forfeited all his rights as a stockholder in said company, even for his 10 shares of paid-up stock, and also for the wages the company owes him for services he performed for said company; whereas, the master should have held that T. A. Honour, Jr., by said erasure, did not forfeit any of his rights in said company, even if he had no right to make said erasure, but the said company was still liable to him for the 10 shares of paid-up stock and for the \$11 balance on salary, and, if he had no right to make said erasure, he was still liable to the company for the 2 shares of unpaid stock. (2) Because the master erred in holding that T. A. Honour, Jr., had no right to erase his name from the

subscription list of said company for his 2 shares of unpaid stock; whereas, the master should have held that he had the right to make said erasure, the company having relieved him from said stock, and the master should have further held and recommended that all the stockholders should be required to pay in the balance due on their unpaid stock, and out of this fund, the costs of this action and the debts of the company should be paid, and the remainder should be divided among the stockholders so as to prorate and equalize the loss among all the stockholders."

Adam O. Welborn, for appellant. Shuman & Dean, for respondent Jackson. Jos. A. McCullough, for respondent Richardson. Haynsworth & Parker, for other respondents.

McIVER, O. J. The plaintiff, suing in behalf of herself and all other creditors of the Cherokee Medicine Company who shall in due time come into and seek relief by this action and contribute to the expense thereof, practically for the purpose of recovering judgment against the stockholders in said company to the extent of their unpaid subscriptions to the stock; the said company being alleged to be insolvent, and the execution issued to enforce a judgment recovered by plaintiff against said company having been returned nulla bona. An order was granted referring all the issues both of law and fact to the master for his determination, and also calling in all the creditors of the said company to prove their claims. Under this order the master called in the creditors, took the testimony, and made his report, which is set out in the case. To this report the defendant T. A. Honour, Jr., alone excepted, and the case was heard by his honor, Judge Benet, who rendered judgment, which, so far as the questions raised by this appeal are concerned, simply confirmed the report of the master, making it the judgment of the court. From this judgment the defendant T. A. Honour, Jr., alone appeals, and hence the only question for us to determine is whether there is any error in the judgment, so far as the rights of T. A. Honour, Jr., are concerned; the other matters mentioned in the report of the master and in the judgment of the circuit judge not being before us for consideration. The report of the master, which should be incorporated in the report of this case, so fully and clearly sets forth the facts upon which this controversy depends as to supersede the necessity of any further statement, except that it appears to be a conceded fact that the defendant T. A. Honour, Jr., and one Charles E. Hicks were originally engaged in the business of compounding and selling certain patent medicines, according to formulas owned by them, and that when the defendant company was formed they sold out

to said company, and in consideration thereof they each received a paid-up certificate for 10 shares of the capital stock of said company, and they each subscribed for 2 shares of such stock, to be paid for as the other stockholders who signed the subscription list. The master found, as matter of fact, that, some time after the stock had been subscribed and the company had been organized, Hicks and Honour erased their names from the subscription list, which originally showed that each of those persons had subscribed for two shares, and that "these erasures were made without the knowledge or consent of the corporation, or any of its authorized agents or officers, and without the knowledge or consent of the defendants in this action," no doubt meaning the other defendants in this action. And he found, as matter of law, that these unauthorized alterations in the contract, evidenced by the subscription list, being material, deprived the said Hicks and Honour of the right to rely upon such contract, so altered in a material respect, to hold the other defendants liable for the claims which they had presented, under the call for creditors, against the said company.

The grounds of appeal presented by the defendant T. A. Honour, Jr., seem to be based, in part at least, upon what we consider an entire misconception of what we understand to have been the findings of the master, affirmed by the circuit judge. For this reason it is necessary that a copy of these grounds should be embraced in the report of this case. Appellant, in these grounds, assumes, erroneously as we think, that the master found that Honour had forfeited his right to the 10 paid-up shares by reason of his erasure of his name from the subscription list. What effect, if any, such erasure may have had upon the rights of Honour to his 10 paid-up shares was not a question before the master, and, so far as we can perceive, he made no finding whatever as to that matter. It will be observed that the action was not brought for the purpose of winding up the affairs of the corporation and adjusting the rights and equities of the several stockholders as amongst themselves, but, on the contrary, the action was brought by a creditor of the corporation, into which all the other creditors were invited to come, for the purpose of requiring such of the stockholders as had not paid up their subscriptions to pay the same for the relief of the creditors of the corporation. The defendant Honour, among others, came in under the call for creditors, and undertook to establish his claim against the corporation, and to make such of the stockholders as had not paid up their stock contribute to the payment of his claim. But, as the master held that such claim on the part of Honour was based solely upon the contract evidenced by the subscription list, which Honour had altered, without authority, in a material respect, to

the prejudice of the other stockholders, by erasing his name therefrom, he had thereby destroyed his right to make any such claim against the other stockholders. So that, as it seems to us, this appeal practically raises but two questions: (1) Whether the master erred in finding that Honour had erased his name from the subscription list without authority, and whether the circuit judge erred in confirming such finding; (2) whether this unauthorized alteration in the contract upon which Honour's claim was based deprived him of the right to rely upon such contract. The first is a pure question of fact, and, as we think the testimony was amply sufficient to sustain the finding of the master, there was no error on the part of the circuit judge in affirming such finding. As to the second question we agree entirely with the master and the circuit judge. The proposition that one who bases his claim upon a contract which he has seen fit to alter in a material respect, without authority, cannot sustain such claim, is too well settled to need the citation of any other authority. Here the appellant must necessarily base his claim to recover, as against the other stockholders, upon the contract evidenced by the subscription list, and, if he chose to alter that contract in a material respect by erasing his name therefrom without authority, he has thereby destroyed the foundation of his claim. The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 139)

WHALEY et al. v. DUNCAN et al.  
(Supreme Court of South Carolina. July 15, 1896.)

PRINCIPAL AND AGENT—POWER OF AGENT TO BIND PRINCIPAL—SETTLEMENT.

1. Where principals authorized their agent to make a settlement of an indebtedness due them, which the agent did, they are bound by the settlement made, though not in all respects in accordance with their instructions, the debtor having no knowledge of such instructions.

2. A settlement of an indebtedness, by which the debtor agrees to and does give the creditors title to property on which they previously held only a mortgage, is not without consideration.

Appeal from common pleas circuit court of Barnwell county; Watts, Judge.

Action by Whaley and Rivers against Willis J. Duncan and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

The following is a copy of the letter referred to in the opinion:

"Barnwell, S. C., Dec. 21, 1892. Messrs. Whaley & Rivers, Charleston, S. C.—Gentlemen: W. J. Duncan came up this morning and made the following proposition, to wit: Duncan will give you deeds to all the lands, and will give you \$2,000 for the 19 head of stock, with bill of sale of same, payable in four notes in 1893, you to take up the \$3,900 on the O'Bannon place, and pay all taxes on

the land this year, and give him a receipt in full. All deeds can be made without litigation, except as to the O'Bannon place, which will have to be sold under power of mortgage. This will give you all the security you now have, and will give you \$2,000 for the stock. The O'Bannon place will rent for \$500 next year, the Sontag for \$100, the Easterling for \$200, the Grant for \$50, and the Red Oak land for \$50. Besides, he turns over to you the Bellinger mortgage for \$350, which I consider good. The O'Bannon place is worth, cash, \$5,000. I believe, if times get better, and cotton continues to go up, the O'Bannon place will sell for \$7,000 in four years' time at 8 per cent. I am in favor of this settlement for the following reasons: He will not give any more security. You get all the security in your own name, and there is nothing more to get. It will save the costs of suit, and you will get the rents, and, I believe, eventually get all your money, with interest, by so doing. I tried to get \$2,500 for the stock, but he said he could not give more. The stock would not sell for very much for cash. In our conversation we had Mr. Buckingham, cashier of the Citizens' Savings Bank, and Mr. Calhoun, asst. cashier of the Bank of Barnwell. Duncan seems to want you all to be paid and satisfied, and spoke kindly of you. I believe he himself would pay the taxes, and probably give \$2,250 for the stock; but I was not in a position to try and get more until I submitted this letter to you. I was pushing Duncan, hence his proposition. Look over my values sent you of a previous date, and decide, and let me know. Yours truly, A. T. Woodward."

The trial court entered the following decree:

"State of South Carolina, County of Barnwell. In the Common Pleas. Whaley & Rivers vs. W. J. Duncan et al. The judgment in foreclosure in this case was set aside and vacated, and the cause recommitted to the master to take testimony whether the two mortgages, known as 'Bank of Barnwell Mortgage' and 'Bamberg Mortgage,' hereinbefore adjudged to be senior liens on the mortgaged premises, be liens at all, and if they be liens, what is their rank as to the mortgage of the defendant Wheeler. The master has taken and reported the testimony, and the cause now comes on to be heard by me upon the testimony so taken and the pleadings and proceedings in the cause. I am satisfied, from the testimony, that there was a contract and agreement between Duncan, the debtor, and Whaley & Rivers, the creditors, consummated through A. T. Woodward, Esq., who was employed by the plaintiffs to settle up the business with Duncan, by which plaintiffs, Whaley & Rivers, were to pay off the three mortgages first,—Bank of Barnwell, Bamberg, and Wheeler mortgages,—and receive in lieu thereof conveyances of the equity of redemption in the

lands owned by Duncan and his mother, and certain other securities, and the mortgage on the stock of the said Duncan for \$2,000. These terms were complied with by Duncan, and Whaley & Rivers have received the benefit of it. Whaley & Rivers, instead of satisfying the mortgages as agreed, paid off the two first mortgages, and took assignments of them, and are now attempting to hold them as prior liens upon the premises, to the exclusion of the mortgage to Wheeler, the payment of which was included in a part of the consideration of the agreement whereby they obtained the titles to the lands and securities as aforesaid. I am therefore of opinion, and so hold, that the lien of the Wheeler mortgage is entitled to priority over the liens of the mortgages of the Bank of Barnwell and Bamberg, which are now held by the plaintiffs, Whaley & Rivers. It is therefore adjudged that the Wheeler mortgage is now the senior lien upon the premises described in the complaint, and, as such, together with the costs and disbursements of the said defendant Wheeler, entitled to be first paid from the proceeds of the sale of the mortgaged premises. It is further ordered that the premises described in the complaint be sold by the master on sales day in October next, or some subsequent sales day thereafter, upon the terms provided in the decree heretofore mentioned in this case. The only real parties in interest in this case are the plaintiffs and the defendant Wheeler, the defendant Duncan having heretofore conveyed the title to the land to one Cannon, who holds for the benefit of the plaintiffs. It is therefore immaterial what amounts, if any, are due under the two mortgages now held by the plaintiffs. It is therefore adjudged that the terms of the decree in foreclosure heretofore rendered in this case, except so far as the same may be inconsistent with this decree, and as amended by this decree, stand as the decree and judgment of the court herein."

Plaintiffs excepted, and appeal on the following grounds:

"(1) Because his honor erred in not holding, as a matter of law, that Duncan, in dealing with A. T. Woodward, the attorney at law of Whaley & Rivers, dealt at his peril in all matters not within the scope of his position as legal adviser and counselor, and when he acted as negotiator for the said Whaley & Rivers; and that the said Whaley & Rivers are in no way responsible for, nor are they bound by, any representations, contracts, or agreements made by the said A. T. Woodward to and with the said Duncan, save only such as were authorized by the said Whaley & Rivers, and only within the specific terms of the authority given; and that if the said attorney at law, Woodward, exceeded the specific terms of the authority, and misled the said Duncan, there is nothing in the mere fact of his being an attorney at law of the said Whaley & Rivers which would justify

the said Duncan in concluding that the said Woodward was conferred with the requisite power to make the alleged agreement whereby he was misled,—the power to make such an agreement not being within the scope of his authority as attorney at law. (2) Because his honor erred in not holding that, although Whaley & Rivers did authorize A. T. Woodward, their attorney at law, to make a settlement or compromise with Duncan of his indebtedness to them upon a certain basis, and accepted certain conveyances of the equity of redemption of lands over which they held mortgages, assignment of mortgages, and other securities, as in carrying out such compromise, believing that the same were given by Duncan with like understanding, and although Duncan, on the contrary, gave said deeds and other securities for the purpose not of carrying out the offer of compromise as made by Whaley & Rivers, but the plan of settlement suggested by him to Woodward, and which plan the said Woodward had informed the said Duncan had been accepted by Whaley & Rivers, and did not advise Duncan of the modifications made therein by the said Whaley & Rivers as a condition precedent to its acceptance, nevertheless the said Duncan, having dealt with the said Woodward in a matter—a compromise—without the purview and scope of his authority as attorney at law, at his peril, cannot hold the said Whaley & Rivers responsible for the failure and neglect of their said attorney to obey their instructions to inform him of the modification of the proposition offered by him, upon which, and only upon which, would the same be agreed to. (3) Because his honor erred in holding that A. T. Woodward was employed by Whaley & Rivers to settle up the business with Duncan, said finding being without testimony to support it; and he should have found that said A. T. Woodward was employed by Whaley & Rivers, as their attorney at law, for the purpose of collecting the debt owed them by Duncan by foreclosing the securities sent for said purpose, and that, as a compromise of said indebtedness, they instructed their said attorney at law to settle same upon certain specified terms and conditions, beyond which their said attorney had no authority, and about which the party treating with the attorney treated at his own peril, and cannot hold Whaley & Rivers beyond the strict line of the instructions given by them. (4) Because his honor erred in holding that there was a contract between Whaley & Rivers and Duncan by which Whaley & Rivers were to pay off the three mortgages,—Bank of Barnwell, Bamberg, and Wheeler mortgages,—and receive in lieu thereof conveyances of lands, a mortgage of stock, and other securities. That Duncan has complied, and Whaley & Rivers have received the benefit of it. Whereas, he should have held that Woodward, as attorney at law, had no authority to make such ar-

range without the consent of clients, and there being no consent proved that the same is void; that, inasmuch as Whaley & Rivers have received the benefit, if benefit there be, innocently believing the transfer in furtherance of the compromise offered by them, they are not within the law providing that, where a party has received the benefit of a transaction, he cannot repudiate same when it comes to his turn to perform his part thereof; that Duncan has not complied with the terms of his own proposition, having himself testified that Whaley & Rivers have not received deeds to the Sontag or Sweet Water place, nor the \$2,000 for the stock; and that therefore, having failed in the performance of his part of the contract, he cannot compel full performance on the part of Whaley & Rivers. (5) Because his honor erred in not holding that there was no consideration moving to the said Whaley & Rivers to make the contract alleged to have been made with Duncan, and that therefore said contract is null and void. (6) Because his honor erred in not holding that there is no mutuality or privity of contract between the defendants Wheeler and Duncan, and the plaintiffs Whaley & Rivers, in the alleged agreement between Duncan and Woodward. (7) Because his honor erred in holding that the lien of the Wheeler mortgage was entitled to priority over the liens of the mortgages known as the Bamberg and Bank of Barnwell mortgages. (8) Because his honor erred in holding that the Wheeler mortgage is now the senior lien upon the premises described in the complaint, whereas, he should have held, if it be true that Whaley & Rivers have not carried out their part of the contract, that the said Whaley & Rivers be compelled to perform the same, or that the deeds and other transfers made by Duncan to Whaley & Rivers be declared null and void, and stricken from the record. (9) Because his honor erred in not holding that an attorney at law has no right, as such, to change, in compromise of claim or debt, the securities sent by his client to him for foreclosure."

Bulst & Bulst, and M. Rutledge Rivers, for appellants. John T. Sloan, Jr., Allen J. Green, and Halcott P. Green, for respondents.

McIVER, C. J. Inasmuch as we think it due to all parties that the decree of his honor, Judge Watts, which is set out in the case, together with exceptions thereto, for the purposes of this appeal, should be incorporated in the report of this case, a very brief statement of the transaction out of which this controversy arose will be sufficient here. It appears that W. J. Duncan, being indebted to the plaintiffs, his factors, in a very considerable sum of money, had given to them certain mortgages on his own property, and also mortgages of his mother on her own property, to secure the payment of such indebtedness, and had also transferred

to the plaintiffs, as collateral security, certain mortgages held by said Duncan upon the property of other persons. Among these mortgages were the following: One, held by the Bank of Barnwell on the O'Bannon place, being the first lien on that property; another, held by F. M. Bamberg, being the second lien on that place; another, held by W. G. Wheeler, being the third lien on the O'Bannon place; and the mortgage to the plaintiffs, being the fourth lien on that place. The mortgage debts secured by the three first-named mortgages amounted, without interest, to the sum of \$3,900; while the fourth mortgage, to the plaintiffs, was for the sum of \$10,000. Some time in the latter part of the year 1892, A. T. Woodward, Esq., an attorney at law practicing in Barnwell county, where the mortgaged lands were situate, and where Duncan resided, was employed by the plaintiffs to effect a settlement or arrangement of the indebtedness of Duncan to the plaintiffs. Accordingly, on the 21st of December, 1892, Woodward wrote a letter to the plaintiffs, a copy of which is set out in the case, communicating the terms of the settlement which Duncan proposed to make, to which letter no reply was produced in evidence. Subsequently thereto, a settlement was made between Duncan and Woodward, acting for plaintiffs; and the plaintiffs, having paid to the holders of the mortgage to the Bank of Barnwell and of the mortgage to Bamberg the amounts due on their mortgages, and taken assignments thereof, are now seeking to enforce such mortgages as liens upon the O'Bannon place prior to the lien of the Wheeler mortgage, upon which nothing has been paid. So that the real controversy now is whether the Bank of Barnwell mortgage and the Bamberg mortgage should not be regarded as paid and satisfied under the terms of the arrangement between Duncan and Woodward, acting as the agent of the plaintiffs, thus leaving the Wheeler mortgage the first lien upon the property. This depends upon two inquiries: (1) What were the terms of the arrangement as actually made by Woodward and Duncan, which is a pure question of fact; (2) whether Woodward was legally authorized to make such arrangement, which may be regarded as partly a question of fact, and partly a question of law.

As to the first of these questions, the undisputed testimony, not only of Duncan himself, but that of Buckingham, the cashier of the Citizens' Savings Bank, who was present at the settlement, leaves no doubt of the fact that the arrangement actually made was that the plaintiffs were to pay and satisfy not only the mortgages to the Bank of Barnwell and Bamberg, but also the mortgage to Wheeler. So that there was clearly no error on the part of the circuit judge in so finding.

As to the second question, the testimony leaves in some doubt what were the instructions given by plaintiffs to Woodward. There is no doubt, as it seems to us, that Woodward was not acting merely as attorney at law, in

the ordinary course of such business in collecting a claim, as seems to be contended for in the argument for appellants; for Mr. Rivers, who was the managing partner of the plaintiffs, as he says, testifies, in answer to a question for what purpose he sent a certain mortgage to Woodward: "I sent it to him with the other mortgages and papers in the Duncan matter, to enable him [Woodward] to effect a settlement with Duncan as outlined in his [Woodward's] letter of the 21st of December, 1892." And that letter, which is set out in the case, shows clearly that the idea was to invest Woodward with much more and different authority from that ordinarily incident to the duty and authority of an attorney at law to whom a claim is sent for collection in the ordinary course of such business. Indeed, the testimony of Mr. Rivers, throughout, shows that the intention of the plaintiffs was to invest Woodward with more authority than is ordinarily incident to the office of a mere attorney at law; for his complaint is, not that Woodward had no authority to make any arrangement or settlement with Duncan, "as outlined" in Woodward's letter, above referred to, but that he had exceeded or departed from the instructions given as to the details of such settlement. Now, what such instructions were presents a question of fact, upon which the burden of proof would rest upon the plaintiffs; and we must say that we are not satisfied that such burden has been met. We have before us the letter of Woodward stating the terms which Duncan proposed, one of which was that the plaintiffs should pay up all the three mortgages prior to plaintiffs', thus leaving theirs as the first mortgage on the O'Bannon place; and to this letter no reply is produced, though one was asked for. And yet the testimony of Mr. Rivers indicates that such letter was replied to promptly. On the contrary, plaintiffs, for the purpose of showing that the terms proposed by Duncan, and communicated to them by Woodward's letter, were modified, rely solely upon the parol testimony of Mr. Rivers, which was objected to, doubtless upon the ground that it did not afford the best testimony; for, as the plaintiffs resided and did business in the city of Charleston, and Woodward resided and did business in Barnwell, there is every probability, confirming the impression of Mr. Rivers, that any instructions given by plaintiffs to Woodward, modifying the terms proposed by Duncan, must have been communicated by letter, a copy of which Rivers seems to think the plaintiffs have, and could have introduced, after notice and failure to produce the original. While, therefore, we cannot doubt, in view of the testimony of Mr. Rivers, that the plaintiffs honestly believed that they had given instructions to their agent, Woodward, to modify the terms proposed by Duncan in certain particulars, yet we are bound to say that this has not been established by such evidence as the law requires in such cases.

But, even if we are in error in this, and

even if we assume that Woodward did exceed or depart from the instructions given him by the plaintiffs, as to the details of the settlement which he was unquestionably authorized to make, we still think the plaintiffs, notwithstanding such private instructions, which it is not pretended were made known to Duncan, would still be bound by the act of their agent, if such act was within the scope of his agency. Now, the scope of Woodward's agency was to make some such settlement as that "outlined" in Woodward's letter; and if, in making such settlement, he departed from the instructions of his principals, in regard to some of the details of the settlement, the principals would still be bound, unless it was made to appear that Duncan was informed of such instructions. It seems to us that the case of *Reynolds v. Witte*, 13 S. C. 5, is conclusive upon this point. In that case the plaintiff, through his agent, loaned money to the defendant, and to secure the payment of such loan deposited with the agent certain city bonds as collateral security. The agent fraudulently appropriated these bonds to his own use, and the question was whether the principal was responsible for this fraudulent act of the agent. The court held that a principal is responsible for any fraudulent act of his agent, where such act is done in the course of his agency, and by virtue of his authority as agent. As was said in that case: "What is the proper understanding of the phrase, 'within the scope of the agency'? Does the 'scope' include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed." In that case the following passage is quoted with approval from Story, Ag. § 452, which is quite appropriate to the present case: "It is a general doctrine of law that, although the principal is not ordinarily liable—for he sometimes is—in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceptions, concealments, misrepresentations, negligences, and other malfeasances, misfeasances, and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, 'Respondent superior.' And it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either di-

rectly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." In *Mars v. Mars*, 27 S. C., at page 134, 3 S. E. 61, it was said: "There are two classes of agents, general and special, and their powers, when properly analyzed, are governed by the same general principle to wit: They can do anything within the scope of their agency, so as to bind their principal, notwithstanding there may be some instructions limiting their powers." So that we do not think there was any error on the part of the circuit judge in holding the plaintiffs were bound by the arrangement between Duncan and Woodward, acting as the agent of the plaintiffs, whereby the plaintiffs were bound to pay and satisfy all of the three mortgages on the O'Bannon place; and, as a consequence, that the mortgages of the Bank of Barnwell and Bamberg must be regarded as paid and satisfied, notwithstanding the fact that the plaintiffs took a formal assignment thereof, and this would leave the Wheeler mortgage as the first lien on the O'Bannon place.

We do not think that the fourth exception, wherein error is imputed to the circuit judge in finding that Duncan had complied with the arrangement, can be sustained. As we understand the testimony of both Duncan and Buckingham as to the terms of the arrangement, Duncan was to give titles to the land covered by mortgages given by himself and his mother, and a bill of sale of the stock to secure the balance of \$2,000; and all this was done. There was no agreement that titles to the lands owned by third persons, upon which Duncan held mortgages, should be made to the plaintiffs, nor that the \$2,000 should be paid; and hence the failure of the plaintiffs to receive titles for the Sontag or Sweet Water place and the failure to pay the \$2,000 was no violation of the agreement. The fifth exception cannot be sustained, for there certainly was some consideration—whether sufficient, or not, is not the question—for the agreement; for by that arrangement the plaintiffs received titles for the land instead of mere liens thereon, and would have obtained a first lien upon the O'Bannon place if the plaintiffs had fulfilled their part of the arrangement made by their agent.

Under the view which we have taken, we do not see the pertinency of the point raised by the sixth exception, and hence it cannot be sustained. The effort here is not to enforce the specific performance of the agreement entered into by Duncan with Woodward, acting as agent of the plaintiffs; but the question here presented is as to the effect of one of the terms of the arrangement upon the rights of the holder of the Wheeler mortgage. If, as we have seen, the effect of that arrangement was to satisfy the Bank of Barn-

well mortgage and the Bamberg mortgage, the necessary result would be to leave the Wheeler mortgage the first lien on the O'Bannon place. The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 211)

ROSS v. JONES et al.

(Supreme Court of South Carolina. July 16, 1896.)

PLEADINGS—JOINDER OF SEVERAL CAUSES—WAIVER OF OBJECTIONS—MOTION TO COMPEL ELECTION.

1. Under Code Civ. Proc. § 165, providing that defendant may demur to the complaint when it appears on the face thereof that several causes of action are improperly united; and section 169, providing that, if no such objection is taken by demurrer or by answer, it shall be deemed waived,—it is error, in case defendant fails to raise the objection in the manner specified, to compel plaintiff to elect on which of several causes of action, separately stated, he will rely.

2. Where plaintiff has blended several causes of action in one statement, he may, on defendant's motion, be compelled either to amend his pleading by stating each cause of action separately, or to elect on which of said causes he will go to trial.

Appeal from common pleas circuit court of York county; Witherspoon, Judge.

Action by J. B. Ross against Rep Jones and others, partners as Jones, Blanton & Co. From an order compelling plaintiff to elect on which of several causes of action he would go to trial, plaintiff appeals. Reversed.

W. B. De Loach and W. B. McCaw, for appellant. T. F. McDow, C. E. Spencer, and N. W. Harden, for respondents.

POPE, J. This action was commenced on the 28th day of February, 1896. The complaint sets out three causes of action separately stated. The defendants made answers to the complaint. Defendants did not demur, nor did they object, in their answer, that several causes of action had been improperly united in a single complaint. A trial of the issues made by pleadings at the November term, 1895, resulted in a mistrial. After a mistrial was had, to wit, February 19, 1896, a motion from the defendants was served upon the plaintiff, to wit: "That the plaintiff is required to elect one of the three causes of action set up in the complaint for a separate trial, and to notify the defendant which will be for trial first and the order of trial of the other two, which also must be tried separately. If he fails to do so in the meantime, the defendants will, on Monday, the 2d day of March, 1896, at 1 o'clock in the afternoon, or as soon thereafter as counsel can be heard, apply to his honor, the presiding judge, at his chambers, at Lancaster courthouse, for an order requiring such election and notice; and, further, that if for any reason, the same shall be denied, the same

shall be renewed on the first day of the term ensuing, and again, if then denied, at the call of this case for trial." On the 14th day of March, 1896, his honor, Judge Witherspoon, granted the following order: "Upon hearing the motion of the defendants, etc., it is ordered that the plaintiff do within five days from the date of this order make the election as required by said motion, and notify the defendants, accordingly. This order is without prejudice to any right the plaintiff may have to call up for separate trial either of the two remaining causes of action, the same as if this order had not been made, provided notice of his election be served at least two weeks before the trial of the first of said two remaining causes that the plaintiff may name."

Thereafter an appeal was taken from the order of Judge Witherspoon on five grounds, namely: "(1) Because the defendants, having neither demurred to the complaint on the ground that several causes of action have been improperly united, as is required by subdivision 5 of section 165 of the Code of Procedure of South Carolina, nor having raised such objection by their answer, served and filed as required by section 169 of the Code of Procedure, thereby waived all objection to the complaint; and his honor erred in requiring the plaintiff to elect one of the three causes of action stated in the complaint for separate trial within five days after the 14th of March, 1896, the date of his order, and to notify the defendants accordingly. (2) For that his honor erred in requiring the plaintiff to elect at all one of the causes of action stated in the complaint for separate trial. (3) For that his honor erred in requiring the plaintiff to elect, in advance of the convening of the court at which the cause was docketed for trial, which one of the three causes of action in the complaint would be the first tried. (4) For that his honor erred in requiring the plaintiff to give two weeks' notice to the defendants before the trial of the first of the two remaining causes of action that the plaintiff might name, after being required to elect, as the condition upon which plaintiff might call for separate trial either of said two remaining causes of action stated in the complaint. (5) For that his honor erred in not refusing the motion of defendants, and in not adjudging that the cause must proceed and be heard upon the pleadings as settled by the failure of the defendants to either demur or object by answer that three causes of action had been improperly united in a single complaint."

It will be seen that the five grounds of appeal are intended to bring out the view supposed to prevent the order of Judge Witherspoon. The appellant emphasizes the view that the defendants, having failed to demur to his complaint on the ground that the complaint contained several causes of action which were improperly united therein, as required by subdivision 5 of section 165 of our

Code of Procedure,<sup>1</sup> and having failed to set up any such objection in their answer, as required by section 169 of said Code,<sup>2</sup> thereby waived all objection to the complaint. This view seems sound, if we will remember the questions of jurisdiction and also the oral demurrer that the complaint fails to state facts sufficient to sustain a cause of action are reversed. The appellant then brings to view that, under section 188 of the Code of Procedure, he is allowed to unite as many causes of action, both legal and equitable, in his complaint, as he chooses, provided, always, that he complies with the conditions specified in said cited section. He then insists that, these things being so, there is no law that sustains the judge's action. The appellant, in his argument, sets out a history of the decisions of our courts of last resort, beginning with *Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639; *Reed v. Railroad Co.*, 37 S. C. 42, 16 S. E. 289; *Ruff v. Railroad Co.*, 42 S. C. 119, 20 S. E. 27; *Thomas v. Railroad Co.*, 38 S. C. 485, 17 S. E. 226,—to show that as far as our court has ever gone is to require, if motion is made for such purpose in those cases, when a plaintiff has inserted two causes of action, which should have been stated separately, but have not been so stated, the plaintiff either to amend his pleading by stating each cause of action separately, or to elect which of said causes of action he will go to trial upon. He claims that in the case of *Thomas v. Railroad Co.*, *supra*, alone, is there any expression that can give color to any other view, and that, when the last cause is examined closely, it will be found that, at the best for respondents, such expression was an obiter dictum, and therefore was not a controlling authority. We have examined these cases, and agree that the appellant has taken a proper view of what they decide. The justice who wrote the opinion of the court in *Thomas v. Railroad Co.*, *supra*, now writes this opinion, and therefore feels at perfect liberty to refer to that decision with the utmost frankness. There was no such question as that presented in the case at bar in *Thomas v. Railroad Co.*, *supra*, for there two causes of action were not separately stated, but, in fact, were embodied in the same statement. No motion was made, either to have the plaintiff state them separately, or to elect which one he would try. Hence it is apparent nothing that was said in that opinion could legitimately determine the present question. We think, therefore, the circuit judge was in error here. So, too, we regard the points raised in the second, third, fourth, and fifth grounds of appeal well ta-

ken. This results, necessarily, from the views we have expressed in considering the first ground of appeal.

It is the judgment of this court that the order of the circuit court be reversed in every particular.

(47 S. C. 190)

BOMAR et al. v. MEANS et al.

(Supreme Court of South Carolina. July 16, 1896.)

FRAUDULENT CONVEYANCES—PLEADING—AMENDMENT—PRACTICE—APPEAL—OBJECTIONS—WAIVER.

1. In an action by judgment creditors to subject the interest of their debtor in property which he had mortgaged and conveyed to others, the original complaint alleged, *inter alia*, that executions on said judgments were levied on certain personal property found on the plantation of said debtor, and that certain defendants brought suit against the sheriff to recover said property, claiming the same through a bill of sale; that the judgment creditors defended that suit on the ground that the said bill of sale was invalid; that from a judgment for the sheriff plaintiffs in that suit appealed, and that the appeal was still pending; and that, even if said judgment was sustained, the property recovered was not sufficient to satisfy the judgments,—and on information and belief alleged that one to whom certain land was mortgaged by the debtor had agreed to accept in satisfaction of his debt only a part thereof. Held that, under Code, § 194, authorizing the court to allow amendments, and section 193, giving discretion to permit acts to be done after the time limited by the Code, etc., it was not error, after an order overruling a demurrer to said complaint had been affirmed on appeal, to permit an amended and supplemental complaint to be filed, which avoided further reference to the appeal in the suit against the sheriff as pending (as it had been decided adversely to plaintiffs in that suit), and alleging the result of such action after said appeal had been dismissed, and omitting the statement that said mortgagee had agreed to reduce the amount of his debt, and alleging that "by far the greater part of the debts alleged to have been due from" said debtor to one to whom he mortgaged other property "was and is pretensive and fraudulent," rather than, as was stated in the original complaint, "that the debts alleged to have been due were and are wholly pretensive and fraudulent."

2. The amended and supplemental complaint was consistent with and in aid of the case set out in the original complaint.

3. Defendants cannot charge plaintiffs with inexcusable delay in moving to amend the complaint where defendants had in part occasioned such delay.

4. Where the agreed statement of facts shows that a copy of the supplemental and amended complaint was served with the notice of motion, it cannot be objected, on appeal, that the motion failed to set forth specifically the proposed amendments, especially where the objection was not raised below.

5. An objection that equitable relief was granted while the legal remedy was not sought was not available to defendants, where it was not raised below, and both the original and supplemental complaints were addressed to the equitable powers of the court.

6. An objection that the facts stated in the amended and supplemental complaint were known at the date of the first complaint was not tenable, as plaintiffs could not have known of the result of the appeal in the action against said sheriff until it was decided, nor of the other facts alleged in their amended complaint.

<sup>1</sup> Code Civ. Proc. § 185, provides that "defendant may demur to the complaint when it shall appear upon the face thereof: \* \* \* (5) that several causes of action have been improperly united."

<sup>2</sup> Code Civ. Proc. § 169, provides that, if no such objections be taken either by demurrer or answer, the defendant shall be deemed to have waived them.

Appeal from common pleas circuit court of Spartanburg county; Benet, Judge.

Action by Elisha Bomar and others against H. F. Means and others to set aside certain conveyances as fraudulent and for other relief. From an order allowing plaintiffs to file an amended and supplemental complaint, defendants appeal. Affirmed.

The original complaint was as follows:

"The plaintiffs above named, in behalf of themselves and of all other creditors of the defendant A. G. Means, Sr., who shall in due time come into this action and seek relief thereby, and contribute to the expenses thereof, respectfully show to the court:

"(1) That on November 12, 1890, the plaintiff Elisha Bomar recovered a judgment in this court against the defendant Albert G. Means, Sr., for the sum of \$852.31, which was on said day duly signed, docketed, and enrolled in the office of the clerk of this court, and execution thereupon duly issued to and lodged with the sheriff of this county; that no part thereof has been paid or satisfied; that an appeal was taken from said judgment by said defendant, which is now pending in the supreme court; that on April 12, 1888, the plaintiff William T. Russell, the plaintiffs John A. Lee and J. Boyce Lee, who were then and are still partners, doing business under the name of J. A. Lee & Son, and Andrew Holtzhouser, each recovered a judgment in this court against the defendant Albert G. Means, Sr., viz. William T. Russell for the sum of \$388.49, J. A. Lee & Son for the sum of \$274.28, and Andrew Holtzhouser for the sum of \$758.45; that each of said judgments was on said day duly signed and docketed and enrolled in the office of the clerk of this court, and executions were thereupon duly issued to and lodged with the sheriff of this county; that no part of either of them has been paid or satisfied; that the executions in favor of J. A. Lee & Son and Andrew Holtzhouser were long since returned by said sheriff wholly unsatisfied, and that the defendant Albert G. Means, Sr., is utterly insolvent; that each of the judgments above mentioned was a valid and subsisting lien on the property herein described; that a transcript of each of said judgments has been duly filed and docketed in the office of the clerk of court of common pleas for the county of Union, where the defendant Albert G. Means, Sr., owns a valuable tract of land, on which said judgments are liens; that executions were issued to the sheriff of said county on the three last-named judgments, and were levied by him on certain personal property found on the plantation of the judgment debtor, Albert G. Means, Sr., that thereupon the defendants, except the defendants H. F. and Albert G. Means, Sr., brought suit in the court of common pleas for said county against said sheriff to recover said property, claiming to be the owners thereof under the bill of sale

hereinafter mentioned; that the judgment creditors defended said action through the sheriff, and the issue raised by them in that action and tried was that said bill of sale was in violation of the assignment laws of this state, and was made with intent to hinder, delay, and defraud creditors, and was therefore void; that said action was tried, and resulted in a verdict and judgment for the sheriff, from which the plaintiffs in that suit appealed to the supreme court, and the appeal is still pending; even if said judgment is sustained, the property therein recovered will not realize enough to satisfy said judgments and executions.

"(2) That the said Andrew Holtzhouser died on the 5th day of April, 1890, intestate, and the plaintiff Jane Holtzhouser was, by an order of the probate judge of this county, duly appointed administratrix of his estate on the 3d May, 1890, and has entered upon the duties of said office, after having duly qualified.

"(3) That on the 4th March, 1884, the defendant Albert G. Means, Sr., executed and delivered to his brother, the defendant H. F. Means, a mortgage of all that lot of land in the city of Spartanburg, county and state aforesaid, containing two and three-fourths acres, more or less, and bounded by Church street, the Central Methodist Church lot, and lots formerly owned by Mrs. M. E. Nowell and Mrs. M. E. Newell, of which said lot the said Albert G. Means, Sr., was then the owner; that said mortgage, which purports to have been given to secure the payment of \$6,892.50, was recorded in the office of the R. M. C. for said county, in Book No. 10, at page 392, on the 30th January, 1888, to the record of which plaintiffs crave reference as often as may be necessary; that plaintiffs are informed and believe that large payments have been made on the debt secured by said mortgage, but exactly how much or when they do not know; and they are also informed and believe that there is an agreement between the defendants whereby the defendant H. F. Means is to accept in full satisfaction of his debt only a part thereof.

"(4) That plaintiffs are informed and believe that on 30th December, 1887, the defendant Albert G. Means, Sr., being then insolvent, and being then indebted to the plaintiffs on their several demands, on which the judgments hereinbefore mentioned were recovered, with intent to evade the provisions of the assignment laws of this state, and with intent to hinder, delay, and defraud his creditors, made, executed, and delivered to one Robert Beaty, Sr., who was his father-in-law, a mortgage to secure an alleged debt of \$6,000 on the lot above described, and also a bill of sale of all his personal property, except about so much as was exempt from execution, and also a confession of judgment in the court of common pleas for the county of Union, state aforesaid, for the sum of \$8,254.61, which said instruments, together

with the liens previously given, far more than covered the value of all the property then owned by the defendant Albert G. Means, Sr., that each of the aforesaid instruments was immediately assigned by the said Robert Beaty, Sr., to the defendants Albert G. Means, Jr., Sarah J. Archer, Nannie B. Means, Jessie M. Thomson, Maggie H. Chapman, Voluna L. Means, and Bessie A. Heinlsh, who are the children of the defendant Albert G. Means, Sr., and the grandchildren of the said Robert Beaty, Sr.; that the mortgage given by the defendant Albert G. Means, Sr., to the said Robert Beaty, Sr., and by him assigned as aforesaid, was on the 31st December, 1887, recorded in the office of the R. M. C. for this county, in Book No. 10, p. 317, and is claimed by the defendants to whom it was assigned to have been a lien on the property hereinbefore described; that the assignment thereof was also recorded in said office in Book No. 9, p. 701, on January 3, 1888, and these records plaintiffs desire to be referred to as often as necessary; that the debts alleged to have been due from the defendant A. G. Means, Sr., to the said Robert Beaty, Sr., and for which the said mortgage, bill of sale, and confession of judgment are alleged to have been given, were and are wholly pretensive and fraudulent; that the assignment of the said instruments to the defendants above named was without any consideration from them, and the said instruments were made, taken, and assigned for the purpose and with the intent to assist the defendant Albert G. Means, Sr., to cover up and conceal his property, and put it beyond the reach of his creditors, with the intent to hinder, delay, and defraud them, and to allow him, the said Albert G. Means, Sr., to retain and enjoy the use of it, as he has done, just as he did before the said instruments were made; that the said Robert Beaty, Sr., never had any actual or bona fide interest in said instruments or the property covered by them.

"(5) That the defendant H. F. Means advertised and sold the lot hereinbefore described on sales day in November last, under and by virtue of the power contained in the mortgage to him, on terms of one-third cash, and the balance in one and two years, with interest on the credit portion from day of sale; that it brought \$10,800,—far more than enough to pay the debt due to the defendant H. F. Means; and that the defendants, except the defendant Albert G. Means, Sr., claim the surplus proceeds of said sale after satisfying the debt due to H. F. Means on the mortgage executed by Albert G. Means, Sr., to Robert Beaty, Sr., and assigned to them.

"Wherefore the plaintiffs pray for an order enjoining and restraining the defendant H. F. Means from paying the surplus proceeds of sale, after satisfying the debt due to himself, to any of the defendants, and that he be required to pay the same into this

court to be applied to the valid liens upon said property, according to their priority; that the mortgage, bill of sale, and confession of judgment given to Robert Beaty, Sr., by Albert G. Means, Sr., assigned to the defendants named herein, be adjudged fraudulent and void, and set aside; and for such other and further relief as the facts and circumstances may require, and as to the court may seem just and equitable."

The amended and supplemental complaint, as allowed by Judge Benet's order, at July term, 1895, is as follows:

"The plaintiffs above named, by their amended and supplemental complaint, in behalf of themselves and all other creditors of the defendant Albert G. Means, Sr., who shall in due time come into this action, and seek relief thereby, and contribute to the expense thereof, allege:

"(1) That on November 12, 1890, the plaintiff Ellisha Bomar recovered judgment in this court against the defendant Albert G. Means, Sr., for the sum of \$793.46, and for \$58.85 costs, which was on said date duly signed, docketed, and enrolled in the office of the clerk of this court, and execution was thereupon duly issued to the sheriff of this county, but no part thereof has been paid or satisfied. That on April 12, 1888, the plaintiff Wm. T. Russell, the plaintiffs John A. Lee and Boyce Lee,—who were then, and are still, partners, doing business under the name of J. A. Lee & Son,—and Andrew Holtzhouser, recovered several judgments in this court against the defendant Albert G. Means, Sr. That is to say, the said W. T. Russell for the sum of \$336.22 and for \$52.27 costs; the said J. A. Lee & Sons for the sum of \$253.88 and for \$20.40 costs; and said Andrew Holtzhouser for the sum of \$785.82 and \$20.15 costs. That each of said judgments was on said date duly signed, docketed, and enrolled in office of the clerk of this court, and executions thereupon were duly issued to and lodged with the sheriff of this county. That the same have long since been returned to the office of the clerk of the court indorsed 'Nulla bona' by said sheriff. That they remain unpaid, except as hereinafter mentioned.

"(2) That a transcript of each of said judgments has been duly filed and docketed in the office of the clerk of the court of common pleas for the county of Union, where the debtor, Albert G. Means, Sr., owns a large and valuable tract of land, on which said judgments are liens. That executions were issued to and lodged with the sheriff of the said county of Union on last-mentioned judgments, and were levied by him upon certain personal property found on the plantation of said judgment debtor. That thereupon the defendants, except the defendants H. F. and Albert G. Means, Sr., brought suit in the court of common pleas for said county against said sheriff to recover said property, claiming to be the owners thereof under the bill of sale hereinafter mentioned. That said judgment

creditors defended said action through the sheriff, and that the issues raised and tried in that action were that said bill of sale was in violation of the assignment laws of this state, and was made with intent to hinder, delay, and defraud the creditors of the said Albert G. Means, Sr., and was, therefore, void. That said action was tried, and resulted in a verdict and judgment in favor of said sheriff for the recovery of said property, or the value thereof if delivery thereof could not be made, and for the costs of said action. That execution was thereupon duly issued to and lodged with the coroner of said county. That said coroner has returned said execution to the office of the clerk of said court wholly unsatisfied, except as to a part of the property, which he is therein commanded to deliver to said sheriff. That the part of the property so delivered to said sheriff by said coroner was sold by said sheriff under and by virtue of the executions aforesaid levied thereon, and, after paying the expenses of setting off the homestead of the defendant Albert G. Means, Sr., the proceeds were applied to payment of said executions, and after such applications there still remains due on said executions a large amount.

"(3) That the said Andrew Holtzhouser died on the 5th day of April, 1890; intestate, and the plaintiff Jane Holtzhouser was, by order of the probate court for this county, duly appointed administratrix of his estate on the 3d day of May, 1890, and entered upon the duties of said office after having duly qualified as such administratrix.

"(4) That on or about the 4th of March, 1894, the defendant Albert G. Means, Sr., executed and delivered to his brother, the defendant H. F. Means, a mortgage of all that lot of land in the city of Spartanburg, county and state aforesaid, containing two and three-fourths (2 $\frac{3}{4}$ ) acres, more or less, and bounded by Church street, the Central Methodist Church, and lots formerly owned by Mrs. M. E. Nowell, of which said lot the said Albert G. Means, Sr., was the owner. That said mortgage purports to have been given to secure the payment of six thousand eight hundred and ninety-two dollars and fifty cents, and was recorded in the office of the register of mesne conveyances for this county in Mortgage Book No. 10, at page 392, on the 30th day of January, 1888, and to the record of which plaintiffs pray reference as may be necessary. That plaintiffs do not know what payments, if any, had been made upon said mortgage prior to sale of said lot under the power given in said mortgage.

"(5) That plaintiffs are informed and believe that on or about the 30th of December, 1887, the defendant Albert G. Means, Sr., who was at that time insolvent, and indebted to each of these plaintiffs on the several demands upon which the judgments hereinbefore mentioned were recovered, and also to various other persons, with intent to evade the law of the state prohibiting insolvent

debtors from making preferences in any assignment of their property for the benefit of their creditors, or from transferring the whole or greater part thereof to one or more creditors to the exclusion of all others, with intent to give a preference, and with the further intent to hinder, delay, and defraud these plaintiffs, and his other creditors, made, executed, and delivered to one of his creditors, to wit, Robert Beaty, Sr., who was his father-in-law, a mortgage purporting to secure an alleged debt of six thousand dollars, and covering the lot hereinbefore described, and also a bill of sale of all his personal property (except only about so much thereof as was exempt from levy and sale), and also a confession of judgment, in the court of common pleas for the county of Union, state aforesaid, for the sum of (\$8,254.61) eight thousand two hundred and fifty-four and  $\frac{1}{100}$  dollars, which said instruments, together with the liens which the said A. G. Means, Sr., had already given upon his property, far more than covered the value of the property then owned by the said A. G. Means, Sr., and they were tantamount to, and intended as, a transfer or assignment by the said Albert G. Means, Sr., to the said Robert Beaty, Sr., of the whole or the greater part of the property of the said Albert G. Means, Sr., with intent to prefer him, the said Robert Beaty, Sr., over all other creditors, and with the intent to hinder, delay, and defraud his other creditors. That the said Albert G. Means, well knowing that he could not accomplish his purpose by what is known as a technical deed of assignment, deliberately devised the scheme of effecting his said purpose by means of the instruments aforesaid. That each of said instruments were immediately assigned by the said Robert Beaty, Sr., to the defendants Albert G. Means, Jr., Sarah J. Archer, Nannie B. Means, Jessie M. Thomson, Maggie H. Chapman, Voluna L. Means, and Bessie A. Heintsh, who are the children of the defendant Albert G. Means, Sr., and the grandchildren of the said Robert Beaty, Sr. That the mortgage given by the said Albert G. Means, Sr., to the said Robert Beaty, Sr., and assigned to his grandchildren as aforesaid, was on December 31, 1887, recorded in the office of the register of mesne conveyances for this county, in Mortgage Book No. 10, at page 317, and is claimed by the defendants to whom it was assigned to have been a lien upon the property hereinbefore described. That the assignment of said mortgage was recorded in said office in mortgage Book No. 9, at page 701, on January 8, 1888, and to these records plaintiffs pray reference as often as necessary.

"(6) That by far the greater part of the debts alleged to have been due from the defendant Albert G. Means, Sr., to the said Robert Beaty, Sr., and for which the said mortgage, bill of sale, and confession of judgment are alleged to have been given was and is pretensive and fraudulent. That the assignment of said instruments to the defendants

above named was without any consideration from them, and the said instruments were made, taken and assigned for the purpose and with the intent to give to the said Robert Beaty, Sr., an unlawful preference over the plaintiffs and the other creditors of the said Albert G. Means, Sr., and to cover and conceal the property of the said defendant, and put it beyond the reach of his creditors.

"(7) That on sale day in November, 1891, the defendant H. F. Means advertised and sold the lot hereinbefore described under and by virtue of the power contained in his mortgage. That it brought ten thousand and eight hundred dollars, far more than enough to pay his mortgage in full. That the defendants, except Albert G. Means, Sr., and H. F. Means, claim the surplus proceeds of said sale after paying the debt due to the defendant H. F. Means, on the mortgage given to Robert Beaty, Sr., by Albert G. Means, Sr., and assigned to them as aforesaid.

"Wherefore the plaintiffs pray that the defendant H. F. Means be enjoined from paying the surplus proceeds of said sale to the defendants, or to any other person, and that he be required to pay the same into this court, to be applied to the valid liens upon said property according to their priority; that the mortgage, bill of sale, and confession of judgment given by Albert G. Means, Sr., to Robert Beaty, Sr., and assigned by him to the defendants aforesaid, be adjudged fraudulent and void, and set aside; and for such other and further relief as to the court shall seem just and equitable."

The defendants, save H. F. Means, gave due notice of appeal from said order, and appealed to the supreme court to overrule the same, allowing the amended and supplemental complaint, upon the following grounds:

"(1) Because the same relief is sought in the 'amended and supplemental complaint' as was sought in the first complaint, no facts having occurred since the first complaint, which vary plaintiffs' relief. (2) Because the 'amended and supplemental' complaint is not consistent with, and in aid of, the case as set out in the first complaint. (3) Because the motion herein was not made in good time, nor upon facts warranting the same. (4) Because the motion herein omits to set forth specifically the proposed amendments. (5) Because equity is allowed to be herein invoked, while the plaintiffs' legal remedy is not only unexhausted, but never commenced. (6) Because the proposed amendments substantially change the claims and case of the first complaint. (7) Because the facts stated were known to plaintiffs at the date of the first complaint, and tend to cure a suit originally defective."

W. W. Thomson, for appellants. Carlisle & Hydrick, for respondents.

POPE, J. This cause was before this court on a demurrer to the complaint, which, it

seems, was filed in 1891, and the judgment of the circuit court dismissing such demurrer was affirmed. See *Bomar v. Means*, 37 S. C. 520, 16 S. E. 537. At the July term, 1895, of the court of common pleas for Spartanburg county, the plaintiffs moved, upon due notice, for an order allowing them to amend and supplement their complaint herein, as shown by their proposed amended and supplemental complaint, copies of which were served with the notice of the motion, and the motion came on to be tried before his honor, Judge Benet, who in a short order allowed the same, with leave, however, to the defendants to answer the same 25 days after the date of his order, which was dated August 16, 1895. From this order of Judge Benet all the defendants except H. F. Means now appeal to this court. The reports will be set out in this case, as well as the original complaint,—a copy of which will be found in 37 S. C. 521, 16 S. E. 537,—and also the amended and supplemental complaint, as well as the grounds of appeal from Judge Benet's order.

An inspection of the two instruments will show that the plaintiffs had referred in their original complaint to an action brought by the defendants except H. F. and A. G. Means, Sr., from which an appeal was pending in the supreme court of this state. The proposed supplemental complaint avoids any further reference to that appeal as pending, as it had been decided adversely to the defendants here, but sets out what was the result of such action after the appeal had been dismissed. By way of amendment, it states the fact more logically, and avoids any contest with H. F. Means by omitting the statement that he had agreed to reduce the amount of his mortgaged debt; and also it amends the statement as to the consideration between A. G. Means, Sr., and Robert Beaty by alleging "that by far the greater part of the debts alleged to have been due from the defendant Albert G. Means, Sr., to the said Robert Beaty \* \* \* was and is pretensive and fraudulent," rather than, as is stated in the original complaint, "that the debts alleged to have been due \* \* \* were and are wholly pretensive and fraudulent," etc. It seems to us that section 195 of our Code of Procedure was designed to give to the circuit courts just such power as was exercised by Judge Benet in allowing this supplementary complaint, and also that section 194 fully empowered him to grant the amendments. The first exception must be overruled. It may be that a very different measure of relief may be accorded the plaintiffs under their supplemental complaint. While the cause of action has not been changed thereby, still the relief flowing out of the cause of action may be increased by having a new point given to it. If this be so, then the objection embodied in the first exception must fall.

As to the second exception, we must frankly

ly say that the amended and supplemental complaint is entirely consistent with and in aid of the case as is set out in the first complaint. This is readily seen by a comparison of the original with the new complaint. The purpose of the first complaint was declared in our former decision (37 S. C. 520, 16 S. E. 537), and therefore need not be repeated here.

As to the third exception, we must overrule it; for in the case itself no ground appears to give color to the charge of inexcusable delay on the part of the plaintiffs. Without for a moment attaching any blame to the defendants for contending in court for their rights as they conceive them to be, still that contention on their part is a part of their responsibility, and not justly chargeable to the plaintiffs. In order that our meaning may be made clear on this point, we will state that the records of our courts show that the delay is not wholly to plaintiffs' charge, but also rests upon the defendants, in part.

So, as to the fourth, fifth, sixth, and seventh exceptions, they must be overruled, because, as to the fourth, we find, in the agreed statement of facts submitted with this appeal, that a copy of the supplemental and amended complaint was served along with the notice of motion, and no such question seems to have been raised before the circuit judge; because, as to the fifth, we do not find any reference in the case for appeal to any such question being raised before the circuit judge, and, besides, the action, as is shown by each complaint, both original and new, is on the equity side of the court; because, as to the sixth, the same cause of action is set up in each of the complaints; because, as to the seventh, it does not appear in the case for appeal that these facts set up by plaintiffs in their new complaint were known to them when the original complaint was filed. Such could not have been the case as to the result of appeal to this court, for it was not then decided, and such is true of other facts set out in the supplemental and amended complaint.

It is the judgment of this court that the order appealed from be affirmed, and the cause be remanded to the circuit court for such further proceedings as are necessary.

(47 S. C. 525)

#### HUNTER v. RUFF.

#### BUCHANAN et al. v. SAME.

(Supreme Court of South Carolina. July 16, 1896.)

#### ATTACHMENT—NONRESIDENT DEFENDANT—PARTIES—JUDGMENT—VALIDITY—RIGHTS OF THIRD PERSONS.

1. The finding and adjudication of a circuit judge that a purchaser at an execution sale was not a party to subsequent proceedings before him to set aside the sale become the law of the case, until appealed from, and cannot be reviewed or reversed by any succeeding circuit judge.

2. In attachment of real property of a non-resident defendant, where a copy of the summons was not mailed to him at his correct place of residence, but to the place which the judgment creditor, after inquiry, was informed was his place of residence, such fact did not render the judgment absolutely void, but, at most, only rendered the judgment voidable by subsequent proceedings instituted for that purpose.

3. Under Code Proc. § 156, par. 3, which provides that "defendant against whom publication is ordered" may, upon good cause shown, be allowed to defend after the judgment, and if the defense be successful, and the judgment has been enforced, such restitution may be compelled as the court may direct, but the title to property sold under such judgment to a purchaser in good faith shall not be affected, such defendant cannot divest rights of innocent purchasers, which had vested before any assault had been made on the judgment, which on its face was entirely regular, though defendant was not duly and legally served by publication.

Appeal from common pleas circuit court of Fairfield county; Aldrich, Judge.

Actions by Cyrus W. Hunter and by O. W. Buchanan and H. A. Gaillard, respectively, against A. Fletcher Ruff, to recover lands. From decrees in favor of plaintiffs in the two cases, defendant appeals. Both reversed.

The order for judgment in the case of Desportes against Hunter, rendered by his honor, Judge J. B. Kershaw (out of which the actions at bar grew), the decree of his honor, Judge James Aldrich, and the grounds of appeal, follow:

#### Order of Judge Kershaw.

"The summons and complaint in this action having been filed in the office of the clerk of this court on the 27th day of December, 1887; and the defendant, Cyrus William Hunter, being not a resident of this state, and having property within this state; service of the summons upon said defendant by publication having been ordered, and, pursuant to said order, the summons having been duly published in the Winnsboro News and Herald once in each week for six successive weeks, commencing on the 29th day of December, 1887; and a copy of the summons having been duly mailed to said defendant, Cyrus William Hunter, addressed to him at Leon, state of Nicaragua, Central America, his place of residence; and the time to answer having expired, and no answer or demurrer having been served on the plaintiff's attorneys, and the defendant having failed to appear; and an attachment having been issued against and upon property belonging to the defendant, Cyrus William Hunter, and proof thereof made by the affidavit of Henry N. Obear; and the defendant being not a resident of this state, the plaintiff having now in court made proof of the demand mentioned in the complaint, and the plaintiff having now in court been examined on oath respecting any payments that have been made to the plaintiff, or to any one to his use, on account of such demand, whereby it appears that no such payments have been

made; and the plaintiff having produced an undertaking, with two sureties, approved by the clerk of this court, that he will make restitution if required, according to the requirement of subdivision 2 of section 267 of the Code of Procedure: Now, on filing said affidavit of Henry N. Obear and said undertaking, and on motion of Messrs. Obear & Rion, plaintiff's attorneys, it is ordered, that the plaintiff, Richard S. Desportes, recover against the defendant, Cyrus William Hunter, the sum of \$182.83, together with his costs, to be adjusted by the clerk of this court."

Decree of Judge Aldrich.

"This is an action for the recovery of the possession of real property lying in the county of Fairfield, and damages for the withholding of the same. Trial by jury being waived, the action was heard by the court. The evidence submitted consists of records of this court, and an agreed statement of facts. While the parties practically agree upon the facts, they differ widely in their views of the law, and these legal issues are submitted for the judgment of the court.

"On June 20, 1888, a judgment by default was entered up in the court in favor of one Richard S. Desportes and against C. W. Hunter, plaintiff herein, in the sum of \$232.35. The subject of said action was a money demand, viz. a sealed note purporting to have been given by said Hunter to said Desportes, at Ridgeway, S. C., on January 5, 1871. Said Hunter was for many years prior to the institution of said action a nonresident of this state, residing in the state of Nicaragua, in Central America, and still remains a resident of that state. At the beginning of said action said Hunter owned a tract of land in Fairfield county, and still owns the tract involved in this action, unless he has lost his title thereto by reason of the facts hereinafter stated. On December 27, 1887, said Desportes began the aforesaid action upon said money demand against the plaintiff herein, by an attempt to serve the summons by publication, and by procuring an attachment to be issued and levied upon the land in dispute. Soon after the aforesaid judgment was entered up, execution was issued thereunder, levied upon the land in question, and it was sold by the sheriff of Fairfield county, under said execution, to the defendant herein, to whom he made a deed, under which defendant entered into possession of premises, and still retains possession. Defendant paid bid, and the sheriff applied same to the payment in full of said judgment debt, satisfying the same, on November 15, 1888; and the surplus, \$123, is still in the hands of the sheriff. Matters remained in this status until September 16, 1889, when plaintiff, upon due and proper notice served upon said Desportes and A. F. Ruff, defendant herein, moved this court to set aside the said judgment by default in favor of Desportes and against plain-

tiff, and the sale to defendant made thereunder. A. F. Ruff was made a party to this motion. His attorney accepted service for him, and he submitted an affidavit, and was heard by counsel in opposition thereto. I note this fact because the learned judge who heard the motion seemed to think that A. F. Ruff was not a party defendant therein. This motion was heard by this court, and his honor, Judge Fraser, the presiding judge, on December 3, 1891, determined said motion by an order or decree wherein he says this is 'a motion to set aside (1) an order for judgment made June 20, 1888, for \$182.85 and costs; and (2) a sale of a tract of land, made in pursuance of an execution issued thereunder, to A. F. Ruff, by the sheriff of Fairfield county.' 'Except that A. F. Ruff has furnished an affidavit to be used at the hearing of this motion, he has not otherwise been made a party to the proceeding before me. I do not, therefore, see how I can, with propriety, make any order setting aside the sale which will be binding upon him.' Judge Fraser then takes up the question of service by publication, and after noting wherein the service was illegal, and that the court never acquired jurisdiction of the person of Hunter, says: 'This order does not set aside the attachment, or the service of the attachment, or the sale, nor dismiss the complaint, as *these matters are not properly before me.*' (Italics mine.) 'It is ordered and adjudged that the judgment and execution above referred to be set aside for want of jurisdiction, and that the plaintiff have leave to proceed as he may be advised.' This order was duly filed in the office of the clerk of the court for Fairfield county, and formal notice of the filing of the same, given by the attorneys for Hunter, was accepted on February 26, 1892, by Mr. Obear, as attorney for Desportes, and McDonald & Douglass, attorneys for A. F. Ruff, defendant herein. The defendant A. F. Ruff was formally made a party to said motion to set aside the judgment. He appeared by counsel at the hearing, submitted affidavits in opposition to the motion, and was duly served with notice of Judge Fraser's decree. Neither R. S. Desportes nor A. F. Ruff appealed from said decree, and the judgment of Judge Fraser is the law of this case, upon all the issues adjudicated by him. This fact should be noted and observed. His decree, unappealed from, under the law of this state, as well as official amenity, is binding upon me, and every other court in this state. It is elementary law, requiring recitation of no authority in support thereof, that when parties have had their day in court, submitted their controversy to it, and the court has rendered its judgment thereon, that controversy is ended,—it is res adjudicata,—and the parties are estopped from again litigating the issue thus decided. This is a most salutary rule of law, as the wisdom of the past and the experience of the present demonstrates. The plaintiff and the defend-

ant herein were parties to the motion above related, and are bound by the decree of Judge Fraser. That decree, in express terms, decides (1) that the 'judgment' be 'set aside'; (2) that the 'execution' be 'set aside'; and (3) that said judgment and execution were 'set aside' for want of jurisdiction in the court over the person of Hunter. So far as the record before me discloses, Desportes never availed himself of the 'leave' given by Judge Fraser 'to proceed as he may be advised.' He did nothing. Matters remained in this condition until May 22, 1893, when the present action was begun. Afterwards the complaint was amended, and, as amended, served upon defendant, January 24, 1894. The amended complaint is in the usual form for the recovery of real property, and for damages for the withholding of the same.

"Defendant, in his answer, for a first defense, denies each and every allegation in the complaint. I need not discuss in detail, and as a separate matter, this defense, because many of the allegations in the complaint are true,—supported by the record, and the agreed statement of facts. The real issues come up in the other defenses, and upon these issues I will discuss every matter included in the general denial. For a second defense, the defendant states the facts upon which his title and right to the possession of the land depend, to wit, the judgment, sale, sheriff's deed, etc., as above stated, and alleges 'that at the time of his said purchase this defendant did not have any notice—actual, constructive, or otherwise—of any defect or irregularities in the said judgment and execution, but the same appear to be regular upon their faces; and this defendant therefore avers that he is an innocent and bona fide purchaser for a valuable consideration, without notice, and entitled, in law and equity, to the protection of this court.' Under the facts of this case, it is hard to comprehend the scope of the position thus taken by defendant. He cannot rely upon the judgment and execution in the case of Desportes v. Hunter, because they no longer exist. They have been 'set aside,' are legally dead, and cannot support defendant's title from the sheriff. It is admitted that plaintiff was, prior to said sheriff's sale, the owner in fee of the land, and, prior to the levy of the attachment and sale, entitled to the possession thereof. 'The plaintiff must, in order to entitle him to recover, show (1) a legal estate in the premises, existing in him at the time the suit was commenced; (2) a right of entry in himself; (3) that at the commencement of the suit the defendant, or those claiming under him, was in possession of the premises.' 6 Am. & Eng. Enc. Law, p. 245k. Defendant admits that he is in possession. Therefore nothing further need be said upon that subject. When defendant admits that plaintiff was at one time the owner in fee of the premises, and entitled to the possession thereof, and then sets up a title, de-

rived through judicial proceedings, from plaintiff, he admits that plaintiff is the common source of title. That being so, the question is, which has the better title? 'Both the judgment and execution are links in the title to property purchased at sheriff sale. Both are necessary, and if either is void the title of the purchaser falls.' Tobin v. Myers, 18 S. C. 327; Jones v. Crawford, 1 McMul. 373; Evans v. Hinds, Id. 490; Ingram v. Belk, 2 Strobl. 208, 218. The question, then, is, were said judgment and execution—either or both—void? If so, defendant's title is void. Plaintiff, in moving to set aside the judgment and execution, upon notice, in the original action of Desportes v. Hunter, complied with the law and practice of this state. Orocker v. Allen, 34 S. C. 456, 13 S. E. 650; Turner v. Malone, 24 S. C. 398; Prince v. Dickson, 39 S. C. 480, 18 S. E. 33. Plaintiff acted wisely in making A. F. Ruff—the purchaser under the execution, and the party in possession of the land—a defendant in said motion, because Ruff was a party seriously and deeply interested in the subject-matter of said motion. The setting aside of said judgment and execution, if held to be void, ipso facto destroyed his title. When Judge Fraser adjudged that said judgment and execution 'be set aside' for want of 'jurisdiction' in the court over the person of Hunter, was that, in law, a judgment that they were void? 'Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject-matter, and of the particular matter which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has not been notified of the proceedings.' 1 Black, Judgm. § 215. The same author says: 'It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction of either the parties or the subject-matter is void, and a mere nullity, and will be so held and treated whenever and for what purpose it is sought to be used or relied on as a valid judgment. \* \* \* They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal, in opposition to them. \* \* \* Hence, for example, if a judgment is merely erroneous the title acquired by a sale under it is valid, and cannot be impeached collaterally; but if it is void for want of jurisdiction the vendee takes no title whatever, and the sheriff's deed does not even create a cloud on the title which a court of equity can remove.' 1 Black, Judgm. § 218, p. 265. 'It is an unquestioned principle of natural justice that a man should have notice of any legal proceedings that may be taken against him, and a full and fair opportunity to make his defense. The law never acts by stealth. It condemns no one unheard.' Id. § 220, p. 267. In James v.

Smith, 2 S. C. 183, where this subject is discussed, and the authorities cited, it was held that where a court is without jurisdiction the judgment is void, and must be so regarded when it comes before another court. See, also, Cooley, Const. Lim. 466, 477; State v. Nerland, 7 S. C. 245; Miller v. Miller, 1 Bailey, 245, 246. In Trapler v. Waldo, 16 S. C. 290, the supreme court say: 'It seems to us that the court in Charleston never acquired jurisdiction over the persons [the words "the persons" italicized by the supreme court] of Gertrude Waldo and her infant son, Rhinelander. This was not a mere irregularity, but a substantial defect, which rendered the decree of foreclosure and order of sale void, so far as these parties were concerned; and we are therefore constrained to hold that to this extent the title tendered the purchaser was defective, and cannot be cured.' Caveat emptor is the rule governing sheriff's sales. 'Every man who goes to a sheriff's sale ought to take care.' Thayer v. Sheriff of Charleston, 2 Bay. 171; Yates v. Bond, 2 McCord, 382; City of Charleston v. Blohme, 15 S. C. 127. It may be argued that this rule is intended to warn the purchaser that he takes title to property purchased at his own risk. This is not the proper construction. 'A purchaser of property' at execution sale 'must examine and judge for himself as to the title and quality.' And. Law Dict. 159. 'It is well settled that a purchaser at a judicial sale (where the rule caveat emptor does not apply) is bound to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before it.' Trapler v. Waldo, 16 S. C. 282; Gardner v. Cheatham, 37 S. C. 77, 16 S. E. 368; Smith v. Winn, 38 S. C. 192, 17 S. E. 717, 751; Cathcart v. Sugenhimer, 18 S. C. 123, Federall v. Bouknight, 25 S. C. 275; and Iseman v. McMillan, 36 S. C. 36, 15 S. E. 336.

"Many writers and courts have discussed the question, what judgments are void and voidable? Mr. Black, in his work on Judgments (volume 1, § 218, pp. 265, 266) says: 'The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a nullity for all purposes'; and in sections 170, 246, 270, 290, the learned author endeavors to state the distinctions between void and voidable judgments. Mr. Freeman, in his work on Judgments, says: 'The weight of the adjudged cases \* \* \* sustains the proposition that the judgment of a domestic court of general jurisdiction is not void, except when the court has no jurisdiction over the subject-matter of the suit, or when, having such jurisdiction over the subject-matter, it is shown by the record to have no jurisdiction over the judgment defendant.' Section 116. Again he says in section 116: 'A judgment rendered without in fact bringing the defendants into court, unless the want

of authority over them appears in the record, is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction.' See, also, sections 124-135. It is settled law in this state that where, upon the face of the record, it is apparent that the court never acquired jurisdiction of the person of the defendant, a judgment against such defendant is void. Gardner v. Cheatham, 37 S. C. 74, 16 S. E. 368. The rule and principle deduced from the authorities in this state establish the proposition that a judgment regular on its face is not a void judgment, in the sense that it can be treated as such in a collateral proceeding, but that it is voidable, in a direct proceeding in the original case, when extrinsic evidence shows a want of jurisdiction over the person of the defendant. Stanley v. Stanley, 35 S. C. 97-98, 14 S. E. 675; Turner v. Malone, 24 S. C. 401-405; Gardner v. Cheatham, supra; and other authorities cited. In Le Conte v. Irwin, 19 S. C. 554, a decree for foreclosure of mortgage, after a sale of the premises thereunder, was set aside, but the title of the purchaser was held to be good. The judgment in this case, was set aside, under section 195 of the Code, upon the ground of 'excusable neglect, and the irregular, if not illegal, mode of entering and enforcing the judgment for money and foreclosure and sale.' This was a motion addressed to the discretion of the court, and the case, therefore, is without authority as to the subject of jurisdiction. In Eason v. Witcofskey, 29 S. C. 239, 7 S. E. 291, 'the proceedings in escheat' were under a special statute, and the notice to claimants was adjudged sufficient.

"Counsel for defendant, in his argument, says it is well settled that the purchaser under an execution not void, but voidable only, will be protected in his title, and, in support of this proposition, cites Henry v. Ferguson, 1 Bailey, 512; Ingram v. Belk, 2 Strob. 207; Williamson v. Farrow, 1 Bailey, 611; Lawrence v. Grambling, 13 S. C. 124; Darby v. Shannon, 19 S. C. 526; Tobin v. Myers, 18 S. C. 328; and Freem. Ex'ns, § 343. In Tobin v. Myers, 18 S. C. 327, it is held: 'For reasons of policy to sustain sheriff's sales, purchasers at such sales are favored, to the extent that mere irregularities in the process will not avoid the sale. If purchasers at their peril were held responsible for the perfect regularity of process under which property is sold, the result would be that property would be sold at a sacrifice, and the usefulness of such sales be greatly impaired, if not destroyed. But this rule as to mere irregularities does not apply where *either the judgment or the execution is absolutely void.*' (Italics mine.) Mr. Freeman, in his work on Executions (volume 2, § 345), in discussing the effect of reversal of a judgment where a stranger has purchased under it, says: 'The distinction between a void and

an erroneous judgment must be kept in view, for if a judgment is void no rights can be based upon it. The reversal of a judgment, on appeal, on the ground, not of errors in proceeding, but because the lower court had no authority to proceed, would be, in legal effect, a declaration that the judgment was void. The judgment may not be wholly void, and yet be substantially so, because the parties whose interest was sought to be affected were not before the court. Their title cannot be imperiled, whether there is an appeal or not. If an appeal is taken, and a reversal ordered on this ground, the defect of parties is judicially declared. Titles resting on such judgment will therefore be declared invalid. But this invalidity arises, not from the reversal, but from the original judgment, which is found to be so destitute of legal authority that it might have been disregarded by the parties. Judge Fraser found by his decree that the judgment of Desportes v. Hunter was not, in law, a judgment,—not because of irregularities therein, but because the court had no jurisdiction of the person of Hunter. Hunter had no notice of the action,—could not, therefore, defend himself, or appeal therefrom; but, as soon as he heard of it, he, according to the law of this state, procured a judgment of this court setting aside the judgment and execution 'for want of jurisdiction.' Was not that, 'in legal effect,' an adjudication 'that the judgment was void'? The case of *Williamson v. Farrow*, 1 Bailey, 619, cited by the defendant, states the distinction. O'Neill, J., delivering the opinion of the court, says: 'The general rule as to purchasers at sheriff's sales is that when the defect in the proceedings is such a one as may be cured by consent, acquiescence, or amendment, it does not affect title. But when it is a defect of substance, as a want of authority from the court, or when the authority is absolutely void, it vitiates and destroys the sale, and title under it.' This case is cited with approval in *Lawrence v. Grambling*, 13 S. C. 124, where the authorities are collected. If it is true, as a legal proposition, that a judgment against a person never brought within the jurisdiction of the court by legal process is void, and a proper court has by its decree pronounced such judgment void, it would seem to be a solecism to say that such judgment is voidable. In this case, Hunter, a resident of a foreign country, hears that A. F. Ruff, a stranger, is in possession of his land, claiming title thereto as a purchaser under a judgment and execution against him. He seeks legal advice; is told that the alleged judgment is void; advised to go into the court which rendered said judgment, and ask that it be set aside. The court grants the relief sought, and sets aside its own judgment, and the execution issued thereon, not for irregularities, but upon the substantial ground, 'want of jurisdiction' over the person of the defendant in said alleged action. With this

deliverance from the court, contained in a formal decree made in a proceeding to which A. F. Ruff is a party, and from which no appeal was taken, it would be a mockery of justice to allow Ruff to retain the title and possession of Hunter's land. The sale and the sheriff's deed, as a legal consequence, fell with the judgment. From the authorities cited it would seem that when a judgment and execution, after sale thereunder, are set aside for irregularities, the title of a bona fide purchaser, as a general rule, is not impaired; but when a judgment and execution, after sale thereunder, are set aside by a court of competent jurisdiction 'for want of jurisdiction' in the court which rendered the judgment, the title of the purchaser is void. The decree setting aside the judgment and execution 'for want of jurisdiction' in the court which rendered it is an adjudication that such judgment and execution were void ab initio.

"As a third defense, defendant alleges the proceedings in attachment, the issuance, levy, etc., thereof upon the land in dispute, and further alleges 'that said action is still pending in this court, and said attachment has never been vacated or set aside by any order of this court or otherwise; and, should this court hold the aforesaid judgment defective, then the defendant asks that he may be subrogated to the rights of the said Richard S. Desportes in said action.' The land in dispute was not sold under the proceedings in attachment. It was sold under the judgment and execution. The law of attachment depends upon the statutes of this state. Property is attached 'as a security for the satisfaction of such judgment as the plaintiff may recover.' Code, § 248. This section is a part of title 7 of the Code, 'Of the Provisional Remedies in Civil Action.' 'Now, as an action cannot, as formerly, be commenced by attachment, which is now only a provisional remedy in aid of an action, it follows, necessarily, that if an action fails for want of jurisdiction the provisional remedy by attachment in aid of such action must fall with it.' *Central Railroad & Banking Co. v. Georgia Const. & Inv. Co.*, 32 S. C. 342, 11 S. E. 192. 'Property levied on after the action is commenced, under a warrant of attachment, and not described—even mentioned—in the complaint, is not the subject of the action. In an action on money demands, property of the defendant attached to secure the judgment when rendered is not the subject of the action.' *Id.* Code, § 160, provides, 'From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.' Again: 'For the purpose of this section [providing for attachments] an action shall be deemed commenced when the summons is issued: provided, however, that personal service of such summons shall be made, or publication

thereof commenced within thirty days.' Code, § 248. 'When an action fails for want of jurisdiction, attachment therein falls with it.' *Central Railroad & Banking Co. v. Georgia Const. & Inv. Co.*, 32 S. C. 319, 11 S. E. 192. The action in *Desportes v. Hunter* failed 'for want of jurisdiction' (judgment of Judge Fraser). Therefore the attachment fell with the judgment and execution, and is legally dead. In the case of *Darby v. Shannon*, 19 S. C. 526, it was said, in the discussion of the case, that even when no summons has been served, but attachment has been issued, the court has jurisdiction for certain purposes. The court used this language in reference to the rights of third persons. The filing of the summons and complaint, the order for service by publication, and the issuance of the attachment, the attempted illegal service, all occurred in December, 1887. Judge Fraser's decree, holding that the alleged service was illegal,—that it did not give the court jurisdiction of the defendant,—is dated December 3, 1891, was filed on December 5, 1891, and notice thereof was served upon Ruff and Desportes. An illegal service is, in law, no service; and under the proviso to section 248 of the Code, above cited, the attachment lost its force and effect. It may be argued that as Judge Fraser, in his order, says, 'This order does not set aside the attachment, or the service of the attachment,' the attachment still remains. But this would be doing the judge an injustice. He makes this statement because, as he himself says, these matters were not properly before him. If Judge Fraser had held that the attachment and service thereof were legal and valid, such a decree, unappealed from, would be the law of this case. He did not pass upon these issues, disavowed any intention of doing so, and the attachment must stand or fall upon its merits.

'The counsel for defendant cites from the third paragraph of section 156 of the Code, 'but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.' The paragraph from which these words are quoted provides, 'The defendant against whom publication is ordered \* \* \* may \* \* \* be allowed to defend after judgment or at any time within one year after notice thereof, and within seven years after its rendition on such terms as may be just \* \* \* but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.' This provision is intended for the relief of a person who has been duly and legally served by publication, over whose person the court acquired jurisdiction, and against whom judgment has been rendered. If upon 'sufficient cause shown' (for example, the plaintiff has taken advantage of the defendant, or the judgment, as against the plaintiff, is voidable for irregularities), the court 'may' allow the

defendant proper relief, 'but' the title to property sold shall not thereby be affected. This is in accord with the law of this state as it exists to-day, and as it stood prior to the code practice.

'Defendant asks to 'be subrogated to the rights of said Richard S. Desportes in said action.' What rights? said action, in law, no longer exists. The only right possessed by Desportes is the right to sue on his alleged sealed note, and to attach plaintiff's property. Plaintiff, in his affidavit, deposes that he has a defense to said note. R. S. Desportes is not a party to this action, and I can make no order affecting his rights. 'Subrogation is an equitable, and not a legal, right. \* \* \* It will not be enforced when it works an injustice to the rights of those having equal equities.' 24 Am. & Eng. Enc. Law, p. 191. Ruff is a mere volunteer. He was not obliged to purchase this land to protect himself against an obligation for which he was bound. He relied upon the title he was purchasing, and it was his misfortune, not Hunter's fault, if he got nothing. Caveat emptor and subrogation are in many respects inconsistent doctrines,—the former, a rule of law; the other, a doctrine of equity; and equity follows the law. Subrogation protects and enforces an existing right, but equity cannot make a void judgment valid. If Ruff is entitled to subrogation, it is to a void judgment. It seems to me that Ruff's remedy, if he has any,—and upon this subject I express no opinion,—is against Desportes and the sheriff, for money had and received.

'The doctrine of bona fide purchase for valuable consideration, without notice, does not apply to this case. This plea is purely equitable, and cannot stand against the legal title. *Hill v. Burgess*, 37 S. C. 604, 15 S. E. 963; *Lynch v. Hancock*, 14 S. C. 90.

'I don't think that there is a defect of parties herein. Neither R. S. Desportes nor the sheriff claim any interest in the subject-matter of this action.

'Wherefore it is ordered, adjudged, and decreed that the plaintiff herein have judgment in his favor, and against the defendant, for the recovery of the possession of the real property described in the complaint herein, to wit: All that piece, parcel, or tract of land lying, being, and situate in the county of Fairfield, in the state of South Carolina, containing one hundred and eighty acres, more or less, situated near the town of Ridgeway, and bounded by land conveyed by plaintiff to Henry A. Gaillard and O. W. Buchanan on February 21, 1892; being the northern half of the tract formerly owned by Mrs. Anna F. Hunter, deceased, and designated by the letter 'W' on a plat of survey made by H. Edmunds, surveyor, and dated June 8, 1887, which said tract was bounded on the north by land of Lloyd A. Davis and Wyatt Davis, on the east by land of Walker Davis and Wyatt Davis, on

the west by land of Henry Hunter, and on the south by lands of George Hunter and Davis. And by consent it is further ordered that this action be, and hereby is, referred to G. W. Ragsdale, Esq., as special referee, to take testimony, and to hear and decide all issues of fact and law in and to plaintiff's demand against defendant for damages for the withholding of above-described premises, as set out in the pleadings herein."

A formal order for recovery of the land in dispute was made in the case of Buchanan and Gaillard v. Ruff, in conformity with the foregoing decree.

#### Exceptions.

"(1) For that his honor erred in overruling the order or decree of Judge Fraser, by holding in this case that the defendant, A. F. Ruff, was formally made a party to the motion to set aside the attachment, judgment, execution, and sale, when, with all the facts before him, Judge Fraser had held otherwise, and there was no appeal from his order and decision in the premises. (2) For that his honor erred in holding that the defendant, A. F. Ruff, was bound by the order or decree of Judge Fraser, when Judge Fraser had held that he was not a party to the proceeding, and had refused to make any order concerning his rights, and had refused to set aside the sale to him. (3) For that his honor erred in holding that the judgment, execution, and sale under which the defendant, A. F. Ruff, acquired possession of the land in dispute, were void; when he should have held that said judgment and execution were voidable only, and that the sale thereunder was valid, and binding on the plaintiff. (4) For that his honor erred in holding that the attachment fell, or lost its force and effect, when Judge Fraser held that the judgment and execution were void for want of service of the summons, and thus overruling the decree of Judge Fraser, who refused to set aside either the sale or the attachment. (5) For that his honor erred in holding that the provisions of section 156 of the Code of Procedure was 'intended for the relief of a person who has been duly and legally served by publication, over whose person the court acquired jurisdiction,' etc. (6) For that his honor erred in holding that the defendant, A. F. Ruff, was not entitled to be subrogated to all of the rights of R. S. Desportes under the judgment of Desportes v. Hunter. (7) For that his honor erred in not holding that when there had been a regular and valid attachment of the land, at the commencement of the action of Desportes v. Hunter, the judgment, execution thereon, and sale thereunder, were sufficient to pass a good and valid title to the land so attached and sold. (8) For that his honor erred in not holding that the attachment being still of force, under the express ruling and deci-

sion of Judge Fraser, the sheriff was a necessary party, and that the plaintiff herein was not entitled to recover, when it appeared that the right of possession was either in favor of the defendant, or the sheriff, under the attachment. (9) For that his honor erred in not holding that the defendant was entitled to retain possession of the land, as against the plaintiff, when it appeared that he purchased the same at a sale thereof under an execution regular in form, and issued upon a judgment apparently regular and valid upon its face, and no proceedings had been instituted before such sale to vacate and set aside the same. (10) For that his honor erred in not holding that the said sale was valid and binding until set aside by a court of competent jurisdiction, and that the plaintiff could not recover possession until said sale was set aside, and that plaintiff, in this respect, was bound by the order and decree of Judge Fraser, in which he expressly refused to set the same aside, and there was no appeal from such order and decree. (11) For that his honor erred in not holding that the defendant was entitled to the possession of the land in dispute, when it appeared from the undisputed facts that he purchased the same at an execution sale under a judgment against a nonresident of this state, whose land had been regularly attached at the time of the commencement of the action, which gave the court jurisdiction to render a judgment under which a valid sale of the land could be made. (12) For that his honor erred in not holding that the said judgment being, at the most, voidable only, and the defendant not having notice of any hidden vice therein, and having purchased at a fair price, and paid the same, he was entitled to be protected in his purchase thereof."

J. E. McDonald, for appellant. J. W. Hanahan and James G. McCants, for respondents.

McIVER, C. J. These two cases, growing out of practically the same state of facts, and depending upon the same principles of law, were heard and will be considered together, and for convenience will be spoken of as one case. The facts are undisputed, and may be stated as follows: On the 22d day of December, 1887, R. S. Desportes commenced an action against the above-named Cyrus W. Hunter to recover the amount due upon a note under seal, bearing date 4th January, 1871, and payable one day after the said date, by issuing a summons in the usual form. On the same day, to wit, the 22d of December, 1887, the said R. S. Desportes made an affidavit that a cause of action existed in his favor against said Hunter; that the said Hunter was not a resident of this state, but resided in the city of Leon, in the state of Nicaragua, in Central America, and

the said Hunter could not, after due diligence, be found in this state; and that said Hunter had property in this state, to wit, the land in controversy in these actions. Upon this affidavit a warrant was duly issued on the 27th of December, 1887, and the same was duly levied on the said land, by the sheriff on the 28th of December, 1887. On the 27th of December, 1887, an order for service by publication was duly made, and the copy summons was duly published in the *Winnsboro News and Herald* (a paper published in the county of Fairfield, where the land in question was situated) once a week for six weeks, beginning on the 29th of December, 1887, as appeared by the affidavit of the printer of said newspaper, bearing date the 13th of March, 1888; and on the 28th of December, 1887, an affidavit of the mailing of the summons to the said Hunter, at Leon, state of Nicaragua, Central America, was duly made. The complaint was in the usual form, and upon an affidavit of one of the attorneys in the action, of all these previous proceedings, his honor, Judge Kershaw, on the 14th of June, 1888, granted an order for judgment in favor of said Desportes against the said Hunter for the amount due upon said note, together with his costs, to be adjusted by the clerk; and on the 20th of June, 1888, judgment was duly entered in accordance with said order, a copy of which is set out in the case, and should be incorporated in the report of this case. Upon the judgment thus entered an execution was duly issued, under which the land in question, which had been previously attached, was, after due advertisement, offered for sale by the sheriff of Fairfield county on the 5th December, 1888, and was bid off by the defendant Ruff, who, having immediately complied with his bid, received titles from the sheriff, went into possession of the land, and has since remained in possession thereof. At the time said defendant bid off the land, and paid the purchase money, and went into possession, he had no notice, either actual or constructive, of any defects or irregularities (if any there be) in the said judgment and execution under which he bought. On the 16th of September, 1889, a notice entitled "*In re Desportes v. Hunter*" was addressed to and served upon the said R. S. Desportes and A. F. Ruff that the said Cyrus W. Hunter would, upon the affidavits annexed thereto, move "to set aside the order of judgment rendered against the defendant [Hunter] by alleged default in the above-named case on the day of —, 188—, and the sale of the land under said alleged judgment on the — day of —, 188—, and which was bought in by A. F. Ruff," upon the several grounds mentioned on the notice, only one of which is it necessary to mention, to wit, that the said Hunter was on the 26th of March, 1888, "and for years before, a resident of the city of Jenotepe, in the republic of Nicaragua, where he resided

with his family, and was not a resident of Leon, as alleged in the pleadings," and that "no notice, summons, or information of said alleged suit was given to defendant." This motion was heard by his honor, Judge Fraser, upon the affidavits set out in the case, who granted an order on 3d December, 1891, "that the judgment and execution above referred to be set aside for want of jurisdiction, and that the plaintiff have leave to proceed as he may be advised." From this order there was no appeal.

These two actions mentioned in the title of this opinion were commenced on the 22d of May, 1893, to recover the possession of the land bid off by the defendant Ruff at the sheriff's sale hereinbefore referred to, for which he received sheriff's titles under which he went into possession. The plaintiffs in the second action above stated seem to have bought from Hunter a portion of the land, and their action is to recover the portion so bought by them, while the action of Hunter is to recover the balance of the land not sold to Buchanan and Gaillard, the plaintiffs in the other action. When Buchanan and Gaillard bought that portion of the land for which they sue does not appear in the case, though it is stated in the argument of appellant's counsel that the conveyance from Hunter to Buchanan and Gaillard was made "after the sale to Ruff," while in the argument of respondents' counsel it is stated that such conveyance was made "after the judgment and execution in *Desportes v. Hunter* was set aside." But, under the view which we shall take, we do not think it material when such conveyance was made, inasmuch as there is no pretense that such conveyance was made before the alleged judgment obtained by Desportes against Hunter was entered, or before the sheriff's sale under which Ruff claims. A trial by jury having been waived, the cases were heard by his honor, Judge Aldrich, who rendered the decree set out in the case, which should be incorporated in the report of this case, wherein he adjudges that the plaintiffs in each of said actions are entitled to recover the land in controversy, together with the damages, to be ascertained by a referee appointed for that purpose. From these judgments the defendant A. F. Ruff appeals upon several grounds set out in the record, which should likewise be incorporated in the report of this case. We do not propose to consider these grounds *seriatim*, but only such questions presented by such grounds as we consider material to the case.

It is very obvious that the controlling inquiry in this case is whether the appellant, Ruff, acquired a valid title to the land by his purchase at the sheriff's sale, and this depends upon the question whether the judgment obtained by Desportes against Hunter, together with the execution issued to enforce the same, afforded legal authority to make the sale. This question also depends upon two

inquiries: (1) Whether it has heretofore been concluded by the order of the judge, above referred to; and, if not, (2) whether, as an original question, such judgment is valid or void.

As to the first of these inquiries, we think it is clear, from the express terms of Judge Fraser's order, that it cannot be regarded as concluding the appellant, Ruff. No authority is needed for the proposition that a person cannot be bound or affected by any order, decree, or judgment in a case to which he has not been made a party in some one of the modes recognized by law. Now, the motion before Judge Fraser was not only a motion to set aside the judgment, but also a motion to set aside the sale made by the sheriff to the appellant, Ruff; and, as we construe the order of Judge Fraser, he, while granting the motion to set aside the judgment, declined to grant the motion to set aside the sale, upon the express ground that Ruff, not being a party to the proceeding, would not be bound thereby. He uses this language: "Except that A. F. Ruff has furnished an affidavit to be used at the hearing of this motion, he has not otherwise been made a party to the proceedings before me." And he adds: "I do not, therefore, see how I can, with propriety, make any order setting aside the sale which will be binding on him." So that it is manifest that Judge Fraser not only found as a fact that Ruff was not a party, but also distinctly adjudged that he could make no order binding upon Ruff, because he was not a party; and hence he, in terms, declined to make any such order. Even if it be conceded that Judge Fraser erred in his finding of fact, and in his adjudication in accordance with such finding, that cannot affect the present inquiry. That order, not having been appealed from, must be regarded as the law of the case, and was absolutely binding, whether right or wrong, upon any succeeding circuit judge. *Warren v. Simon*, 16 S. C. 362. The question whether Ruff was a party to the proceeding before Fraser was finally closed by the finding and adjudication that he was not a party thereto, and could not, therefore, be bound by any order made in that proceeding, and it was beyond the power of any subsequent circuit judge to review or reverse that decision. We are therefore of opinion that Judge Aldrich erred in practically reversing the judgment of Judge Fraser as to the question whether Ruff was a party to the proceeding under which the judgment in question was set aside, and that appellant's first and second exceptions must be sustained. It would indeed be a strange result to hold that a person was a party to a proceeding under which an order granted in such proceeding should be binding upon him, in face of the patent fact that the judge who granted such order not only held that he was not a party, but also, for that reason, declined to grant any order affecting the rights of such person.

The question, therefore, whether the judgment obtained by Desportes against Hunter

is valid is still an open question; at least, so far as the rights of Ruff are concerned. That judgment was obtained under proceedings which, upon their face, were entirely regular; and there was nothing whatever in the record to indicate any vice, or even irregularity, therein. It appears from the recitals made in the order for judgment granted by Judge Kershaw that every step required by law as necessary to the rendition of such judgment had been regularly taken. The only vice or even informality that is now suggested in that judgment is that, in mailing a copy of the summons to the said Hunter, it was addressed to him at Leon, state of Nicaragua, Central America, instead of at the city of Jenotepe, in the republic of Nicaragua, Central America; which it is now claimed was the place of residence of said Hunter, and that he never received any copy of the summons, or notice of the action. The fact that Hunter never received any copy of the summons, is not, and cannot be pretended, sufficient to avoid the judgment; for our statute does not require anything of the kind, and such a requirement would in many, if not in most, cases, render a proceeding by attachment nugatory; for if a plaintiff were required to show that an absent debtor, residing in a distant country, or even in an adjoining state, actually received the copy of the summons mailed to him at his place of residence, under the penalty of having his judgment rendered void, it is very manifest that the salutary and necessary remedy by attachment would become practically useless. The only inquiry, therefore, is whether the mistake in mailing a copy of the summons to Hunter at Leon, in the state of Nicaragua, Central America, instead of at the city of Jenotepe, in the republic of Nicaragua, where it now appears that Hunter had his residence, renders the judgment so absolutely void that no rights can be acquired under it. The provision of our statute requiring "a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can, with reasonable diligence, be ascertained by him," must, from the very nature of the case, receive a reasonable, if not a liberal, construction. If a creditor whose debtor, leaving property behind, has left this state, and acquired a residence in a distant state,—in this case, in a far-distant foreign country,—cannot avail himself of a remedy for the collection of his debt out of the property left in this state, unless he first obtains certain knowledge of the new residence of his debtor, the remedy would in many, if not most, cases, become fruitless. Indeed, the very terms of the statute show that all that is required of the creditor is "reasonable diligence" to ascertain the place of residence of his debtor. This necessarily implies inquiry from others, and warrants action upon information thus acquired. These

views are supported by authority. In 16 Am. & Eng. Enc. Law, 820, it is said: "The notice must be mailed to the party at the address stated in the order of publication. A mailing to a different address will not be sufficient. But if the address stated in the order, or the affidavit to procure the order, is not in fact the correct one, judgment obtained thereon will not be void, if the plaintiff acted in good faith;" citing *Martin v. Pond*, 30 Fed. 15, which has been examined, and found to sustain fully the text. It is a decision rendered by Judge Brewer, now one of the associate justices of the supreme court of the United States. So, in *Van Fleet*, Coll. Attack, 482, it is said, "A copy of a summons, mailed to a place where the defendant did not reside, \* \* \* by reason of which he did not get the notice mailed to him, does not make the proceeding void;" citing *Martin v. Pond*. In *Lessee of Fowler v. Whiteman*, 2 Ohio St. 270, where publication for nonresidents was ordered, and plaintiff was directed to mail a copy of the paper containing the notice to them, if their address was known, and the nonresidents, in an action of ejectment, offered to show that their address was known to plaintiff, who did not mail a copy to them, it was held that, as the court in the original suit had found that publication had been duly made, such finding was conclusive on the nonresidents. In this case, Judge Kershaw, in his order for judgment, had found that a copy of the summons had been duly mailed to the defendant Hunter, addressed to him at Leon, state of Nicaragua, Central America, "his place of residence." In *Weber v. Weitling*, 18 N. J. Eq. 441, where a bill was filed to set aside a sale of real estate under attachment proceedings, on the ground that the defendant, who was a resident, had been sued as a nonresident, the court held that the foundation of the proceeding and of the jurisdiction of the court was not the nonresidence of the defendant, but the affidavit having been made in good faith, and appearing regular on its face, the court could not declare the proceedings void. In *Freem. Judgm.* § 126, quoted with approval in *Darby v. Shannon*, 19 S. C., at page 537, and again in *Eason v. Witcofskey*, 29 S. C., at page 246, 7 S. E., at page 295, it is said: "There is a difference between a want of jurisdiction, and a defect in obtaining jurisdiction. \* \* \* In case of an attempted service the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusions reached by the court, being derived from hearing and deliberating upon a matter which by law it was authorized to hear and decide, although erroneous, are not void. When, in a proceeding by attachment, the ground required by the statute for the issuing of the process has been laid, and the process has been issued and executed, the jurisdiction of the court is complete. Where there has been an insufficient publication, or an entire failure to pub-

lish, the proceedings are not so invalidated as to be made void." Now, in the case under consideration the presumption here spoken of has become a fact, for it is recited in Judge Kershaw's order for judgment that a copy of the summons was duly mailed to the defendant, at "his place of residence"; and, even if such finding of fact should afterwards turn out to be erroneous, that will not render the judgment void. Inasmuch as it clearly appears that all the proceedings leading up to the judgment under which the land in controversy was sold were entirely regular upon their face, and disclosed no vice nor infirmity of any kind, and inasmuch as it appears from the statements in the case that Desportes, the plaintiff in such judgment, made efforts, by inquiry, to ascertain the place of residence of the defendant therein, and in good faith acted upon the information thus acquired, we cannot think that the fact that it has been made to appear, since the sale by the sheriff, and since the payment of the purchase money by the appellant, that the information thus acquired by Desportes was erroneous, and that in fact the city of Jenotepe, instead of the city of Leon, was the place of residence of defendant Hunter, can be sufficient to require the court to declare the said judgment absolutely void, and to invalidate all proceedings thereunder, even against an innocent third person, who has been induced to pay out his money in reliance upon a judgment entirely regular upon its face, and not even indicating any infirmity of any kind in it. While it is quite true, as contended for by respondent's counsel, that the proceedings before Judge Fraser, culminating in an order setting aside the judgment, became a part of the record, yet it must be remembered that these proceedings were not even commenced until some time after the sheriff's sale under which appellant claims was made, and at that time there was nothing in the record or elsewhere, so far as the case shows, to even suggest that there was any vice, or even irregularity, in the judgment.

But again, in 1 Black, Judgm. § 218, it is said, "The result deducible from a majority of the cases seems to us to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a nullity for all purposes." And in *Freem. Judgm.* § 116, quoted with approval in our own case of *Turner v. Malone*, 24 S. C., at page 403, the most approved view is considered to be as follows: "It has often been said that a judgment is void whenever the court which pronounced it had not jurisdiction of the parties to the judgment, or of the subject-matter in controversy. This is undoubtedly true everywhere, provided the want of jurisdiction is not controverted, or is manifest from an inspection of the record. It is also true, in some of the states, even though the jurisdictional facts are asserted in the record. The weight of adjudged cases, however, sustains the proposition that the judgment of a do-

ment court of general jurisdiction is not void except where the court has no jurisdiction over the subject-matter of the suit, or where, having such jurisdiction over the subject-matter, *it is shown by the record* [italics ours] to have had no jurisdiction over the judgment defendant. \* \* \* The word 'void' can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. A judgment rendered without in fact bringing the defendants into court, *unless the want of authority over them appears in the record* [italics ours], is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. In either the judgment can be avoided and made functus officio by some appropriate proceeding instituted for that purpose, but, if not so avoided, must be respected and enforced." See, also, *Voorhees v. Bank*, 10 Pet., at page 478, where Mr. Justice Baldwin, in delivering the opinion of the court, speaking of the rights of purchasers at a sale made under judicial process, uses this language: "The purchaser is not bound to look beyond the decree, when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceeding, nor look further back than the order of the court." So, in *Cooper v. Reynolds*, 10 Wall. 308, in delivering the opinion of the court, Mr. Justice Miller, speaking of a sale of property which had been attached, uses this language: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to the jurisdiction, as it unquestionably is in the proceedings purely in rem. Without this, the court can proceed no further. With it, the court can proceed to subject the property to the demand of plaintiff." And after speaking of the effect of a defective affidavit upon which the writ of attachment was issued, which might render the judgment reversible for error, he says: "We are unable to see how that can deprive the court of jurisdiction acquired by the writ levied upon defendant's property. So, also, of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made; and undoubtedly, if there has been no such publication, a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice." Upon the same principle, we would say that where, as in this case, there subsequently appears to have been an honest mistake in mailing a copy of the summons to the defendant at the city of Leon, which, plaintiff, after inquiry, was informed was defendant's place of residence,

instead of mailing such copy to him at the city of Jenotepe, which it has subsequently been made to appear was in fact his place of residence, cannot deprive the court of jurisdiction over the property acquired by a levy of the attachment thereon. The comments of Justice Brown on the case of *Cooper v. Reynolds*, supra, in the subsequent case of *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, cannot affect the former, because it was distinguished from the latter by the fact that in *Cooper v. Reynolds* the property in question was seized under a writ of attachment,—a proceeding in rem,—while in the latter case there was no attachment. So, too, in our own case of *Trapier v. Waldo*, 16 S. C. 276, relied on by the circuit judge as well as by counsel for respondents, there was no attachment; and moreover in that case the record not only failed to show that Gertrude Waldo and her infant son, Rhinelander, had been properly made parties, but rather showed to the contrary. We are therefore of opinion that even if the fact be that a copy of the summons was not mailed to the judgment debtor at his correct place of residence, but was mailed to him at the place which the judgment creditor, after inquiry, was informed was his place of residence, such fact did not render the judgment so absolutely void as to render all proceedings under it nullities, but at most only rendered the judgment voidable, and liable to be declared void when such fact was made to appear in a subsequent proceeding instituted for that purpose. But such subsequent showing cannot be allowed to affect the validity of any proceedings taken under such judgment before such showing has been made,—*Turner v. Malone*, 24 S. C., at page 404; *Gregg v. Bigham*, 1 Hill (S. C.) 302; *Slimms v. Slacum*, 3 Oranch, 300,—at least, so far as the rights of third persons are concerned.

But, in addition to this, it seems to us that the legislature, recognizing the hardship and injustice which an innocent purchaser who has bought property under a judgment regular on its face would suffer if the owner of such property should be allowed to come in afterwards, and, by showing that there was some hidden vice in the judgment, have the same, and all proceedings thereunder, set aside, has made express provision for such purchaser from such hardship and injustice. In the third paragraph of section 156 of the Code of Procedure the provision is that "the defendant against whom publication is ordered \* \* \* may \* \* \* upon good cause shown, be allowed to defend after the judgment, or at any time within one year after notice thereof and within seven years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs; *but the title to the property sold under such judgment*

to a purchaser in good faith shall not be thereby affected." The circuit judge holds that the saving clause, which we have italicized, inserted for the protection of innocent purchasers, was intended only for the protection of one who has purchased under a judgment obtained in a case where the judgment debtor "has been duly and legally served by publication, over whose person the court acquired jurisdiction, and against whom judgment has been rendered." It would be sufficient to say that such is not the language of the statutory provision; and, to give it the construction adopted by the circuit judge, it would be necessary to interpolate words into the statute which the legislature has not seen fit to insert therein. The section of the Code (section 156) in which the provision here in question is found, after providing in what cases a defendant may be made a party to an action by publication, and after providing that in such cases the court may grant an order that service may be made by publication, and after providing that certain other things should be done, provides, in the third paragraph of the section, that "the defendant against whom publication is ordered [not that the defendant who has been duly and legally served by publication] may, on sufficient cause shown, be allowed to come in and defend," etc., but that when he does so, and he seeks to assail a judgment recovered against him in his absence, he cannot be allowed to divest rights of innocent purchasers, which had vested before any assault had been made upon the judgment, which upon its face was entirely regular, and free from any infirmity. We therefore must conclude that the circuit judge erred in holding that the judgment recovered by Desportes against Hunter was so absolutely void as that the appellant, Ruff, acquired no title by his purchase at the sheriff's sale made under said judgment. Under this view the other questions raised in the argument become wholly immaterial, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court in each of the cases mentioned in the title of this opinion be reversed, and that the complaints in each of said cases be dismissed.

(47 S. C. 106)

**WRAGGE v. SOUTH CAROLINA & G.  
R. CO.**

(Supreme Court of South Carolina. July 14, 1896.)

**ACCIDENT AT CROSSING—STATUTORY LIABILITY—  
PROXIMATE CAUSE—CONSTRUCTION OF  
STATUTE—REQUESTS TO CHARGE.**

1. Rev. St. 1893, § 1692, provides that if a person is injured at a crossing, and the railroad corporation neglected to give the statutory signals, and such neglect contributed to the injury, the corporation shall be liable, etc. *Held*, that the railroad company's liability does not depend upon whether its failure to give said signals was the proximate cause of the injuries to a person at a crossing, but as to whether it contributed thereto.

2. It was not error to omit to explain to

the jury the meaning of the term "contributed," as used in said statute, where no request therefor was made at the trial.

3. In an action under Rev. St. 1893, § 1692, providing that if a person is injured at a crossing, and the railroad company neglected to give the statutory signals, and such neglect contributed to the injury, the corporation shall be liable, etc., it was proper to refuse to charge on the meaning of the word "contributed" that plaintiff, in addition to the failure to give the signals, must prove that, but for such failure, the injury would not have occurred.

4. The supreme court will not decline to consider the refusal of the trial judge to give requests to charge, though they failed to comply with a rule of the circuit court which required counsel to note in the margin opposite a request to charge the authorities relied on to support the proposition of law contained therein, and produce the same, when required by the court, where such objection to said requests was not raised below, and the court, without objection, considered each request, as it will be assumed that the requests were submitted in proper form.

Appeal from common pleas circuit court of Charleston county; Aldrich, Judge.

Action by Caroline A. Wragge, administratrix of the estate of Henry H. Wragge, deceased, against the South Carolina & Georgia Railroad Company, for damages for causing the death of her intestate. There was a judgment for plaintiff, and defendant appeals. *Affirmed*.

Judge Aldrich's charge to the jury, which is referred to in the opinion, was as follows:

"This is an action brought by the plaintiff, Mrs. Caroline A. Wragge, as administratrix of the estate of Henry H. Wragge, deceased, against the South Carolina & Georgia Railroad Company, to recover the sum of \$30,000. It is my duty to construe the pleadings, and to inform you as to the issues before the court, and perhaps I can best explain them by saying to you in brief language that, some years back, an injury which resulted in the death of a person, or the cause of action resulting therefrom, died with the person. This state—I think it was in 1859—adopted the English statute, which allowed the executor or administrator of the person who was killed through the negligence of any person or corporation to bring an action for the benefit of the wife and children, based upon the killing of the husband. The act to which I refer says that such administrator may bring an action for the benefit of the heirs at law or distributees of the person whose death has been so caused as may be dependent on him for support. Mrs. Wragge, it is admitted here, is the administratrix of the estate of her late husband, Henry H. Wragge, who, it is admitted, is dead; and that his death was occasioned by a collision with a railroad engine and cars of the defendant company; so that the next inquiry to which I will invite your attention is as to the complaint.

"The complaint alleges, after stating that Mrs. Wragge is the administratrix of her deceased husband, and, after setting out the names of his wife and children, and their ages, and that the action is brought for their

benefit, goes on to say: "That a public road and way leads from the Atlantic Phosphate Works over and across the track of the defendant to the Meeting street road, in the county and state aforesaid; that on the afternoon of the 14th day of February, Henry H. Wragge, the plaintiff's intestate, was traveling in a vehicle drawn by one horse along the aforesaid road and way from the Atlantic Phosphate Works to the aforesaid Meeting street road, which said road and way crosses the railroad of the defendant at a certain place known as "Atlantic Crossing," and as the said Henry H. Wragge had reached said crossing the defendant carelessly, negligently, and recklessly caused one of its locomotives, with a train of cars attached thereto, to approach said crossing at a very high rate of speed, and then and there to pass rapidly over the track of the said railroad, and negligently, carelessly, and recklessly omitted, while so approaching said crossing, to give any signal by ringing a bell or sounding a steam whistle of said locomotive, as required by law, by reason whereof the aforesaid Henry H. Wragge was unaware of the approach of the said locomotive and train of cars attached thereto; that by reason of the aforesaid negligence of the defendant, and while the said Henry H. Wragge was lawfully upon and passing over said crossing, said locomotive struck the said Henry H. Wragge, whereby he was so seriously injured that he soon thereafter died; that the said Caroline A. Wragge, Daisy Estelle Wragge, James H. Wragge, and Thomas H. Wragge, for the benefit of whom this action is brought, are the widow and children of the deceased, respectively, and were entirely dependent upon him for their subsistence, and sustained by his death great pecuniary injury and damage, viz. \$30,000; wherefore the plaintiff prays judgment against the defendant for the sum of \$30,000, and for her costs and disbursements.' I charge you that under that complaint the cause of action set out there is for the alleged killing of Mr. Wragge at the place or way or road mentioned in the complaint.

"Negligence is a mixed question of law and fact, and where one sues another for negligence it is incumbent upon the pleader to set out the facts upon which he bases his action; and in this connection it is necessary to refer to sections 1685 and 1692 of the Revised Statutes of 1893, as bearing directly upon this case. Section 1685 provides: 'That a bell of at least 30 pounds weight and a steam whistle shall be placed on each locomotive engine, and the bell shall be rung or the whistle sounded by the engineer or fireman at a distance of at least 500 yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place, and if the engine or cars shall be at a stand still within

a less distance than 100 rods of such crossing; the bell shall be rung or the whistle sounded for at least 30 seconds before the engine shall be moved, and shall be kept ringing or sounding until the engine shall have crossed such a public highway or street or traveled place.' Now, the next section (1692) says: 'If the person is injured in his personal property by collision with an engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, unless it is shown that in addition to the mere want of ordinary care the person injured, or the person having charge of his person or property was at the time of the collision guilty of gross or willful negligence, or was acting in violation of law, and that such gross or willful negligence or unlawful act contributed to the injury.' Now, in passing, I would refer to a remark appearing in an opinion of the supreme court in the case of *Kaminitzky v. Railroad Co.*, 25 S. C. 64, which says: 'We do not, however, consider that by the aforesaid provision the main object of the legislature was to make a change in the law of evidence, but to induce compliance with the previous requirement as to signals. The rule of evidence as to negligence was made to apply only in case of failure to give the required signals, and it is manifest that the purpose was to give an additional sanction to the provision requiring the signals to be given.' Now, in connection with the law, I had better take up the requests to charge. The defendant has put in an answer denying the allegations of the complaint, and as a further defense alleges that an accident would not have happened but for the gross negligence of the plaintiff. The law requires me to pass upon these requests to charge, and, as they are very numerous, I shall pass upon them, and instruct you as to the general law.

"The first request of the plaintiff is as follows: 'By the statute law of this state a railroad company is required to have a bell of at least 30 pounds weight and a steam whistle placed on each locomotive engine, and such bell shall be rung or such whistle sounded by the engineer or fireman at the distance of at least 500 yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place.' That is correct, and I so charge you.

"Now, the defendant's request, bearing upon the same subject, is defendant's first request: 'That this action is brought by the administrator of the deceased against the railroad company under the provisions of sections 1685 and 1692 of the Revised Stat-

utes of 1893, being respectively sections 1483 and 1529 of the General Statutes of 1882.' That is correct.

'Now, the second request of the defendant is as follows: 'That section 1685 requires the ringing of a bell of 30 pounds weight, or blowing of a whistle by the engineer or fireman of a locomotive engine at least 500 yards from any crossing of a public road by a railroad track, and that the bell should be kept ringing or the whistle blowing until the locomotive passes the crossing.' That is correct, and I so charge you.

'The second request of the plaintiff is as follows: 'If the testimony satisfies you that Henry H. Wragge was injured in his person by collision with the engine or cars of the defendant at the crossing in question, and that such crossing was a public highway or street or traveled place, and it appears that the corporation neglected to give the signals required by section 1685 of Revised Statutes, and that such neglect contributed to the injury, the defendant corporation is liable for all damages caused by the collision, unless it is shown that, in addition to a mere want of ordinary care, the person injured was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury.' That is correct. The plaintiff alleges that the injury occurred at a public road and way, and the plaintiff must prove his case as stated in his complaint. I shall go back presently to that question of public road or way.

'The third request of the defendant is as follows: 'That section 1692 makes any railroad company neglecting to give the signals required by the statute liable in damages for any injury to any person at the crossing of a public road, provided that failure to give such signals was a proximate cause of the injury.' That request I shall have to modify by changing the word 'proximate,' so as to make it read, 'that such failure to ring a bell, etc., contributed to the injury.'

'Now, the plaintiff's third request is as follows: 'If you believe that the road along which deceased was traveling was a public road, or traveled place, and that he was negligently killed by the defendant where such road or traveled place is crossed by the defendant's railroad, then the proof of contributory negligence on his part, in order to have the effect of dispensing the law and absolving the defendant from all liability, is required to be clear and convincing. It is not to be assumed that a man in his senses will heedlessly imperil his own life.' That is correct. It is taken literally from the decision of the supreme court. Just here I will tell you what is the meaning of negligence. In *Renneker v. Railway Co.*, 20 S. C. 222, the supreme court has defined negligence as follows: 'Negligence is a failure to do what a reasonable and prudent person would ordi-

narly have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in the omission or commission. The duty is divided and measured by the exigencies of the action.' The statute uses the word 'gross' negligence. Gross negligence is the absence of that kind of care which even a careless and indifferent person would be expected to exercise under the existing circumstances.

'The fourth request of the defendant is as follows: 'That the plaintiff cannot recover in this action for any other negligence than the failure to give the statutory signals; and, even if the jury find from the evidence that the railroad company was negligent in other respects, they would not be justified in finding a verdict against the company.' That I charge you as correct, because that is the allegation set out in the complaint.

'The fourth request of the plaintiff is as follows: 'Oulpable negligence, which contributed to the injury, must always defeat the action, but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused, or would not have existed, or no injury would have resulted from it but for the primary wrong, it is not in law to be charged to the injured one, but to the criminal wrongdoer.' That is copied from the supreme court decision, and I so charge you.

'The fifth request of the plaintiff is as follows: 'A man approaching a railroad at a public highway, street, or traveled place has a right to rely upon the railroad's giving the signals required by the statute for that place.' I so charge you, and in connection with that I charge you the twelfth request of the defendant, which is as follows: 'That it is the duty of the person approaching a railroad crossing to use his senses of sight and hearing in order to protect himself from the danger of a collision.' Those two requests I have charged together because a man may rely upon the railroad train giving the signals required by law at that place, and it is also the duty of the person approaching the crossing to use his senses of sight and hearing in order to protect himself from injury, and to listen for the signals the railroad company is required to give.

'Now the sixth request of the plaintiff is as follows: 'By the term "traveled place," as used in the statute, is meant a place across which the public not only have been accustomed to travel, but where they have a right to travel; and if the jury find that the deceased was crossing at such a place, then he was entitled to the statutory signals.' That is correct, and in connection with that I will take up the defendant's fifth request: 'That in order to justify the jury in finding a verdict against the defendant, the plaintiff, the administrator, must prove by the preponder-

ance of the evidence that the deceased was killed through collision with the defendant's locomotive; also that the road over which deceased was crossing the track of the defendant was a public road, and that deceased was killed in crossing it; and, further, that the statutory signals were not given; and, further still, that the failure to give these signals caused the death of the deceased,—that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death.' I cannot go as far as that request goes. The statute says, 'If the neglect to give such signals contributed to the injury,' and I have to modify that request in accordance with the statute. If the failure to give these signals contributed to death of the deceased, it might be sufficient. So modified, I charge you that request.

"The sixth request of the defendant is: 'That unless the plaintiff prove that the crossing referred to in the evidence was the crossing of a public road, plaintiff cannot recover, even if the bell was not rung nor the whistle blown.' I charge you that as correct, because that is the allegation in the complaint.

"The seventh request of the defendant is as follows: 'That, in order to prove that the crossing was that of a public road, plaintiff must show by the preponderance of the evidence that the public had been granted by the owners of the land over which the road passed the right to use the road, or that the public had exercised such right continuously, adversely, and without interference for full twenty years.' And the eighth request of the defendant is as follows: 'That the mere fact that the public were in the habit of using the road alleged to be a public road for twenty years would not be sufficient to make the road a public road; but plaintiff must, in addition, prove that the owner of the lands recognized the right of the public to use the road; in other words, that the road was not simply used with the knowledge and acquiescence of the owners, but there was something more, showing the adverse use of the road by the public.' Now, in regard to the roads this complaint alleges that Mr. Wragge was killed on the public road or way crossing the railroad track. In our statute the term 'public highway' is used as designating those roads laid out by special act of the legislature, or a road created in pursuance of the legislature, or roads taken charge of by the public officers under authority of law. They are such as are usually laid out by the officers of the law in the first instance, or are taken in charge of by the officers of the law, and kept up and maintained, upon which persons are required to work, or are kept in repair at the public expense. I need not go into the definition or attempt to explain to you the private right of way which one or more men may have to pass over the lands of another, but will go directly to what we sometimes term 'neighborhood roads,' where they are known

by various names. It means this: that a 'path,' as termed in the old books, may be beaten across the premises of another or others, and the public travel along that line may continue in order to make it a public road; it is not essentially necessary, nor is it necessary that the public officials of the government should have supervision or control of that road. It is a public road if the public have used it for twenty or more years adversely, because the idea is this: Persons may pass or re-pass in a road or traveled way across the premises of another. If they do so by mere acquiescence or consent of the owners of the land, that does not give them a right in the sense in which that term is used. On the contrary, if they pass by permission, their right then is the right of permission,—a leave to do so. But a neighborhood road becomes a public road when the twenty years have elapsed, and the public have acquired the right to travel it; a right in themselves, separate and distinct from a mere permission. What constitutes that right? The travelling of a road from time immemorial, or for over twenty years, or for so much longer as the evidence may disclose, would be a question of fact for your consideration in determining whether the public had a right or not to travel that road. Upon that I can express no opinion. The right, if it once exists, or the public exercise it, or if it is once asserted and maintained by the public, or that right is acquiesced in or recognized by the owners of the lands, recognized in the public at the expiration of twenty years, it ripens and grows into a legal right. It may have begun in trespass, but use for twenty years has ripened into a legal right.

"The seventh request of the plaintiff is as follows: 'The fact that all persons who desire to do so have been accustomed to cross a railroad at a certain place, with the knowledge and acquiescence of the railroad company, is not, of itself, sufficient to establish the legal right to cross; but there must be something more, something to show an adverse use of the crossing, or something to show that the railroad company recognized the right of the public to cross at the point in question.' I so charge you.

"The eighth request of the plaintiff is as follows: 'If from the testimony you find that the crossing in question has been used by the public for twenty years or more, and the use has been of an adverse character, or that this right to cross by the public has been recognized by the railroad company, then the crossing is a "traveled place" within the meaning of the statute, and the deceased was entitled to statutory signals.' That is correct, because the law requires these signals to be given at a public highway, street, or traveled way crossing the railroad, and it is the duty of railroads to know or to determine what are public highways, streets, or traveled places, and to ring a bell or to sound a whistle as the statute requires.

It would not do for the railroad to be the sole judge, and to be able to say that a certain highway is not a highway, and thereby establish the fact. The law says what a highway, public road, or traveled place is; and what the law says is a public highway, road, or traveled place is a place where these signals must be given.

"The ninth request of the plaintiff is as follows: 'When a railroad company knowingly permits a place not a highway crossing to be used as a crossing by the general public for years, it is bound to use reasonable care at such crossing, even though there is no statute on the subject.' As an abstract proposition of law, that is correct; but, as I have charged you, this action is brought upon an allegation in the complaint based upon the statute, which I have read to you; and, while the proposition is abstractly correct, I do not see its relevancy to this case.

"The tenth request of the plaintiff is as follows: 'If from the evidence you find the crossing in question is not a "traveled place" within the meaning of the statute, but that it has been used by the general public as a crossing for years, and that this use has been acquiesced in by the railroad company, then such company is bound to use reasonable care and prudence at such crossing; and it is for you to determine whether or not reasonable care and prudence required that at the place in question some signals should be given of an approaching train, and whether such signals were given is a question of fact for you.' I charge you that it is a question of fact for you to say under this complaint whether the railroad company failed to sound a whistle or ring a bell, as alleged in the complaint; and as I said on the preceding request, as an abstract proposition of law it is correct.

"The ninth request of the defendant is as follows: 'That if the jury find from the evidence that the road referred to in the testimony was entirely upon the uninclosed lands of a private corporation, and used by that corporation for its own purposes and for the purposes of its employes, agents, or customers, and that it led only from the public road to the phosphate works of the owner of the land, that would not justify the jury in finding the road to be a public road.' I have charged you what a public road was, and I cannot charge you upon the facts of this case; but, if the testimony satisfies you as to the existence of the facts, that law is correct.

"The tenth request of the defendant is as follows: 'That, even if the jury find that the road referred to in the testimony was a public road, the mere fact that the bell was not rung or the whistle blown for at least 500 yards from the crossing, and kept ringing or blowing until the locomotive passed the crossing, would not be sufficient proof of negligence; but that the plaintiff must prove, in addition to the failure to give these sig-

nals, that, but for such failure, the injury would not have occurred.' I cannot charge you that request, and I refuse it.

"The eleventh request of the defendant is as follows: 'That, even if the jury find, from the evidence that the railroad company was guilty of negligence, they are not authorized in finding a verdict against the company if they find that the deceased was not exercising slight care in avoiding collision with the company's train.' That is substantially correct, because the absence of slight care or neglect is given in the definition of gross negligence.

"The thirteenth request of the defendant is as follows: 'That no damage can be recovered in this suit if the jury conclude to find any damages except damages for the actual loss of deceased's wife and children by his death, and nothing must be given for the sufferings of deceased or the loss of his society to the widow, or the wounded feelings of the widow or children, or as a punishment to the railroad company.' That is correct, and I so charge you.

"The fourteenth request of the defendant is as follows: 'That where a public way depends upon adverse use, by adverse use is meant such use as is indicative of a use against the will and consent of the landowner.' That is correct, and I have already charged you that.

"The fifteenth request of the defendant is as follows: 'That recognition by the owner of a legal right in the public to a road means a recognition of their right to use it against his will and consent.' That is correct, and I have already charged you that, if the public assert an adverse right to use it, and do use it for twenty years, it ripens into a legal right, and makes it a public highway.

"The eleventh request of the plaintiff is as follows: 'If you find that the verdict should be for the plaintiff, then you should give such damages as you may think proportioned to the injury resulting from the death of Henry H. Wragge to his widow and children, respectively, for whom and for whose benefit this action is brought. And in estimating damages the circumstances to be considered are the age of the deceased, the amount of his earnings, his habits, health, and the probable duration of his life.' That is correct, only I do not limit you to that. I leave the entire testimony to you, upon which you may see fit to base your verdict. Now, gentlemen, this action is brought for the benefit of the widow and children to recover from the railroad company the loss they have sustained by the death of the father and husband. If you find that the railroad company killed Henry H. Wragge through negligence, as described in the complaint, then what was the loss? What was the loss to them? What was their support and subsistence, and what did they receive from him? It may be—and I do not

mean to express any opinion—that a man may make a large amount of money, and yet all of it may not be expended upon the family; it may not be necessary for their support and maintenance. Therefore the question you will consider is to compensate them in damages for the loss in a pecuniary point of view the widow and children have sustained by being deprived of husband and father. In writing your verdict, if you find for the plaintiff you will say, 'We find for the plaintiff' so many dollars, writing out the amount in words. If you find for the defendant, your verdict will be, 'We find for the defendant.'"

Defendant made and filed the following exceptions: "The defendant herein excepts to the ruling and instructions of his honor, the presiding judge, in charging the jury, in the following particulars, viz.: (1) That his honor, the presiding judge, erred in refusing to charge the jury as requested by defendant: 'That section 1692 makes any railroad company neglecting to give the signals required by the statute liable in damages for any injury to any person at the crossing of a public road, provided that failure to give such signals was a proximate cause of the injury.' (2) That his honor, the presiding judge, erred in modifying the said request to charge by changing the word 'proximate' so as to make it read 'that such failure to ring a bell, etc., contributed to the injury,' without explaining to the jury the meaning of the word 'contributed.' (3) That his honor, the presiding judge, erred in refusing to charge as requested by defendant, 'that plaintiff must prove by the preponderance of the evidence' that the statutory signals were not given, and, further, that the failure to give these signals caused the death of the deceased; that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death. (4) That his honor, the presiding judge, erred in modifying the said foregoing request by changing the expression, 'that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death,' into these words: 'If the neglect to give such signals contributed to the injury,' without explaining to the jury the meaning of the word 'contributed.' (5) That his honor, the presiding judge, erred in refusing to charge, as requested by defendant: 'That, even if the jury find that the road referred to in the testimony was a public road, the mere fact that the bell was not rung, or the whistle blown, for at least 500 yards from the crossing, and kept ringing or blowing until the locomotive passed the crossing, would not be sufficient proof of negligence, but that the plaintiff must prove, in addition to the failure to give these signals, that, but for such failure, the injury would not have occurred.'"

Jos. W. Barnwell, for appellant. Murphy & Legare, for respondent.

McIVER, C. J. The plaintiff, as administratrix of the personal estate of her deceased husband, brings this action to recover damages for the killing of her said husband by the defendant company's negligence. The allegation is that the deceased was killed by a collision with the engine of said company, while attempting to cross the railroad track at a point where it was intersected by a public road along which the deceased was traveling; and that such collision was caused by the failure of the defendant company to give the signals required by section 1685 of the Revised Statutes of 1893 when approaching such a crossing. At the outset of the case the circuit judge ruled (to which ruling there was no exception) that the only cause of action set out in the complaint was the failure on the part of the defendant to give the signals required by the statute when approaching such a crossing, and the trial proceeded under that ruling. At the close of the testimony his honor, Judge Aldrich, before whom the case was tried, charged the jury as is fully set out in the "case." The jury having rendered a verdict in favor of the plaintiff for the sum of \$12,500, a motion for a new trial on the minutes was made, and the circuit judge ordered a new trial unless the plaintiff would remit all over the sum of \$6,020.50. The plaintiff entered a remittitur for such excess, and, judgment having been entered for the balance after deducting the amount remitted, the defendant appealed, and served the exceptions set out in the record. For a full understanding of the case it will be necessary to set out in the report of the case a copy of the judge's charge, in which he considers, in detail, the request to charge, as well as the exceptions taken for the purpose of this appeal. It seems to us that these exceptions present but two general questions: (1) Whether there was any error in refusing to charge, as requested, that, in order to render the defendant liable, the jury must conclude that the failure to give the required statutory signals was the "proximate" cause of the injury sustained; (2) whether there was any error in omitting to explain to the jury the meaning of the term "contributed" as used in the statute, and in refusing to adopt the interpretation of that term as suggested in the defendant's request to charge, because it went too far. This being an action under section 1692 of the Revised Statutes of 1893, it is proper to set out here the precise terms of the statute, which reads as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision,

or to a fine recoverable by indictment, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of law, and that such gross or willful negligence, or unlawful act, contributed to the injury." Now, it will be observed that there is nothing in the language found in this section calculated to convey the idea that the legislature intended to make the liability of the railroad company dependent upon the fact that the neglect to give the statutory signals was the proximate cause of the injury complained of; and, on the contrary, the language used implies no such intention. All that the statute requires is that the neglect to give the prescribed signals shall contribute to the injury, which, in our judgment, is a very different thing from saying that such neglect must be the proximate cause of the injury. In the case of *Thompson v. Railroad Co.*, 24 S. C. 366, the action was to recover damages for the destruction, by fire, of certain property, under the allegation that such fire was communicated by sparks from the locomotive of the defendant company, and the action was based upon the provisions of section 1511 of the General Statutes of 1882; and it was held that under the provisions of that section the question as to proximate or remote cause was eliminated, and the only inquiry was whether the case fell within the terms of that section. As we said in that case: "Under the terms of the act there can be no necessity for an inquiry as to whether the fire caused by the act of the company or its agents was the proximate or remote cause of the destruction of the property in question, as would have been the case under the old law; for it declares in absolute terms, without any qualifications, that the company shall be liable for the destruction of property by fire which originated within the limits of the right of way from some act of the company or its agents or employés, and this precludes any inquiry as to whether the fire so originating was the proximate or remote cause of the damage complained of." While it is true that the case just quoted from arose under a different section from that upon which the present action is based, yet, as it seems to us, the principle upon which that decision rests is applicable here. That principle is that, where a statute imposes a liability under certain conditions therein prescribed, the only question is whether such conditions are found to exist in a given case, and not whether, under the general law, apart from the provisions of the statute, liability would accrue. Now, in the case under consideration the question is whether the conditions prescribed in section 1692 of the Revised Statutes, upon which this action is based, are found to exist; so that the first inquiry is, what are those conditions? and this is an-

swered by the express terms of the statute, which declares that when a person is injured by collision with an engine of a railroad company at a crossing, and it appears that such company neglected to give the prescribed statutory signals, "and that such neglect contributed to the injury," the company shall be liable, except in certain cases, which need not be specified here, as there is no pretense that such exceptions are applicable here. Now, under the express terms of this statute, the only inquiry, so far as the point we are now considering is concerned, is not whether the neglect to give such signals was the proximate cause of the injury,—as might have been the case, apart from the provisions of this statute,—but the inquiry is, in the language of the statute, whether "such neglect contributed to the injury." The cases of *Glenn v. Railroad Co.*, 21 S. C. 466; *Petrie v. Railroad Co.*, 29 S. C. 303, 7 S. E. 515, and *Brown v. Laurens Co.*, 38 S. C. 282, 17 S. E. 21,—cited by counsel for appellant,—are not, in our judgment, in point. In *Glenn's Case* the negligence complained of was the failure to supply the engine with a headlight; and, as it conclusively appeared from the plaintiff's own testimony that the absence of the headlight "had nothing to do with causing the injury," as stated in one part of the opinion, and, in another place, "that the absence of the headlight in no way contributed towards causing the injury complained of," it was very clear that the plaintiff could not recover; for, while there was evidence of negligence on the part of the railroad company in failing to provide a headlight, there was no evidence tending to show that such negligence had anything whatever to do with causing the injury, and in no way contributed to such injury, for, as was pointedly said by that great jurist, Gibson, C. J., in *Hart v. Allen*, 2 Watts, 116, "the defendant is answerable for the consequences of negligence, and not for its abstract existence," and hence such negligence must, in some way, be connected with the injury complained of. In that case, certainly, there is nothing to indicate that the court held that the negligence alleged must be the proximate cause of the injury complained of. So, too, in *Petrie's Case*, the court, in passing upon the question whether the motion for nonsuit was properly refused, after affirming the rule as laid down in *Glenn's Case*, proceeded "to inquire whether there was any evidence tending to show that the failure on the part of the defendant to give the signals required by statute in any way contributed to the injury complained of," and not a word was said indicating that it was necessary to show that such failure was the proximate cause of the injury complained of. As to the case of *Brown v. Laurens Co.*, it will be sufficient to say that the action there was not based upon any such statute as that upon which the present action is based, and hence what was said as to proximate cause does not ap-

ply here. We are of the opinion, therefore, that so much of the exceptions as impute error to the circuit judge in refusing to instruct the jury that, to entitle the plaintiff to recover in this case, they must be satisfied that the negligence imputed to the defendant was the proximate cause of the injury complained of, must be overruled.

This brings us to the consideration of the second general question above stated. This question may be divided into two branches: First, whether the circuit judge erred in omitting to explain to the jury the meaning of the term "contributed," as used in the statute; second, whether the interpretation put upon that word in defendant's requests to charge was the correct interpretation. As to the first branch of this inquiry, it is sufficient to say that there was no request that the circuit judge should define or explain the meaning of the term "contributed" in his charge; so that the only real inquiry is whether the circuit judge erred in refusing the request of defendant to charge the jury, as asked in one of the requests, that the plaintiff must not only prove that defendant failed to give the statutory signals, but must also show "that the failure to give these signals caused the death of the deceased; that is to say, that if, under the circumstances proved in this case, the statutory signals had been given, the deceased would not have come to his death"; or, as was asked in another request, that the jury should be instructed that, to enable the plaintiff to recover, she must prove, "in addition to the failure to give these signals, that, but for such failure, the injury would not have occurred." These two requests, though expressed in different phraseology, practically amount to the same thing, to wit, that the plaintiff could not recover unless the jury should conclude from the evidence, not only that defendant neglected to give the required statutory signals, but also that such neglect was the efficient cause of the injury complained of. Now, it is quite certain that the statute does not contain any such language as that used in either request, but only requires that, as a condition precedent to defendant's liability, it shall be made to appear that the neglect to give the signals "contributed" to the injury complained of. So that the practical inquiry is whether this word, by which the legislature saw fit to express its intention, should properly be interpreted to mean the same thing as that expressed by the words used in the request to charge. The well-settled rule is that words used in a statute must be given their ordinary and popular signification, unless there is something in the statute requiring a different interpretation. As was held by this court in *Akers v. Rowan*, 33 S. C., at page 470, 12 S. E. 171: "One of the primary rules in the construction of a statute is taken in their ordinary

and popular signification, unless there is something in the statute requiring a different interpretation. *Cooley, Const. Lim.* 58, 59; *Potter, Dwar. St.* 127-146. This is really nothing more than a rule of common sense, for it must be supposed that the legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people, for whose guidance and government the law was enacted, unless there is something in the statute showing that the words in question were used in some other sense." Now, as it is apparent that there is nothing in the statute here under consideration to indicate that the word "contributed" was used in any other than its ordinary and popular signification, the only inquiry is, what is such signification? This word is of frequent occurrence in the text-books and in the decided cases, where it most frequently appears in questions of contributory negligence. The foundation upon which the doctrine that contributory negligence on the part of the plaintiff will constitute a defense to an action to recover damages for an injury caused by the negligence of another rests is that, when such injury may be partly the result of the defendant's negligence and partly the result of the plaintiff's own negligence, the court will not undertake to graduate or apportion the damages according to the contribution from either side, but will leave the parties as they found them. This repels the idea that the word "contributed" or "contributory" ever has been understood to bear such an interpretation as that claimed for it by appellant. On the contrary, it seems to us that in the ordinary and popular signification of the term, one thing is understood to contribute to a given result when such thing has some share or agency in producing such result, and is not understood to convey the idea that such thing was the efficient cause of such result in the sense that without it such result would not have occurred; for it is possible such result may have occurred, even in the absence of the thing which is supposed to have had some share or agency in producing such result. To apply this to the case in hand, it may have been possible that the disaster would have occurred even if there had been no neglect on the part of the defendant to give the signals; and yet, if there was such neglect on the part of the defendant company, and such neglect contributed in any way to the disaster, in the sense that it had any share or agency in bringing about the disaster, the defendant, under the express terms of the statute, would still have been liable. It seems to us, therefore, that there was no error on the part of the circuit judge in instructing the jury in the express terms of the statute, and no error in refusing to instruct the jury as requested by the defendant.

Having reached this conclusion, the position taken by the counsel for respondent, that none of the requests to charge could properly be considered, because not presented to the circuit judge in the form prescribed by the rules of court, becomes immaterial in the case, and therefore, ordinarily, would not be considered. But as that position involves a question of practice which it is important for the interests of the bar to settle, we will not decline to consider it now. This position is based upon the rule of the circuit court which, among other things, requires counsel to note, in the margin opposite each request to charge, the authorities relied on to support the position of the law contained therein, and produce the same when required by the court. This position is conclusively disposed of by the fact that it nowhere appears that any such position was taken before the circuit judge, or that he was requested to make, or did make, any ruling upon the subject; and hence, under the well-settled rule, there is nothing before this court to review. Besides, it appears that the circuit judge, without objection, either from counsel or from the court itself, so far as the "case" shows, did consider and dispose of each request; and, in the absence of any evidence to the contrary, we must assume that the requests were submitted in proper form. The point of the objection seems to be that counsel for appellant failed to note, in the margin of his requests, the authorities upon which he relied; but, for all that appears in the "case," no authorities were relied upon, and, if so, of course none could be noted. At all events, it seems to us that this court would be going very far—much further than we are disposed to go—to refuse to consider whether a circuit judge has erred in refusing to charge a proposition of law, simply because it was presented in a request alleged to have been framed in disregard of a technical requirement of a rule of the circuit court; especially when such refusal was not based upon a failure to comply with such technical requirement. The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 556)

**ARCHER et al. v. LONG, Sheriff.**

(Supreme Court of South Carolina. July 16, 1896.)

**CLAIM AND DELIVERY—ALTERNATIVE JUDGMENT—PARTIAL PERFORMANCE.**

Where there is a judgment in favor of defendant, in claim and delivery, for the return of the property, and in the alternative for its value, in a specified sum, and plaintiff returns only part of the property, he will be permitted to show the value of the property not returned. McIver, C. J., dissenting, on the ground that plaintiff may show only the value of the property returned.

Appeal from common pleas circuit court of Union county; Benet, Judge.

Action of claim and delivery by Sarah J. Archer and others, against J. G. Long, sheriff, in which there was a judgment in favor of defendant for a return of the property, or for the sum of \$1,700, the value thereof, in case of failure to return it. Only part of the property was returned to defendant, and it was sold under execution for \$345.10, which sum was applied on the judgment. From an order denying a motion by plaintiffs to be allowed to introduce testimony showing the value of the property not returned, they appeal. Reversed.

For prior reports, see 11 S. E. 86; 14 S. E. 24, 26; 15 S. E. 380; 16 S. E. 998; 19 S. E. 696; 20 S. E. 539.

Judge Benet's order was as follows:

"This was an action of claim and delivery, tried at the October term, 1890, of this court. The verdict and judgment were in favor of the defendant, for the return of the property in dispute, or for the sum of \$1,700, the value thereof, in case a recovery could not be had, and for the costs and disbursements of the action. The sheriff being a party to the suit, execution was issued to and lodged with the coroner of the county, who, on April 15, 1893, delivered to the defendant a part of the property described in the execution, and made return that the balance of it could not be found. He also made return upon the execution that the plaintiffs had no property within his county whereof he could levy, as commanded therein. The defendant, as sheriff of the county, then advertised and sold that part of the property which had been returned to him, under and by virtue of certain executions in his hands which he had levied upon it, and it brought \$345.10, which was applied towards the partial satisfaction of said executions, leaving still due and unpaid thereon a considerable balance. On August 3, 1894, an order in supplementary proceedings herein was made by his honor, Judge Watts, then the presiding judge in this circuit, by which J. Wright Nash, Esq., was appointed referee, to take and certify the examination of H. F. Means and W. J. Beaty, as executors of the last will and testament of Robert Beaty, Sr., deceased, who was alleged to be indebted to plaintiffs. This is a motion on the part of plaintiffs for an order allowing plaintiffs to introduce testimony in their behalf, before J. W. Nash, who has heretofore been appointed special master, showing the value of that part of the property described in the complaint which was not found by the coroner, and delivered by him to the defendant, as well as on other points.' The last clause in the notice of the motion above quoted is very general, but counsel for plaintiffs stated at the hearing that the only points upon which they desired to introduce

testimony were—First, to show the value of that part of the property which was not returned to the defendant, and that for the purpose of having the court order that the value of that, as shown by such testimony, be paid upon the judgment in full satisfaction thereof; and, second, to show that the judgment herein is void, because Judge Wallace, before whom the cause was tried, was disqualified, on account of being interested in the event of the suit, in that he was, at the time of the trial, a creditor of one of the plaintiffs, to wit, Mrs. Jessie M. Thomson. Upon this latter point, it is admitted by counsel for the plaintiffs that they [the plaintiffs] have already heretofore made a motion to set aside the judgment herein upon this very same ground; that the said motion was duly heard by his honor, Judge Witherspoon, who, after hearing the affidavits and evidence pro and con, passed an order in which he refused the motion upon the merits; that from this order an appeal was taken to the supreme court, which was dismissed; that thereafter the plaintiffs moved the supreme court to reinstate their appeal; and that said motion was refused, after having been heard on its merits, and an order filed to that effect. Now, it is clear to my mind, that upon both these points the plaintiffs are estopped,—upon the first by the judgment and verdict herein; and upon the second by the order of Judge Witherspoon. To allow them to introduce the testimony which they propose would be to open up for reconsideration and review matters that have already been duly and solemnly considered, and passed into the judgment of this court. This cannot be done. It is therefore ordered that the motion be, and it is hereby, refused. It is further ordered that the original notice of this motion and the affidavit of A. G. Means be filed herewith.”

The grounds of appeal were as follows:

“Because his honor, W. C. Benet, the presiding judge, erred: (1) In holding that the plaintiffs were estopped from showing the value of that part of the property which was not returned to the defendant, for the purpose of having the court order that the value of that part, as shown by such testimony, be paid upon the judgment, in full satisfaction thereof. (2) In holding that the plaintiffs were estopped from showing that the judgment herein is void, because Judge Wallace, before whom the cause was tried, was disqualified, on account of being interested in the event of the suit. (3) In holding that to allow plaintiffs to introduce the testimony which they propose would be to open up for reconsideration and review matters that have already been duly and solemnly considered, and passed into the judgment of the court. (4) In holding that the plaintiffs could not introduce the testimony which they proposed, as that would be to open up for reconsideration and review matters already

duly and solemnly considered, and passed into the judgment of the court. (5) In passing his said order on matters which were neither presented nor embraced in the foregoing notice or the accompanying affidavit. (6) In holding that the price of the property, at the sale by the sheriff, under execution herein, on sales day in May, 1893, was the sole and proper credit on the judgment, and execution herein. (7) In holding that there is still due and owing a considerable balance on the execution in said action. (8) In not holding that, inasmuch as the verdict and judgment herein decided title in A. G. Means of the property in dispute, that the plaintiffs, as third parties, could not be held for the proposed balance on judgment, amounting, under his honor's ruling, to about \$2,200, instead of the just and lawful sum of about \$150, as the balance due. (9) In not holding that the defendant was committed and restricted to his plain statutory remedy of suit upon the outstanding replevin bond, which is absolutely good and gilt-edged, and, with condition broken by the alleged omission to return a part of the property in dispute, presents to said defendant full and adequate legal remedy for any balance herein due. (10) In refusing and overruling plaintiffs' motion, as above set out.”

W. W. Thomson, for appellants. Carlisle & Hydrick, for respondent.

GARY, J. This action was commenced on the 11th of August, 1888, for claim and delivery of nine mules, three wagons, five cows, seven hogs, a lot of farming implements, and a threshing machine and fan. The case was tried at the October, 1890, term of the court, and resulted in a verdict for the defendant for the return of the property in dispute, or for the sum of \$1,700, the value thereof, in case a delivery could not be had. Judgment was entered in accordance with the verdict, and for the costs and disbursements of the action. The sheriff being a party to the suit, the coroner of the county, with whom the execution was lodged, delivered to the defendant a part of the property described in the execution on the 15th of April, 1893, and made a return that the balance could not be found. A. G. Means, the father of the plaintiffs, in his affidavit states that the remainder of the property, consisting of three mules, three cows, and five hogs, was worth, in his judgment, not exceeding \$150. The affidavit of the defendant, among other facts, states that “he duly advertised the property so returned to him, under and by virtue of executions in his hands against A. G. Means, Sr., under which he had levied upon it when the action was commenced against him, and sold the same at public auction on sales day in May, 1893, and that it brought the sum of \$345.10, which was applied towards the satisfaction of said executions, and that after such application said

executions still remained unsatisfied, and that no part of the costs and disbursements of this action has been paid, and that the judgment and execution herein still remained unsatisfied." His affidavit further sets forth in detail the rendition and entry of two other judgments in his favor against the plaintiffs, and that executions thereupon were duly issued and lodged with the coroner, that the same have been returned wholly unsatisfied, and remain unpaid. On the 23d of July, 1894, his honor, Judge Watts, granted an order, in supplementary proceedings, which, after the usual preliminary recitals, proceeds as follows: "It is further ordered that the said Henry F. Means and W. J. Beaty, as executors of the last will and testament of Robert Beaty, deceased, be, and each of them is hereby, required to appear before me at my chambers at Spartanburg, S. C., on Friday, the 3d day of August, 1894, at 10 o'clock a. m., to be examined on oath concerning the indebtedness of them, and each of them, to the plaintiffs named, or any or either of them." A copy of this order was served upon W. W. Thomson, Esq., plaintiffs' attorney, on the 24th day of July, 1894. At the request of W. W. Thomson, his honor, Judge Watts, postponed the examination, and appointed J. W. Nash special master to take the testimony and certify the examination of said parties at such time and place as he might appoint. Duncan & Sanders, then plaintiffs' attorneys, served notice on defendant's attorneys that they would make a motion before his honor, Judge Benet, at Spartanburg, on the 7th of August, 1895, for an order allowing the plaintiffs to introduce testimony in their behalf before J. W. Nash, who had been appointed special master, showing the value of that part of the property which was not found by the coroner, and delivered by him to the defendant, "as well as on other material points in the matter." The record in the case showed that, under the order of his honor, Judge Watts, the special master appointed by him had held a reference on July 12, 1895, and had taken and reported the testimony of the persons ordered to be examined. The motion was heard by his honor, Judge Benet, and refused, for the reasons stated in his order, which, together with appellants' exceptions, will be incorporated in the report of the case.

No objection seems to have been urged against granting the order on the ground that J. W. Nash was no longer special master at the time the motion was made. The second exception has been abandoned. This court will therefore consider the only other question raised by the exception, to wit, whether his honor, the circuit judge, was in error in refusing the motion on the ground that "to allow them to introduce the testimony which they propose would be to open up for reconsideration and review matters that have already been duly and solemnly considered, and passed into the judgment of the court." The plaintiffs' motion was not intended to raise

any question as to the validity of the judgment, nor any matters adjudicated by it, but to have a fact ascertained occurring after the rendition of the judgment, to wit, the amount necessary to satisfy the judgment after crediting it with the property returned to the defendant. When the question arose as to the amount necessary to satisfy the judgment, it was important to ascertain this fact, so as to be able to carry into effect the provisions of the Code as to supplementary proceedings, without detriment to the rights of at least some of the parties to the action. Subdivision 2 of section 312 of the Code of Civil Procedure is as follows: "After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the court, or a judge thereof, that any judgment debtor has property which he refuses to apply towards the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear at a specified time and place to answer concerning the same; and such proceedings may thereupon be had, for the application of the property of the judgment debtor, towards the satisfaction of the judgment, as are provided upon the return of an execution." Section 313 of the Code of Civil Procedure provides: "After the issuing of execution against the property any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution. \* \* \*" It will thus be seen how important it is to know the amount remaining unpaid on the execution.

It is a familiar principle that a court of equity will exercise, even by an independent action in a proper case, its powers of injunction, by restraining proceedings under a judgment and execution which have been paid. So, whenever it becomes necessary, during the progress of a case, to know the extent to which payments have been made on a judgment, the court will render all reasonable aid to ascertain such fact. The object of section 233 of the Code of Civil Procedure, under which the jury rendered the verdict herein, is thus stated by Mr. Chief Justice McIver, in *Finley v. Cudd*, 42 S. C. 127, 20 S. E. 34: "It seems to us that the real object of the section of the Code under which this question arises is of a twofold character: First, to protect the rights of the true owner of the property, and to regain possession of his property in specie, if practicable; second, to save the party who may be innocently, but illegally, in possession of the property of another from being compelled to pay such value as the jury may see fit to place upon the property, by giving him the alternative of returning the property to its rightful owner and only paying such damages for its detention as may be determined to be proper." If the plaintiff returns the chattels adjudged to be the property of the defendant, within a reasonable time, in as good con-

dition as they were at the time the judgment was rendered, and pays whatever damages have been assessed, together with the costs of the action, the judgment will thereby become inoperative, and satisfaction should be entered upon the record. In this case the jury rendered an alternative verdict for the value of the property, but did not assess any damages. Therefore, in this case, a return of the property, within a reasonable time after the rendition of the judgment, in as good condition as when the judgment was rendered, and payment of the costs, would have extinguished the judgment. When a part of the property is returned, but not within a reasonable time, nor in as good condition as when the judgment was rendered, the property so returned works satisfaction of the judgment in the proportion which the value of the returned property bears to the value of all the property as assessed by the jury. The value of the property is concluded by the verdict of the jury, and is the standard by which to determine the proportionate amount that should be credited on the judgment; and as it is not known at this time what amount is still due on the judgment, the plaintiffs should be allowed to renew their motion, looking towards the ascertainment of this fact. *Trimmier v. Vise*, 17 S. C. 504. It is the judgment of this court that the order of the circuit court be reversed.

McIVER, O. J. (dissenting). The defendant, as sheriff, having levied upon certain personal property as the property of one A. G. Means, Sr., under certain executions in his office against said Means, the plaintiffs set up a claim thereto, and brought this action of claim and delivery to recover the possession thereof from the defendant, who had seized the same under said executions; and, the plaintiffs having given the required undertaking, the property was delivered to them. The action of claim and delivery resulted in a verdict for defendant, and for a return of the property, and, in case such return could not be made, for the sum of \$1,700, the value thereof; and judgment was entered in accordance with the verdict, and for the costs and disbursements of the action. Upon appeal from such judgment it was affirmed by the supreme court. From this judgment plaintiffs could have relieved themselves by doing one of two things: (1) By returning the property in dispute, and paying the costs of the action; (2) by paying the value of the property, as finally fixed and determined by the judgment, together with the costs. It appears now that the plaintiffs have returned only a part of the said property, and that they cannot return the balance. So that the practical inquiry is, to what amount are the plaintiffs entitled to credit on the whole value of the property as ascertained and finally determined by the judgment? It seems to me that the obvious answer is that the amount of the credit to

which plaintiffs are entitled is the real value of the property which was returned. For, if none of the property had been returned, then certainly the plaintiffs would have been liable to pay the whole amount of the value thereof, as ascertained and finally determined by the judgment; but if, on the other hand, the plaintiffs had returned all of the property in dispute, then they could not be required to pay anything but the costs. It seems to me, therefore, that the question as to what is the value of the property which has not been returned is an immaterial inquiry. And, as the motion was to allow the plaintiffs to introduce testimony "showing the value of that part of the property, described in the complaint, which was not found by the coroner and delivered by him to the defendant, as well as on other material points in the matter," I think it was properly refused, for the reason that, as I have said, such testimony was immaterial; and the application to introduce testimony "on other material points in the matter," which in the decree of the circuit judge is explained to mean testimony as to another point, which has been formally abandoned in this case, becomes likewise immaterial. But, while this is so, yet I am quite willing, in the interests of fairness and justice, that plaintiffs shall have an opportunity, if they so desire, to apply for an order allowing them to introduce testimony to show what was the real value of the property which was returned, in order that such value may be credited on the \$1,700 ascertained by the judgment to be the value of the whole of the property; for, while it does appear that the portion of the property which was returned has been sold by the sheriff, and ordinarily the amount of such sale would be, at least prima facie, the test of its value, yet, if the plaintiffs can show that its real value exceeded the sum which it brought at sheriff's sale, I think they ought to be permitted to do so. It seems to me, therefore, that the proper judgment in this case is that the order of his honor, Judge Benet, be affirmed, but without prejudice to the right of the plaintiffs to make another motion, upon due notice, for the purpose indicated above.

JONES, J. I concur in separate opinion of Chief Justice McIVER.

(47 S. C. 150)

CUNNINGHAM et al. v. CAUTHEN.

(Supreme Court of South Carolina. July 16, 1896.)

APPEAL—COSTS—TAXATION—EXAMINATION OF WITNESS UNDER AOT 1883—CROSS INTERROGATORIES.

1. The prevailing party in an appeal is entitled to costs, without regard to the final result of the action in the circuit court.

2. Such costs do not fall within the statutory provision empowering the circuit judge to direct in equity cases which of the parties shall pay the costs.

8. Where a witness is examined under the provisions of Act 1883 (18 St. at Large, 378), cross interrogatories are not necessary; and, since the statute makes no provision for the taxing of costs for cross interrogatories, a party who chooses to use them can make no charge for them.

Appeal from common pleas circuit court of Lancaster county; Townsend, Judge.

Action by William J. Cunningham and others against Lewis J. Cauthen, administrator of the estate of Andrew J. Kibler, deceased. From an order made on motions to correct the taxation of costs as allowed by the clerk, both sides appeal. Modified.

#### Order of Judge Townsend.

"Under the decree and orders of the court herein, the clerk of this court proceeded to tax the costs and disbursements of the plaintiffs in this action, and entered the same in the judgment in favor of the plaintiffs, and against the defendant. Both the plaintiffs and the defendant gave notice of motions to be made before the court to correct the taxation of the costs as made by the clerk herein, in certain specified particulars; and the defendant also gave notice of a motion for an order directing the clerk to tax certain costs and disbursements claimed by the defendant against the said plaintiffs. These motions came on to be heard at Lancaster at the last term of the said court.

"The motion by the defendant for an order allowing the taxation of certain items as costs and disbursements now taxable in favor of the defendant, and against the plaintiffs, is, in effect, a motion for an order for judgment against the plaintiffs, and in favor of the defendant, for such costs and disbursements. The motion cannot be granted, for the reason that it has already been finally adjudged in this action that the costs and disbursements thereof shall be paid out of the estate of the defendant's intestate.

"This is an equity cause, in which the costs and disbursements are subject to the control of the court; and the power to direct the payment thereof has already been exercised by the court in orders made at previous terms, requiring that same shall be paid out of the estate of the defendant's intestate. In the order of Judge Witherspoon, dated January 16, 1891, it is directed 'that the costs of this action be paid by the estate of Andrew J. Kibler.' Upon an appeal afterwards to the supreme court, this order was so far vacated as to leave the question as to the payment of the costs of the action to be determined by the final decree of the circuit court thereafter to be made. The matter of directing the payment of the costs being thus again referred to the circuit court, a final decree was made by Judge Gary on the 6th day of May, 1894, ordering 'that the costs of this action should be paid out of the estate of Andrew J. Kibler.' An appeal from this final decree was taken by the defendant, one of the grounds of appeal being 'that the circuit judge erred in requiring the

costs of the case to be paid out of the estate of Andrew J. Kibler, deceased.' The supreme court affirmed the decree of Judge Gary in every particular, and overruled the above-stated exception thereto taken by the defendant. Upon this judgment by the supreme court being remitted to the circuit court, an order was made by Judge Earle, dated June 19, 1895, directing the entry of judgment in favor of the plaintiffs, and against the defendant, for certain specified sums, and 'for the costs and disbursements of the said plaintiffs in this action, to be taxed by the clerk, and entered in the judgment against the said defendant.' It is very clear from these decrees and orders that it has already been finally adjudged that the costs of this action are to be paid out of the estate of the defendant's intestate, and that no costs are to be taxed against the plaintiffs. Therefore the motion by the defendant for an order that certain costs and disbursements be now taxed against the plaintiffs must be refused.

"The other motion made by the defendant, as already stated, is to correct the taxation of costs made by the clerk herein by disallowing certain items of costs and disbursements taxed in favor of the plaintiffs, and against the defendant. As has already been shown, the orders and decrees heretofore made herein directed the taxation by the clerk of the costs and disbursements of the plaintiffs in this action, and the entry thereof in the judgment in favor of the plaintiffs, and against the said defendant. It follows, therefore, that whatever comes within the description 'the costs and disbursements of this action' was properly taxed by the clerk and entered in the judgment in favor of the plaintiffs, and against the defendant. The only question now open is whether any of the items of costs and disbursements allowed and taxed by the clerk fail to come within the description 'the costs and disbursements of the plaintiffs in this action.' If the costs and disbursements allowed and taxed by the clerk are costs and disbursements of the plaintiffs in this action, recognized by the statutes upon the subject, then such costs and disbursements were properly taxed against the defendant.

"The defendant's first objection is that there was \$35 too much allowed by the clerk to plaintiffs' attorneys for attending references previous to the first report, on the ground that there were only 40 days of references, instead of 47. The weight of evidence is in favor of 47, and I sustain the clerk in this allowance, and overrule the objection. I overrule the clerk in regard to the second allowance objected to by the defendant, viz. \$5 for exceptions to the first report, for the reason that plaintiffs' exceptions thereto were overruled. I sustained the third objection by defendant, viz. to the allowance of \$45 to plaintiffs' attorneys for costs on appeal to supreme court, for the reason that plaintiffs did not succeed in that ap-

peal. I sustain the clerk's allowance of \$15 to plaintiffs' attorneys for three days' reference concerning the second report, the weight of the testimony being that way; and hence the defendant's fourth objection is overruled. I sustain defendant's fifth objection, and overrule clerk's allowance of \$5 for exceptions to second report, on the ground that said exceptions were overruled. I sustain the sixth objection by defendant, and overrule this allowance to plaintiffs' attorneys of all supreme court costs on second appeal, because the plaintiffs did not prevail in said appeal. I overrule defendant's seventh objection, and sustain the allowance of \$141 to the referee, on weight of evidence. The defendant's eighth objection must be sustained, and the allowance by the clerk of the items \$75, \$5.26, \$1.05, 25 cents, \$96.52, \$5.10, \$15.40, \$80.25, \$7.60, \$40.12, \$24.75, and \$3 are overruled, on the ground that all of them relate to appeals to the supreme court in which the plaintiffs did not prevail in any respect. All costs for defendant against the plaintiffs are disallowed, under previous orders of this court directing the estate of A. J. Kibler to pay all costs.

"It remains to consider the motion by the plaintiffs to correct the taxation of the costs and disbursements in favor of the plaintiffs, and against the defendant, made by the clerk herein, by allowing and taxing against the defendant certain additional items of costs and disbursements. The first item of costs and disbursements proposed by the plaintiffs and disallowed by the clerk is the charge of eight (\$8) dollars 'for cross interrogatories for P. H. Nelson.' There was no affidavit or other proof by the defendant in contradiction of the affidavit by the plaintiffs' attorney in support of this charge; but it is objected by the defendant that as P. H. Nelson was not examined by commission, but on notice, under the act of 1883, no charge for cross interrogatories can be allowed. It appears that neither the attorneys for the defendant nor the counsel for the plaintiffs attended at the examination of the witness which was had before a notary public in Kershaw county; but 'interrogatories for P. H. Nelson' were served by the defendant's attorneys along with the notice of taking the deposition, and 'cross interrogatories for P. H. Nelson' were served by the plaintiffs. The examination of the witness was held upon this notice and these interrogatories, and his deposition was used in the cause. Section 2551 of the Revised Statutes provides for the taxation of costs for cross interrogatories, eight (\$8) dollars; and the cross interrogatories were as necessary and proper in this case as in any other. It is therefore considered that this item of costs should have been taxed by the clerk and entered in the judgment in favor of the plaintiffs, and against the defendant. The second, third, fourth, and fifth items of costs alleged by the plaintiffs as improperly disallowed by the clerk are as follows: '(2) For briefs for circuit judge, 1st trial, \$5; (3)

for trial of the case in circuit court, 1st trial, \$5; (4) for briefs for circuit judge, 2d trial, \$5; (5) for trial of the cause in circuit court, 2d trial, \$5,—of which the second and fourth are allowed, and the third and fifth are disallowed. The sixth item of costs and disbursements alleged by the plaintiffs as improperly disallowed by the clerk is the charge of \$90, referee's fees, 'for number of days actually engaged in making 1st report, stating accounts,' etc.; said number of days so actually occupied being proven by the affidavit of the referee as 51 days, 'but only charged by the referee as 30 days in stating accounts and making report.' And the seventh item of costs and disbursements alleged by the plaintiffs as improperly disallowed by the clerk is the item of \$18, referee's fees, 'for six days occupied in the business of the reference in making last report, restating the accounts,' etc., in conformity to the decrees herein. By the order of reference herein, the referee was required to take the testimony, report his findings of fact and conclusions of law, and state the accounts of Andrew J. Kibler, as administrator of the estate of J. A. Cunningham, with the estate and with each distributee. It was necessary that the referee should, after the conclusion of the taking of the evidence, examine a large mass of testimony, scrutinize a vast number of vouchers, and that he should make numerous calculations of interest and commissions in stating the accounts between the said administrator of Cunningham and the estate of his said intestate, and between the said administrator and the several distributees, the plaintiffs herein. It was necessary, under the order afterwards made to restate the accounts, that the referee should again make calculations of interest and commissions to conform the stated account to the principles settled by the decrees herein. The accounts so stated and restated extended over a period of twenty or twenty-five years. The referee has made affidavit that he was so occupied on the 1st report for a period of fifty-one days; but he only charged for thirty days as actually necessary and fully occupied in so examining the testimony and vouchers, and in stating accounts, and in making said report. The referee also made affidavit that he was engaged in restating the accounts and in making the second report for the period of six days. This affidavit was before the clerk, but he allowed the referee only the sum of three dollars for each report, although there was no evidence to contradict the affidavit of the referee that thirty days and six days, respectively, were occupied and were necessary in making these two reports, stating the accounts, etc. From the mass of the testimony in the case, and from the length of the accounts and the reports, this affidavit of the referee is fully supported by the record. The referee was at the time the clerk of the court, and experienced in the work of stating accounts, and in the general business of a referee. The allowance by the clerk, in taxing these costs,

of only three dollars in each instance, instead of ninety dollars and eighteen dollars, respectively, as shown by the affidavits to be correct, seems to have been based upon the theory that, as the Code allows three dollars to a master for making a report, only three dollars should be allowed to a referee for the time occupied by him in stating accounts, examining evidence, and making his report, although there is no similar provision as to a referee. Section 2556 of the Revised Statutes provides that 'each referee shall be entitled to receive for every day occupied in the business of the reference the sum of three dollars.' There is no provision anywhere in the statutes fixing any sum as the amount to be paid a referee for making a report; but the general provision above quoted, that the referee shall receive three dollars for every day 'occupied in the business of the reference,' plainly covers the time engaged in the making of the report. The referee, who is required by the order of reference to take testimony, hear arguments, state accounts, and make a report, is as clearly 'engaged in the business of the reference' during the days when he is stating the account, examining evidence and vouchers, and making his report, as when he is taking testimony. The one is as much a part of 'the business of the reference' as the other. The uncontradicted proof is that the referee in this case was occupied in examining the evidence, in stating the accounts, and in making up his report, for the full period of thirty days before the first report, and for the full period of six days before the second report. It is very clear that, while so engaged, he was 'occupied in the business of the reference,' as the orders of reference required the statement of accounts and the making of the reports; and it follows that the taxation of costs in this case should be corrected by striking out the allowance of only three dollars for first report, and substituting ninety dollars instead, and by striking out the allowance of three dollars for second report, and substituting eighteen instead.

"It is therefore ordered that the taxation of costs made by the clerk herein be corrected by charging therein in favor of the plaintiffs, and against the defendant, the following additional items, mentioned above, that is to say:

As costs of plaintiffs' attorneys:	
For cross interrogatories for P. H. Nelson .....	\$ 8 00
For briefs for circuit judge, 1st trial .....	5 00
For briefs for circuit judge, 2d trial .....	5 00

Disbursements—Referee's costs:	
For number of days actually occupied in the business of the reference in making 1st report, stating accounts, etc., 30 days, at \$3.00 .....	90 00
For number of days actually occupied in the business of the reference in making 2d report, stating accounts, etc. ....	18 00

Total additional costs of referee, in addition to other costs allowed referee for taking evidence, etc.	\$108 00
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"The said taxation of costs must then be further corrected by striking out the two items of \$3 each allowed the referee in former taxation for making the 1st and 2d reports, respectively; said two items being covered by the two items of \$90 and \$18 above stated. The clerk will enter the correction of the taxation of the costs herein accordingly, and will amend and correct the judgment in favor of the plaintiffs, and against the defendant, so as to conform the same to the amended taxation of costs. In all other respects other than as above specified, the taxation of costs by the clerk is confirmed."

#### Plaintiffs' Grounds of Appeal.

"Within the time prescribed by law, the plaintiffs gave due notice of intention to appeal to the supreme court of the said state of South Carolina from the above order; and the plaintiffs now appeal to the said supreme court, and will move the said court to reverse or modify the said order upon the following grounds:

"First. Because the circuit judge, having correctly concluded that the power to direct the payment of the costs and disbursements of the plaintiffs in this action had been already exercised in previous orders of the court directing judgment in favor of the plaintiffs, and against the estate of the defendant's intestate, for such costs and disbursements, erred in concluding that the following items of the costs and disbursements of the plaintiffs in this action should not be taxed against the estate of the defendant's intestate, that is to say: (1) The item of \$5, plaintiffs' attorneys' costs 'for exceptions to the first report' of the referee, which item was disallowed by the circuit judge for the reason, as stated by him, 'that plaintiffs' exceptions thereto were overruled.' (2) The item of \$10, plaintiffs' attorneys' costs 'for making and serving case on appeal to supreme court, 1st appeal'; \$15, for 'appeal to supreme court, 1st appeal'; and \$20, for 'argument in supreme court, 1st appeal,'—which said items (aggregating forty-five dollars) were disallowed by the circuit judge for the reason, as stated by him, 'that plaintiffs did not succeed in that appeal.' (3) The item of \$5, plaintiffs' attorneys' costs for 'exceptions to the 2d report' of the referee, which item was disallowed by the circuit judge, as stated by him, 'on the ground that said exceptions had been overruled.' (4) The items of plaintiffs' attorneys' costs of \$10, for 'making and serving case, etc., on 2d appeal to supreme court'; of \$15, for 'appeal to supreme court, 2d appeal'; and of \$20, for 'argument in supreme court, 2d appeal,'—which said items were disallowed by the circuit judge for the reason, as stated by him, that 'the plaintiffs did not prevail in said appeal.' (5) The items of disbursements by the plaintiffs of \$75, paid for 'printing testimony for 1st appeal'; of \$5.28, paid 'deputy clerk for copying report and papers'; of \$1.05, paid 'probate judge for copying order of sale of Cunningham estate (made by order and for

use of circuit judge'); of 25 cents, paid for 'sending briefs to supreme court'; of \$58.52, paid for 'printing brief for supreme court'; of \$5.10, paid for 'copying case for supreme court'; \$15.40 and \$80.25, paid for 'printing points for supreme court, 1st appeal'; of \$7.60, paid for 'copy of decision of supreme court'; of \$40.12, paid for 'printing 2d brief for supreme court'; and of \$24.75 and \$3, paid for 'printing points for plaintiffs on 2d appeal to supreme court,'—which said items were disallowed by the circuit judge for the reason, as stated by him, 'that all of them relate to appeals to the supreme court in which plaintiffs did not prevail in any respect.' (6) The items of plaintiffs' attorneys' costs of \$5, for 'trial of the cause in the circuit court, 1st trial'; and of \$5, for 'trial of the cause in circuit court, 2d trial,'—which items were disallowed by the circuit judge without reason assigned.

"Second. Because, as to each and every one of the items mentioned in division 1 of these grounds of appeal, the circuit judge erred in setting aside and disregarding the previous orders of the court herein directing judgment to be entered in favor of the plaintiffs, and against the estate of the defendant's intestate, 'for the costs and disbursements of the said plaintiffs in this action, to be taxed by the clerk.'

"Third. Because, as to each and every one of the items mentioned under subdivisions 2, 4, and 5 of division 1 of these grounds of appeal, the circuit judge erred in finding as matter of fact that same 'relate to appeals to the supreme court in which plaintiffs did not prevail in any respect.'

"Fourth. Because, even if the items mentioned under subdivisions 2, 4, and 5 of division 1 of these grounds of appeal were items of costs and disbursements relating to appeals to the supreme court in which plaintiffs did 'not prevail in any respect,' nevertheless the same are, as is in effect found by the circuit judge, costs and disbursements of the plaintiffs in this action; and the circuit judge had no power to disregard or set aside in whole or in part the previous orders of the court herein, directing the entry of judgment in favor of the plaintiffs, and against the defendant, for the said 'costs and disbursements of the plaintiffs in this action'; and the circuit judge therefore erred in disallowing the said items, as well as in disallowing all the other items above mentioned, and erred in failing to order the taxation and entry of all the said items in the judgment in favor of the plaintiffs, and against the defendant."

Ernest Moore, for plaintiffs. R. E. & R. B. Allison, for respondent.

McIVER, C. J. In this case both sides appeal from an order made by his honor, Judge Townsend, on motion to correct the taxation of costs as allowed by the clerk. It appears that the original decree was rendered by his honor, Judge Witherspoon, from

which both sides appealed, which was disposed of as appears by the report of the case in 37 S. C. 123, and 15 S. E. 917, from which it will be seen that the plaintiffs were wholly unsuccessful in that appeal, while the defendant succeeded in materially modifying the circuit decree. Mr. Justice McGowan, delivering the opinion of this court, in speaking of the exceptions to that portion of the decree of Judge Witherspoon which adjudged "that the costs of this action be paid by the estate of Andrew J. Kibler," used the following language: "As the case will have to go back to the circuit, to reform the account in some respects, we think it better that the order as to costs should await that accounting. The order as to costs is reversed, without prejudice." The case, having been remanded to the circuit court, came on to be heard by his honor, Judge Ernest Gary, who rendered a decree from which both sides again appealed, as will be seen by reference to 21 S. E. 800, where it appears that both appeals were dismissed, and the decree of Judge Gary was, practically, affirmed. In that decree, Judge Gary, in treating of the matter of costs, used the following language: "After considering the facts, I agree with Judge Witherspoon that the costs of this action should be paid out of the estate of Andrew J. Kibler, and I so decree." The foregoing statement has been deemed necessary for a proper understanding of what seems to be the main question presented by the present appeal. The other facts may be gathered from the order of Judge Townsend, which, with the grounds of appeal, both on the parts of the plaintiffs and defendant, should be incorporated in the report of this case.

The main question, as we understand it, is as to which side is entitled to the costs of the appeal to the supreme court from the decree of Judge Witherspoon, and also whether either side is entitled to the costs of the appeals from the decree of Judge Gary. In the case of Huff v. Watkins, 25 S. C. 243, approving the previous decisions in Cleveland v. Cohrs, 13 S. C. 397, it was held distinctly that the statutory provision as to costs of an appeal to the supreme court was intended to allow such costs to the prevailing party in the appeal, without regard to the final result of the action. These two cases, as well as the subsequent case of Sease v. Dobson, 38 S. C. 554, 15 S. E. 703, 704, were distinctly recognized and followed in the very recent case of Sullivan v. Latimer, 43 S. C. 262, 21 S. E. 3. It must now be regarded as settled that the prevailing party in an appeal, whether he be appellant or respondent (Sease v. Dobson, supra), is entitled to his costs in prosecuting his appeal, or resisting that of his adversary, without regard to the final result of the action in the circuit court. It is contended, however, on the part of the plaintiffs, that this question has been concluded by the decrees of Judge Witherspoon

and Judge Gary, adjudging that the costs of the action, which it is claimed include the costs of the appeals, must be paid out of the estate of Kibler, defendant's intestate. This contention is based upon an entire misconception of the true intent and effect of those decrees. It is very manifest that the decree of Judge Witherspoon was not intended to embrace, and could not have embraced, the costs of any appeal from his decree, for no such appeal had been taken when that decree was filed, and it would have been impossible for any one to know that any such appeal would thereafter be taken; and it is equally manifest from the terms used by Judge Gary in his decree that he did not intend to embrace in his decree any provision that the costs of appeal should be paid out of the estate of Kibler, for he says expressly: "I agree with Judge Witherspoon that the costs of the action should be paid out of the estate of Andrew J. Kibler," showing very clearly that his intention was to make the same decree, as to costs, which had been made by Judge Witherspoon, which, as we have seen, could not possibly be construed as embracing the costs of appeal. But, even if it were possible to construe the decrees of Judges Witherspoon and Gary as contended for by plaintiffs, then we would be compelled to hold that those judges had no power to make any decree to that effect; for in the very recent case of *Hall v. Hall* (S. C.) 22 S. E. 881, it was distinctly held that the prevailing party in the supreme court has the right to tax costs incurred on appeal, and they do not fall within the statutory provision empowering the circuit judge to direct, in equity cases, which of the parties shall pay the costs. This ruling was in direct conformity to a remark made by the late Chief Justice Simpson in *Rabb v. Flenniken*, 32 S. C., at page 185, 10 S. E. 343, which, though then a dictum, has since become the law, by the direct decision in *Hall v. Hall*, supra. The several cases cited by counsel for plaintiffs as being in conflict with the view hereinbefore taken do not, in our judgment, present any such conflict, for the reason that the question which we have been considering was not made in any of those cases. It seems to us, therefore, that the circuit judge erred in refusing defendant's motion for an order directing the clerk to tax his costs in his appeal from the decree of Judge Witherspoon, in which he prevailed, in large part at least, and in refusing his motion for an order directing the clerk to tax his costs incurred in successfully resisting the appeal of plaintiffs from Judge Witherspoon's decree. As to the costs of the two appeals from Judge Gary's decree, in which both sides were unsuccessful, while it might be that plaintiffs would be entitled, under the foregoing cases, to the costs of successfully resisting the appeal of defendant, yet on the other hand, upon the same principle, the de-

fendant would be entitled to his costs in successfully resisting the appeal of the plaintiffs from that decree; and thus one set of costs would set off against the other, and the practical result would be that neither side should be allowed to tax costs against the other on those appeals.

The next question which we propose to consider is whether there was any error in allowing plaintiffs eight dollars for the cross interrogatories propounded to the witness P. H. Nelson. This witness was not examined under a commission sent to commissioners, under the long and well settled practice, but he was examined under the provisions of the act of 1883 (18 St. at Large, 373). In this act, which, in terms, is declared to be for the purpose of providing an additional method to those then provided by law for obtaining the testimony of a witness in certain cases, there is no provision for such costs as were here allowed; and, in the absence of any such provision, the well-settled rule is that no such allowance can be granted, as the party who claims costs must be able to put his finger upon the statute allowing the costs in question. There is a provision for such an allowance where a witness is examined by commission, but, where he is examined under the provisions of the act of 1883, no cross interrogatories are necessary (*Moore v. Willard*, 30 S. C. 615, 9 S. E. 273); and, if a party chooses voluntarily to use cross interrogatories, he can make no charge for the same, in the absence of any statute allowing such a charge.

As to the other points upon which exceptions are taken to the order of the circuit judge by these appeals, we agree with him, for the reasons stated in his order, and hence such points need not be further considered. The judgment of this court is that the order of the circuit judge, except where it conflicts with the views herein presented, be affirmed, and, as to those points wherein it is in conflict with this opinion, it be reversed, and that the case be remanded to the circuit court for the purpose of having the views herein announced carried into effect.

(99 Ga. 170)

#### MEEKS v. LOFLEY.

(Supreme Court of Georgia. June 12, 1896.)

WILLS—ISSUE DEVISAVIT VEL NON—EVIDENCE—RELEVANCY—HARMLESS ERROR—RECORDS, OF PROBATE—COMPETENCY.

1. Upon the trial of an issue of *devisavit vel non*, evidence that the propounder had been appointed guardian of a grandson of the alleged testatrix was irrelevant, but its admission was harmless error, the evidence being immaterial to the case.

2. Records from the ordinary's office, showing that the alleged will had been admitted to probate in common form, and that the propounder had been appointed administrator with the will annexed, and had qualified as such, contained matter relevant to the issue, and there was no error in admitting these records over an objection that they were "not competent

evidence." It does not, as to the particular records just mentioned, appear that the question was raised that certified copies should have been offered instead of the original records, and therefore this question is not now presented for adjudication.

3. Although the paper propounded as a will recited that previous advances to a considerable amount had been made to the caveator, a son of the testatrix, there was no error in rejecting a ground of caveat alleging that she was laboring under the mistaken idea that the caveator had received advances from her, when he had not done so; it appearing from other statements contained in the caveat that the advances referred to were the rents of certain land, as to the ownership of which there had been a dispute between the testatrix and the caveator, and that he had finally yielded to her claim of title. The fact that the caveator received the rents was not brought in question by the caveat, and it merely showed there had been a difference of opinion between him and the testatrix upon a question of title relative to the land which produced these rents.

4. There was sufficient evidence to show the due execution of the will, and also to warrant the jury in finding that the testatrix, though illiterate, had knowledge of its contents when she signed it.

(Syllabus by the Court.)

Error from superior court, Macon county; W. H. Fish, Judge.

S. F. Lofley offered for probate an instrument purporting to be the will of Margaret Meeks, deceased. Caveat was interposed by J. P. Meeks. There was a verdict for the propounder, and, a new trial having been denied, the caveator brings error. Affirmed.

The following is the official report:

Lofley offered for probate in solemn form the will of Mrs. Margaret Meeks, alleging in his petition, among other things, that A. H. Greer, the executor nominated in the will, having died before Mrs. Meeks, petitioner was appointed administrator with the will annexed. By the will testatrix left all her estate to her husband, Allen Meeks, during his life. She gave to her son James P. Meeks \$5, stating that previous advances had been made to him of considerable amounts. She gave to her two daughters Margaret and Mary Cromer the whole of her estate in remainder, after the death of Allen Meeks, except a small legacy to her son, and, in the event of the death of either of the daughters before becoming possessed of the legacy, she provided that then the child or children, if any be living, of such deceased legatee, should be entitled to such legacy, and the same rule to apply in case they should both die. Caveat was interposed by James P. Meeks. There was a verdict for the propounder, and, the motion for a new trial made by the caveator being overruled, he excepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in admitting in evidence, over the objection of caveator, the original order of the ordinary, being the order appointing S. T. Lofley as guardian of John Cromer, for the

purpose of showing the appointment of Lofley as guardian of John Cromer, minor son of Margaret Cromer; said order being identified only by the testimony of the clerk of the court of ordinary, showing that said order was a genuine original record from the ordinary's office. The objection of caveator was that it was not competent evidence, a certified copy being the proper and best evidence. Error in admitting, over objection of caveator, the original record book, purporting to be from the court of ordinary, containing the record of letters of administration with the will annexed, granted to S. T. Lofley, and Lofley's bond as administrator, for the purpose of showing the interest of Lofley as a propounder of the will; said record book being identified only by the testimony of the clerk of the court of ordinary, showing that it was the genuine original record from the ordinary's office. Caveator's objection was that it was not competent evidence. In a note to this ground and the ground last above, the court states: "When the record and papers from the ordinary's office was offered, Mr. Perry testified that he was now the clerk of the court of ordinary, and knew the records and papers to be the genuine and original records and papers from the ordinary's court; that he brought them from the ordinary's office, but was not the clerk of the court of ordinary at the time said records were made. Caveator objected to said records and papers, because the original was not admissible in evidence, but certified copies were the highest and best evidence." Error in striking caveat's amended caveat, on the ground that it was too vague, uncertain, and indefinite, and not sufficient in law. All the grounds of the original caveat had previously been withdrawn by counsel for caveator. The grounds of amended caveat were: (1) The will should not be established, because, at the time of making it, Margaret Meeks was laboring under the mistaken idea that this defendant had received previous advances by and from her, "when, in fact, said advances were the rents from this caveator's own land, that this caveator afterwards unwillingly abandoned to testatrix, and which forms a part of the estate bequeathed,—gave the same to said testatrix by abandoning the same to her. (2) Then caveator left the state of Georgia on or about the — day of —, 1859, and returned in 1880 to see his said parents, and collect rents due to him from testatrix and her husband. At the time of his said return a difficulty arose, under a misapprehension of the caveator's real rights as to said land, between caveator and said testatrix, and he immediately returned to Texas, his former home, and said testatrix immediately made her will, while still mad with this defendant, and while she was unduly prejudiced against him by reason of said difficulty aforesaid." Further, because

the verdict was unsupported by law and evidence, as movant contends the evidence showed that the testatrix was illiterate, and it did not appear that the will was read over to her, or that she had knowledge from any source of its contents. Upon this last ground the testimony showed that the three witnesses to the will were John M. Greer, clerk of the superior court, and ordinary when the will was signed, W. M. Greer, and C. A. Greer; that the handwriting in the body of the will was that of A. H. Greer; that John M. Greer and W. M. Greer are both dead, and so is A. H. Greer, who was the executor named in the will; that Mrs. Meeks could not read nor write, but could drive a good bargain, was a good business woman for an illiterate one, and in the opinion of several witnesses was considered sane and competent to make a will; that, a number of years after the will was made, it was found by C. A. Greer among other papers in the office of his father, A. H. Greer, after his father's death, sealed up in an envelope with the words "Last will and testament of Mrs. Margaret Meeks" written on the envelope in the handwriting of A. H. Greer; that C. A. Greer notified the heirs of Mrs. Meeks, and they came and got it. It further appears that, while C. A. Greer recognized the signature of the attesting witnesses to the will, and the handwriting in the body of the will, his recollection was very vague about the matter of the execution of the will; but, after his recollection was refreshed, he testified that his father called him and his brother, W. M. Greer, into his (A. H. Greer's) office, where Mrs. Meeks was, and sent him after John M. Greer, then clerk of the superior court and ordinary; that they were all asked in to his father's office, where Mrs. Meeks was, to witness the will; that either she or his father, in his presence, asked him to witness it; that he saw her make her mark to the will, and his recollection was that she and all the witnesses were present in the same office when she and they signed the will; and that the will was not read to her in his presence. There was further testimony, that in her last illness testatrix said she had separated her property as she wanted it, "and I want you children to see that Jim Meeks does not get anything, and fight him to the last." She said nothing about her will, but what she said may have had reference to it. It does not appear that any of the beneficiaries under the will ever heard of the will until notified by Greer.

R. Don McLeod and Hixon, Cutts & Greer, for plaintiff in error. J. W. Haygood, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(39 Ga. 168)

SIMPSON et al. v. PATAPSCO GUANO CO.  
(Supreme Court of Georgia. June 12, 1896.)

PRINCIPAL—LIABILITY TO THIRD PERSON—SALE TO AGENT.

1. An undisclosed principal, in whose behalf and for whose benefit goods are purchased and used by an agent, is liable to the seller for the price of the same.

2. The evidence in the present case showing conclusively that the person to whom the plaintiff's goods were sold and delivered was the defendants' agent, and that the defendants obtained the benefit of these goods, there was no error in refusing to grant a nonsuit, or in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

The following is the official report:

The PatapSCO Guano Company sued Misses Mary, Sallie, Eliza, and Ocia Simpson upon an account for \$148.20, besides interest; the account being dated March 6, 1891, and being for 57 sacks of guano. Upon the trial of the case in the superior court, to which it had been taken by appeal from the county court, at the close of plaintiff's evidence defendants moved for a nonsuit, which motion was overruled. To this ruling defendants excepted. Affirmed.

After the motion for nonsuit was overruled the court asked defendants' counsel if he could give any reason why the jury should not be instructed to return a verdict for plaintiff. Defendants' counsel objected on the ground that no contract had been proved, as between plaintiff and defendants. The court instructed the jury to return a verdict for plaintiff for the amount of its claim, to which action, also, defendants excepted. For plaintiff, A. T. Fort testified: "The account is just, true, and unpaid. I sold the goods to W. B. Simpson, as agent, in March, 1891; and he afterwards gave his note, as agent for them. I have never said anything to the defendants on the subject of guano. My instructions were to take notes, and sell to parties who owned the land. So, while I did not know then, exactly, to whom the land belonged, as no will had been offered for probate at that time, I sold and delivered the guano to W. B. Simpson as agent for the parties who did own the land. The guano was bought by W. B. Simpson for the Simpson farm, where the defendants lived." W. B. Simpson testified for plaintiff: "My sisters, the defendants, own the land on which I put the guano. I bought the guano from Fort for myself, and not as agent for defendants, and used it on my crops on defendants' farm. I bought it just as I have always been buying it for myself. I made the contract and got the guano. Defendants never knew anything about it. I never said a word to them about it, and they never knew when I got it. I was never authorized by them to act as their agent to buy this guano, and it was not sold or delivered to either of them. I

made the crops, paid the hands, and used it as my own. I never accounted to them for it. I never was authorized by them to act as their agent at any time. The land was given to them by my mother's will. Defendants and I managed just this way: I attend to the making of the crops, and they to the household work. I do as I have always done. Have worked for them all my life. If I make anything, they get it; if not, they don't. The fact is, they get all I make. I have been living with them on their land since their mother's death, superintended the farm, and attended to all the farming business, purchased the guano every year, and sold the crops. If anything was made on the farm, they got it; and, if nothing was made, they got nothing. They owned everything on the farm, and got the benefit of the guano I purchased. We never had any special contract or understanding as to how the farm should be conducted, but I have been staying there, working the farm as stated, for several years, trying to make a living for us all. I have no property of my own."

R. F. Watts, for plaintiffs in error. E. T. Hickey and Bante & Miller, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 168)

### BROWN v. BROWN.

(Supreme Court of Georgia. June 12, 1896.)

#### DISTRESS WARRANT—ISSUES—CERTIORARI.

1. A distress warrant, in resistance to which no written defense of any kind has been interposed by the defendant, presented nothing for trial by any court; the warrant alone forming no issue for adjudication.

2. Where such a warrant was issued, and the question of the plaintiff's right to proceed with the same was, notwithstanding the defendant's failure to file the counter affidavit and bond required by section 4083 of the Code, tried before a magistrate in a justice's court, it was still the plaintiff's right, upon the trial of an appeal to a jury in that court, entered by the defendant, to raise the question that there was no issue to be tried, although this had not been done at the original hearing.

3. The whole proceeding being coram non iudice, the verdict rendered on the appeal in the plaintiff's favor could not be reviewed by certiorari.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

Action by G. R. Brown against Mrs. G. C. Brown. From the judgment, plaintiff brings error. Reversed.

The following is the official report:

The matter was heard before a justice of the peace, who rendered judgment for plaintiff for \$40. Defendant appealed to a jury. When the case came on to be tried by a jury, plaintiff insisted that the claim was not properly in court, as defendant had not filed

her counter affidavit, and given bond and security, as required by law before defense could be made. Defendant then offered to file said affidavit and give said bond, which was allowed by the court, but which she refused and neglected to do. The answer of the magistrate to the writ of certiorari in the case states the above, and states, further: "But inasmuch as the case had been tried by the court when there was no counsel on either side, and judgment had been given for plaintiff against the defendant for \$40, and an appeal had been entered, and respondent, believing that he had no right in his judicial capacity to dismiss any appeal from a judgment which he had rendered, he refused to do so, and allowed said case to go to trial notwithstanding said counter affidavit and bond had not been filed as required by law." The jury failed to agree. At the next term of the court another jury was drawn, and the same motion was made by counsel for plaintiff, that defendant was not properly in court because the proper affidavit and bond had not been given in order to allow a defendant to defend in matters of distress warrants; but for the reason above stated the magistrate allowed the case to proceed to a jury, and there was a verdict for plaintiff for \$35. Defendant took the case by certiorari to the superior court. In that court plaintiff moved to dismiss the certiorari, upon the ground that it appeared by the answer of the magistrate that no counter affidavit and bond had ever been given by defendant, and that she could not defend otherwise than by counter affidavit and bond, and hence there was no issue to be tried, and she was not properly in court, and could not bring the case up by certiorari. This motion the court overruled, and to this ruling plaintiff excepted. In a note to the bill of exceptions the judge states that it appeared from the answer of the justice that, when the case was tried before the justice, nothing was said about the affidavit and bond not being filed by defendant, but the case went to trial on its merits, and both sides put in their evidence. It was upon the appeal trial that plaintiff contended that defendant was not properly in court. While the answer says something about a motion, it does not affirmatively appear that plaintiff's counsel made a motion to dismiss the appeal, or any other motion. It appeared, from the petition for certiorari and the answer of the justice, that plaintiff leased a portion of defendant's plantation for a term of five years; that at the end of the fourth year defendant requested plaintiff to allow her to rent that portion of the place so leased to him, together with the remainder of her place, to another party, as she could by that means rent the whole place; that plaintiff replied that she might rent the place, but not to rent his part of it for less than eight bales of cotton; and that she thereupon rented the whole place to another party for the next year. Upon these

facts the judge of the superior court decided that defendant was not due plaintiff any rent, and sustained the certiorari, and rendered a final decision disposing of the case, refusing to send the case back to the justice court for a rehearing, holding that under the facts the relation of landlord and tenant did not exist. To this ruling, also, plaintiff excepted.

E. J. Wynn, for plaintiff in error. E. T. Hickey and L. McLester, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 187)

HOOPER et al. v. CLEGG et al.

(Supreme Court of Georgia. June 12, 1896.)

RECEIVERS—EXPENSES—ATTORNEY'S FEES—RIGHTS OF PRIOR MORTGAGEE.

This case, upon its facts, is controlled by the decision of this court in *Lewis v. Edwards*, 17 S. E. 920, 92 Ga. 533; and the court committed no error in declining to allow the fees of plaintiffs' counsel to be paid out of the fund in court.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Petition of intervention filed by Hooper & Hixon in the case of Newhoff & Sons and others against Clegg & Co. and others. There was a judgment against petitioners, and they bring error. Affirmed.

The following is the official report:

In the case of *Newhoff v. Clegg* (this term) 25 S. E. 184, before the passing of the final judgment, and before the distribution of the funds raised by the sale of the stock of goods of Coates,—the mortgage held by Clegg & Co. being more than sufficient to absorb the entire fund in the hands of the receiver, and the court adjudging that the receiver should pay over to Clegg & Co. the amount due on their mortgage,—Hooper & Hixon, counsel for the creditors, filing the original petition, filed their petition of intervention, claiming attorney's fees out of the fund for filing the original suit and bringing the fund into court. By consent of parties this petition was heard separately by the court, and the court ruled that petitioners were not entitled to any fee as prayed for. To this ruling petitioners excepted. On the hearing it appeared that Hooper & Hixon were counsel for Newhoff & Sons, creditors filing the original petition against Coates, which petition was filed December 13, 1889. Under this petition a temporary receiver was appointed, and a temporary restraining

order granted. Then Cochran, Baird & Levi and a large number of other creditors intervened and were made parties plaintiff and attacked the mortgage to Clegg & Co., and under this amendment Clegg & Co. were made parties defendant. In making this amendment Hooper & Hixon and Butt & Lumpkin were the attorneys for petitioners. This amendment seems to have been made before the date set for the hearing under the original petition. Afterwards an order was passed, by consent of all parties, that the amendment be allowed, and have the same force and effect as if the original petition had been filed as "now amended"; that two persons named be appointed receivers to take charge of all the goods and assets of Coates, who should have power to sell the goods for cash in such manner as seemed best, in their discretion; that Clegg, one of the receivers, agreed to charge nothing for his services except that he was to have the use of the money after the goods were sold, subject to pay the same into court whenever the judge should so order; and that Felder, the other receiver, should have such compensation as might be allowed by the court. The answer and cross petition of Clegg & Co. are set out in the case of *Newhoff v. Clegg*, supra. There was evidence, in addition to the above, in behalf of petitioners, Hooper & Hixon, that they rendered the usual services in such cases; that there was a great deal of work to do in the case, in getting up the evidence, taking the interrogatories of so many nonresident witnesses, and looking after the case generally; that they received \$200 as retainer, the balance of their fee being conditional on what they could get out of the case; that the value of the services of attorneys filing such a suit and bringing in a fund is about 10 per cent. of the fund,—that is, a reasonable fee. For defendant, W. A. Dodson, Esq., one of their attorneys, testified: "We allowed this property to be sold by the receiver because it was important that the stock of goods should be disposed of at once, so as not to go out of season. We therefore thought it best for the interest of all parties not to object to the receivership, so as to allow the stock to be disposed of at once, and avoid a delay about disposing of it."

W. F. Clark and E. H. Cutts, for plaintiffs in error. Jas. Dodson & Son, Fort & Watson, and E. A. Hawkins, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

**FRANKLIN v. SALEM BLDG. ASS'N et al.**  
(Supreme Court of Appeals of Virginia. July 18, 1896.)

**SPECIFIC PERFORMANCE—CONTRACT OF SALE—SUFFICIENCY OF EVIDENCE.**

Plaintiff, being indebted to a building and loan association under a deed of trust, agreed orally that the association should take the property under the deed in satisfaction of the debt. Plaintiff vacated the premises shortly thereafter, and left the state, making no claim to the premises or to the rents, and paying no taxes thereon for a period of five years. In the meantime the association took possession, and sold the property, with the knowledge of plaintiff, who made no objection. The association made no demand on plaintiff for dues or interest or payments on the debt, but removed his name from the roll of stockholders. *Held*, that the evidence was sufficient to support a decree against the plaintiff for specific performance of the contract of sale to the association.

Appeal from circuit court, Roanoke county; Henry B. Blair, Judge.

Bill by H. J. Franklin against the Salem Building Association and another for the recovery of certain real estate. From a decree ordering specific performance on the part of the plaintiff of the contract of sale, plaintiff appeals. *Affirmed*.

L. W. & L. C. Hansbrough and G. W. Crumpecker, for appellant. L. H. Ceeke and R. H. Logan, for appellees.

**RIBLY, J.** The propriety of the decree of the circuit court in requiring specific performance by the appellant of an alleged contract of sale of his house and lot to the Salem Building Association is the matter drawn in question by the appeal to this court. The association does not base its claim to the property upon a purchase thereof at a sale under the deed of trust made to secure the debt which the appellant owed it, but relies solely upon a parol contract entered into after the effort to effect a sale under the deed of trust had failed. When the property was offered at public auction under the deed of trust, although there were a dozen or more persons present, there was but one bid made. This was a bid of \$500 made by the secretary of the association, which amount he considered would cover the indebtedness of the appellant to the association and the expenses of the sale. W. M. Graybill, the secretary of the association, who had gone to the sale to represent its interests, and made the bid of \$500, testified that, when no other bids were made, both Franklin, the appellant, and himself, tried to get some one to bid more, or to take the property at \$500, but, being wholly unsuccessful, he thereupon told Franklin that "the association would take the property at that price as a settlement of his indebtedness to the association"; that Franklin replied that "he had a friend in Franklin county who had promised to buy the property, but, as he had disappointed him, he thought that it would be best to have the association take the property"; and that "he then and there agreed to let the as-

sociation take the property for the amount he owed the association, and said that we could take the property, and make of it what we could." John H. Shuff, who, as one of the trustees, was present, superintending the sale to be made under the deed of trust, also testified that, "after the bidding was over, Mr. Graybill and Mr. Franklin had some conversation in my presence, in which Mr. Franklin said he thought it best for the association to take the property at the price above mentioned," which was \$500, though he also added that he "was not paying particular attention to the conversation, and could not say exactly what took place." Franklin gave his deposition, and denied that he made such agreement to sell the property to the association; but his testimony is so contradictory in itself, and differs so materially from the allegations of his bill, which was duly sworn to by him (it being, among other things, also a bill for an injunction), not to say in direct conflict therewith in many particulars, that no injustice is done to him in saying that it is entitled to very little weight; and especially is this the case since his conduct subsequent to the alleged sale of the property to the association is consistent with and confirmatory of such sale, and wholly inconsistent with his present contention. The evidence shows that within a few months after the sale of the property to the association, as testified to by Graybill, Franklin vacated the house and premises, and that the association took possession of it; that Franklin packed up his furniture and household goods, and shipped them to Bristol, Tenn., where he went himself to reside, and for five years, from 1886 to 1891, he laid no claim whatever to the property. He did not pay the taxes for the year 1885, which were due on the property when it was sold, nor pay, or offer to pay, the taxes for any year thereafter. He did not thereafter pay, or offer to pay, the dues and fines to the association which would otherwise have been payable on his stock, nor any interest to it on his former indebtedness; neither did he in all that time assert any claim for rent for the property, nor call for any account of his standing with the association. It was not until 1891, when he ascertained that the market price of the property had risen, that he set up a claim to the property, and brought his suit. The association, after the purchase of the property, as claimed by it, made no demand on him for dues, fines, interest, or other payments, but dropped his name from its roll of shareholders, took possession of the property, and after repeated efforts to dispose of it at the price of \$500, sold it, on August 4, 1886, at that sum, to the appellee W. C. Bass, payable in monthly installments of \$10 each, and put him in possession of it. The purchase of the property from the association by Bass, and his possession of it, were facts well known to Franklin; and he acquiesced therein without the slightest objection until he instituted this suit, five years afterwards.

We are of opinion that the evidence establishes the sale of the property to the Salem Building Association, as claimed by it; that the association acquired possession of the property under the contract of sale; and that there has been such performance thereof by the association as justified the circuit court in decreeing its specific execution by Franklin. The court, in decreeing specific execution of the contract, decreed that the association pay to Franklin the sum of \$56.63, with interest from June 1, 1886, which was the difference between the sum of \$500, that was bid for the property by the association at the time it was put up for sale under the deed of trust, and the amount which he actually owed it at that time. Upon a review of the evidence and a careful consideration of the whole case, we are not prepared to say that the court erred in so doing. Our conclusion, therefore, is that its decree should be affirmed.

#### TROUT v. TROUT'S EX'R et al.

(Supreme Court of Appeals of Virginia. July 16, 1896.)

#### PAROL GIFT OF LAND — PART PERFORMANCE — STATUTE OF FRAUDS—SPECIFIC PERFORMANCE.

Equity will not decree specific performance of a parol gift of land on the ground that the donee had, in consideration thereof, given up the occupation of telegraph operator, and had taken possession of the land, and made valuable improvements, where such donee was not working as a telegraph operator at the time the gift was made, and the value of the improvements made by him was small, and was less than the rental value of the premises for the period of his occupancy.

Appeal from circuit court, Craig county; Henry E. Blair, Judge.

Bill by John Henry Trout against R. E. Trout's executor and others. Decree for defendants, and complainant appeals. Affirmed.

G. W. & L. C. Hansbrough, for appellant. J. W. Marshall and Blair & Blair, for appellees.

BUCHANAN, J. This is an appeal from a decree refusing the specific execution of a parol gift of land. The grounds relied upon by the appellant (who was the nephew of the donor) to take the case out of the statute of frauds are that he was induced by her to give up other arrangements for a business life, viz. that of a telegraph operator, in which he had good prospects of success; that he was placed in complete possession of the land; that he had put valuable improvements upon it; and that it would operate as a fraud upon him not to specifically enforce it.

It is well settled that a court of equity will compel the conveyance of the legal title of land claimed under a parol gift under certain circumstances, but it only does so where the gift is supported by a meritorious consideration, and where the donee has, by reason

thereof, been induced to alter his condition, and make expenditures of money or labor in making valuable permanent improvements on the land. The ground upon which courts of equity consider part performance of a parol agreement or a parol gift as creating an equity to have it specifically executed, notwithstanding the statute of frauds, is that it would be a fraud upon the party if it were not completed. *Burkholder v. Ludlam*, 30 Grat. 255; *Halsey v. Peters*, 79 Va. 60; *Griggsby v. Osborn*, 82 Va. 371, 373; 2 Minor, Inst. (4th Ed.) 851 et seq.

But, if the acts done under the agreement or gift be of such a character that they can be fully compensated in damages, the contract will not be specifically executed.

The evidence in this case, including that taken upon the bill of review, shows that the appellant did take possession of the land either under a gift from his aunt or under a promise that she would give it to him. The proof is not at all clear that he was engaged in the business of telegraph operator when she gave, or promised to give, him the land, or that he gave up that business to take possession of it. On the contrary, the evidence tends to show that he had already given it up, because he did not like it, and was at that time engaged as a salesman in a store.

After taking possession of the land, it appears that he made some repairs upon the buildings, but they were of little value, easily compensated in damages, and estimated by one of his own witnesses at \$75, which was less than the rental value of the land during the time that he occupied it prior to the rendition of the decree appealed from.

Upon this state of facts, a court of equity would not be justified in decreeing a specific execution of the gift. To do so would be to disregard the statute of frauds where the equities of the case did not require it, and where the appellant had been fully compensated for all his expenditures upon the land by the use of it. The prevailing disposition of the courts is not to extend the doctrine of part performance of parol agreements or parol gifts any further than the adjudged cases and the principles established by them require.

The evils which have flowed from the specific execution of parol gifts of land caused the revisers of the Code of 1837 to suggest, and the general assembly to provide, by section 2413, that no right to a conveyance of any estate of inheritance or freehold or for a term of more than five years shall accrue to the donee of the land, or those claiming under him, under a gift or promise of gift, of the same hereafter made, and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee, or those claiming under him.

This provision of the Code was not in force when the gift, or promise to give, in this case, was made, and therefore has no effect

upon it; but it shows that, in the opinion of the lawmaking power of the states, it was not only unwise to extend the doctrine of part performance of parol gifts of land, but that it should be abolished altogether as to cases arising after the Code took effect.

We are of opinion, therefore, that the decree of the circuit court was plainly right, and should be affirmed.

(93 Va. 322)

**RUSSELL v. LOUISVILLE & N. R. CO.**  
(Supreme Court of Appeals of Virginia. July 9, 1896.)

**RAILROAD COMPANIES—FAILURE TO CONSTRUCT CATTLE GUARDS—REMEDY—ACTION FOR PENALTY BY LANDOWNER—EVIDENCE—JUDGMENT—ORDER OVERRULING DEMURRER—WHEN SET ASIDE.**

1. Code, § 1262, requires railroad companies to construct cattle guards at any point where a fence may be necessary; that they shall be constructed on written request of the landowner; that, if the company refuse to construct them for 10 days after such notice, the owner, on 10 days' notice, may apply to the county court to appoint freeholders to determine whether the cattle guards shall be constructed; that their decision shall be filed with the clerk; that, if their decision be that they ought to be constructed, the company shall construct them in 20 days; and that, on its failure, it shall pay the landowner \$5 for every day of such failure. *Held* that, in an action by a landowner to recover such penalty, it was error to exclude as evidence the notices prescribed by such statute, the orders of the county court appointing freeholders, etc., and the report of the freeholders, on the ground that the statute does not apply to private crossings, since whether it applies or not was not the question involved.

2. The remedy of the landowner in case of failure of a railroad company to comply with such statute is an action of debt to recover the penalty, and an action on the case will not lie.

3. Where the court improperly overrules a demurrer, it may, at any time before the final trial, set aside such order, and sustain the demurrer.

Error from circuit court, Lee county; W. T. Miller, Judge.

Action on the case by H. J. Russell against the Louisville & Nashville Railroad Company to recover a penalty by virtue of Code, § 1262, and the failure of defendant to comply with such statute for 170 days, relative to two cattle guards which plaintiff requested defendant to construct at certain designated points within plaintiff's inclosed lands. There was a verdict for defendant, and plaintiff brings error. Case dismissed, without prejudice.

Pennington Bros. and B. H. Sewell, for plaintiff in error. Duncan & Hyatt, for defendant in error.

**CARDWELL, J.** This is a writ of error to a judgment of the circuit court of Lee county in an action on the case brought by the plaintiff in error to recover of the defendant in error a penalty by virtue of section 1262 of the Code, and the failure of the defendant in error to comply with the provisions of that section for 170 days, relative to two cattle guards that plaintiff in error requested should

be constructed by the defendant in error at certain designated points within plaintiff in error's inclosed lands. Section 1262 of the Code is as follows: "It shall be the duty of every railroad company, whose road passes through any enclosed lands in this state, to construct and keep in good order, cattle guards sufficient to prevent the passage of stock of every kind over such land, at any point where a fence may be necessary or proper, whether it be a division fence between contiguous farms or between different parcels or tracts belonging to the same person, or a fence along a public highway. Such cattle guards shall be constructed on request of the land owner, in writing, made to any section master or employee of the company having charge or supervision of the road at that point. If the company refuse or fail, for ten days after such request, to construct the cattle guards at the place designated, the owner having given ten days' notice to such section master or employee, may apply to the county court of such county for the appointment of three disinterested freeholders, whose duty it shall be to go on the land and determine whether the proposed cattle guard shall be constructed. Their decision shall be in writing, and shall be forthwith returned to and filed in the clerk's office of the county court of such county. If such decision be that the cattle guard ought to be constructed, the company shall within twenty days thereafter construct the same. Upon its failure so to do, it shall pay the land owner five dollars for every day of such failure." The defendant demurred to the plaintiff's declaration, and the demurrer was overruled; whereupon the defendant pleaded not guilty, and tendered six pleas in writing, to each of which the plaintiff objected, and the objection was sustained as to four of them, but overruled as to two, and these two, numbered 4 and 5, were allowed to be filed. Upon the issues joined, a third trial was had (there having been two mistrials), at which trial the judge of the circuit court, after the plaintiff and defendant had each made an opening statement before the jury, announced to the bar that "at the preceding term the court held the view that the erection of cattle guards, under section 1262, applied to private crossings, but the court was now of opinion that it was in error, and, in order to save time, thought it proper to say to counsel that, under the construction of the law now entertained by the court, the demurrer should have been sustained, but, as the case had passed that stage, the notices, the report of the commissioners, and the orders of the county court appointing commissioners, heretofore read, would, in the further progress of the case, be refused." The notices, report of the commissioners, and the orders of the county court referred to were the notice to the section master of the defendant company that the cattle guards in question were required by the plaintiff to be put in at certain places within his inclosed lands, notice of the plaintiff's appli-

cation to the county court, the order of the county court appointing three disinterested freeholders to go upon the land, and determine whether it was necessary and proper that cattle guards should be constructed by the defendant at the places designated, and the report in writing of the decision of the three freeholders to the county court. The verdict of the jury was for the defendant.

One of the questions, and the main question, presented by the writ of error, therefore, is whether the court erred by this ruling. It is manifest that the ruling was erroneous. Whether or not section 1262 applies to private crossings was not the question involved. It was whether or not the points within the plaintiff's inclosed lands at which he requested the defendant company to construct the cattle guards were necessary and proper places for them to be constructed, within the meaning of the statute; and this question was to be determined from the evidence adduced by the plaintiff to show that the cattle guards were necessary and proper to be constructed at the points designated. If the plaintiff sustained, by legal proof, the allegations of his declaration, he would be entitled to recover, in a proper action, the penalty prescribed by the statute for the failure of the defendant to construct the cattle guards when it became its duty to do so, and for which his suit was brought, unless the defendant made good one or more of its defenses. Without showing that the proceedings had been taken that were required of the plaintiff by section 1262 to establish the fact that the places at which he requested the cattle guards to be constructed were necessary and proper places for them to be constructed, the plaintiff would have been without standing in court to assert a claim to the penalty prescribed, even though he had brought a proper action.

The circuit court was also in error in considering that the stage at which the demurrer to the declaration might have been sustained had passed. The former order of the court overruling the demurrer might have been set aside, and the demurrer sustained, but not properly, for the reasons stated by the court. The demurrer should have been sustained at the first hearing of the cause, solely upon the ground that the plaintiff had brought a wrong action. Where a statute imposes a penalty for the nonperformance of a duty prescribed, no part of which penalty can accrue to the commonwealth, and the statute provides no particular mode by which the person aggrieved may recover the penalty, the common-law action of debt may be maintained therefor, and is proper. 3 Bac. Abr. tit. "Debt," A, pp. 83, 84; 1 Chit. Pl. 111, 112, and note 6; 3 Rob. Prac. (New) 382; 4 Minor, Inst. 585. Section 1262 making no provision for the recovery of the penalty prescribed, and the case not coming under the provisions of the general statute, section 712 of the Code, in which it is provided that

the proceedings to collect fines due in whole or in part to the commonwealth shall be in the name of the commonwealth, if the plaintiff be entitled to recover, under the allegations of his declaration, his remedy is by action of debt. The statute declares and fixes a sum certain for each day's failure, after 20, to construct cattle guards. The recovery in cases like this is not measured by the damages sustained. The verdict does not sound in damages, but is a sum eo nomine and in numero; otherwise in an action on the case. The common-law action of debt lies whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty, and is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise which the law annexes to the liability. 1 Chit. Pl. 106; Hodges v. Railroad Co., 105 N. C. 170, 10 S. E. 917; and Railroad Co. v. Schuyler, 34 N. Y. 85. In the case last cited, it was said that "all duties imposed upon a corporation by law raise an implied promise of performance." In Sims v. Alderson, 8 Leigh, 483, Tucker, J., says "that the action of debt is the peculiarly appropriate action to recover a penalty by statute."

It becomes unnecessary for us to consider the remaining assignments of error contained in the petition for the writ of error, as we are of opinion that the court below erred in overruling the defendant's demurrer to the declaration of the plaintiff, and for this error its judgment must be reversed and annulled; and this court will enter such order in the case as the court below should have entered, sustaining the demurrer, for the reasons stated herein, and dismissing the case, but without prejudice to the plaintiff to institute any proper action that he may be advised, to recover the penalty sought to be recovered by this action.

(93 Va. 408)

DUDLEY et al. v. MINOR'S EX'R et al.  
(Supreme Court of Appeals of Virginia. July 18, 1896.)

**INJUNCTION AGAINST LAW ACTION—CONFESSION OF JUDGMENT—CONDITION PRECEDENT.**

1. A bill to enjoin an action on certain notes alleged that they were procured by fraud; and that they, with notes executed by others, were deposited with a bank as collateral security for a note executed by the payee; and that plaintiffs in said action had knowledge of the fraud; but that, if complainants were liable on their notes to the extent of the unpaid balance on the note executed by said payee, they were entitled to contribution from those whose notes were likewise deposited. *Held*, that it was error to require, as a condition precedent to the continuance of the injunction, that complainants confess judgment for the amount of the notes.

2. If the requirement of such condition had been a proper exercise of the discretion vested in the court, the confession should not have been required to be made unconditionally, but the court should have expressly provided that the judgment so confessed should be dealt with as the court should direct.

Appeal from circuit court, Roanoke county; Henry E. Blair, Judge.

Bill by O. W. Dudley and others against A. Miner Wellman, executor, etc., and others, to enjoin an action at law upon certain notes, and for other relief. From a decree requiring complainants, as a condition precedent to the continuance of an injunction, to confess judgment on said notes, complainants appeal. Reversed.

Berryman Green, for appellants. Moor-naw J. Woods, for appellees.

**RIELY, J.** We have no statutory provision commanding courts of equity to require, in any case, a confession of judgment as a condition of equitable interference with legal proceedings. The terms upon which injunctions are awarded by courts of equity, except where they are controlled by statutory enactments, are in each case a question for the discretion of the chancellor. It is not, however, an arbitrary discretion, but a discretion, as was said by Judge Bouldin in *Great Falls Manuf'g Co. v. Henry's Adm'r*, 25 Grat. 575, 579, "to be exercised on well-established principles of equity and law, so as to preserve, as far as practicable, the rights of the party restrained, and at the same time to inflict no wrong on the plaintiff in equity." If it be a general rule, as was claimed by counsel for the appellees, that, where a party seeks to restrain a plaintiff from prosecuting against him his suit at law, he will be required, as a condition of the injunction, to confess judgment in the action at law, the rule is far from being inflexible; but, on the contrary, a court of equity will not, under the practice in this state, require an unconditional confession of judgment at law in any case where it would be unsafe for the defendant to do so. *Great Falls Manuf'g Co. v. Henry's Adm'r*, 25 Grat. 581. In *Warwick v. Norvell*, 1 Rob. (Va.) 306, 320, Judge Allen said: "No authority has been produced which establishes that a party having a defense at law to an action brought against him, and a distinct ground of equitable relief should his defense prove unavailing, must abandon his legal defense by confessing judgment, or await the decision of the action at law before he can be entertained in a court of equity." In *Staples v. Turner's Adm'r*, 29 Grat. 330, the bill was filed to correct errors in a certain settlement of accounts between the parties, in which were blended individual and executorial accounts, and to have the accounts separated, and a proper settlement made, by the chancery court, as the most appropriate tribunal for this purpose, so as to ascertain the amount for which the complainant was individually liable, and to restrain the plaintiff in two actions at law, which were founded on the erroneous settlement, from proceeding further to prosecute the same. The injunction was granted

upon the condition that judgments were confessed in the suits at law. It was held by this court that "the case was not a proper one for requiring the confession of judgments in the suits at law as a condition upon which the injunction would be awarded." In *Thornton v. Thornton*, 31 Grat. 212, the complainant filed his bill in equity to restrain the plaintiff from proceeding in an action at law which he had brought to recover an alleged balance on account between them, and, denying wholly the justice of the claim asserted in the suit at law, asked that the court settle and adjust the accounts between them. The complainant confessed judgment unconditionally in the action at law for the amount claimed, under an order of the judge in the chancery cause requiring him to do so, or else submit to a dissolution of the injunction and a dismissal of his bill. Judge Burks, who delivered the opinion of the court, after strongly intimating that it was an erroneous exercise of the discretion vested in the chancellor to require the complainant to confess a judgment at law in the pending action, which was founded on mutual accounts between the parties, said: "If it was proper to require a confession of judgment at all, the order requiring it should have expressly provided that the judgment so confessed was thereafter to be dealt with as the chancery court might direct." In *Great Falls Manuf'g Co. v. Henry's Adm'r*, supra, the complainant in equity denied the right of the plaintiff in the action at law to recover his claim, or any part of it, in any tribunal, but did not lay claim to any strictly equitable defense to the claim at law. It merely sought to transfer the litigation to the equity side of the court, as the more appropriate tribunal, under all the circumstances of the case, to do justice between the parties. In that case Judge Bouldin said: "The appellant came into equity, denying in toto the right of the appellee to recover at law or in equity, denying the existence of any indebtedness at all, and merely invoking, under the peculiar circumstances of the case, the aid of the equity court in making his defense available. It is very evident that in such case, if entertained in equity at all, the defendant at law could 'not safely confess a judgment,' and therefore no such confession should have been required, but, if required, it should certainly have been on terms of being 'dealt with as the court shall direct,' so that it might retain control of the judgment. But the circuit court, as we have seen, in disregard of the principles above declared, required an unconditional confession of judgment as the price of the injunction; thus compelling the defendant at law to acknowledge, as the price of his injunction, that a debt was in fact due, the existence of which he had ever denied, both at law and in equity."

The principle to be deduced from these

decisions is that, although a defendant in an action at law has a legal defense to the action, yet, if he has also a distinct ground for equitable relief should his defense at law prove unavailing, he is not compelled to abandon his legal defense, by confessing judgment, or to wait the decision of the action at law, before he can be entertained in equity; nor where he denies any indebtedness whatever upon the claim sued on at law, and the right to recover in any forum, either at law or in equity, but invokes the aid of a court of chancery as the more appropriate tribunal, under all the circumstances of the case, in which to conduct the litigation, is he required, if entertained at all in equity, to confess judgment in the action at law as the price of an injunction to the proceedings at law. In such cases it is not safe for him to confess a judgment at law, and it is error for the chancellor to impose such condition upon him.

The appellants, who were the defendants in two actions at law brought on certain promissory notes executed by them to the Salem Development Company for the purchase of lots, alleged in their bill that the notes were procured from them by false and fraudulent representations of the said company, and, by reason thereof, were wholly null and void, and that the plaintiff in the actions at law, and the persons through whom he claimed, had notice of such fraud before any transfer of the notes was made. They further alleged that the said notes, along with a number of other notes also given for the purchase of lots, all of which notes were secured by deeds of trust on the lots, and aggregating \$27,392, were delivered by the Salem Development Company to the Farmers' National Bank of Salem, to be held by it as collateral security for a note of \$21,500, given by the said company to certain named persons, representing themselves as the Olean Cart Company, Limited; that the sum of \$8,000 had been paid on the note of \$21,500, leaving the sum of \$13,500 unpaid; that all the notes constituted one security for the payment of the note to the Olean Cart Company, and that the bank had no authority to transfer any of the said notes; that the complainants, if held liable at all on their notes, and the makers of the other notes which were likewise deposited with the Farmers' National Bank as collateral security (which persons they also made defendants to their bill), were entitled to contribution among themselves, and to have the bank, as trustee, collect on each note such sum as was necessary to satisfy the balance due on the note of Olean Cart Company; that, to this end, they were entitled to have an account taken of the balance then due on the said note for \$21,500, and of the notes held by the bank, and the collections thereon, if any, and to have sale made of the said lots under the various deeds of trust, and

the proceeds of sale applied to the payment of the balance on said note for \$21,500; and, as ancillary to their relief in equity, they prayed an injunction to restrain the plaintiff in the suits at law from further prosecution of the same. The injunction as asked for was awarded, upon proper bond being given; but, upon a motion thereafter to dissolve it, the court decreed that unless the defendants, before the adjournment of the term of the court, confessed judgment in the suits at law, the injunction should be dissolved. This they declined to do, and obtained an appeal from this court.

It is manifest from the allegations of the bill that the defendants in the suits at law, denying any liability whatever on the notes sued on, by reason of the fraud that infected them in the hands of the Salem Development Company, and notice thereof by the plaintiff before any transfer of the notes was ever made by the said company, if entitled, upon the case made by the bill, to be entertained in equity at all to make their defense, could not safely confess judgment in the suits at law; and it was error in the court to require it, as the condition of a continuance in force of the injunction. But even if the requirement of such condition had been a proper exercise, under the circumstances of the case, of the discretion vested in a court of equity, the confession should not have been left by it to be made unconditionally, but the court should have expressly provided in its order that the judgments so confessed were thereafter to be dealt with as the court of equity might direct. *Thornton v. Thornton*, supra; and *Great Falls Manuf'g Co. v. Henry's Adm'r*, supra.

For the foregoing reasons, the decree of the circuit court must be reversed, and the injunction awarded in the cause continued in force, without a confession of judgment in the suits at law.

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SHOWALTER et al. v. HAMBRICK et al.  
(Supreme Court of Appeals of Virginia. July 16, 1896.)

SPECIFIC PERFORMANCE—LACHES OF COMPLAINANT.

Specific performance of a contract to convey land, brought by one who has been for 30 years in possession of the land under the contract, will not be enforced, where the evidence shows that the consideration for the conveyance has never been paid.

Appeal from circuit court, Floyd county; Henry E. Blair, Judge.

Bill in equity by William J. Hambrick and others against H. B. Showalter and others. Decree for complainants, and defendants appeal. Reversed.

Phlegar & Johnson, for appellants. J. L. Tompkins and J. C. Wysor, for appellees.

CARDWELL, J. The appellees filed their bill in the circuit court of Floyd county to

compel the specific performance of a contract for the sale of a certain tract of land in that county, made in the year 1865 or 1866, whereby H. B. Showalter sold to George Hambrick, one of the appellees, the tract of land in question, at the price of \$120, and the latter was put in possession of the land at or about the time of the alleged contract, and remained in possession thereof until some time in the year 1891, when he gave a title bond therefor to his three sons, William J., J. C., and G. E. Hambrick, who are also appellees; the bond bearing date June 1, 1891, and recorded September 17, 1891. The bill does not appear in the record, but, from the affidavit setting it up as a lost paper, it did not set out clearly the provisions of the contract, but stated that Showalter never delivered to Hambrick any deed, title bond, or other title papers for the land that the latter could place on record, and further set forth that Showalter had on the 7th day of September, 1891, executed to George E. Lester, one of the appellants, a title bond for 25 acres of the land alleged to have been purchased by Hambrick from Showalter in the year 1865 or 1866, and that on the 15th of April, 1892, Showalter executed to one J. S. Lawson a title bond conditioned to convey to Lawson  $5\frac{1}{2}$  acres of land when the purchase price therein named was paid, and that afterwards Lawson sold this parcel of land to Lester, who claims title now to the land embraced in the contract alleged to have been made between Showalter and Hambrick. Upon the hearing of the cause in the court below on the bill and exhibits, the separate demurrer and answer of Showalter and Lester, and the depositions taken for both plaintiffs and defendants, the court overruled the demurrer, and decided that the contract between Showalter and Hambrick, made, as alleged in 1865 or 1866, was a written contract; that George Hambrick had paid Showalter therefor; that he was entitled to a deed of conveyance,—and directed a commissioner to convey the land in question to J. C., W. J., and G. E. Hambrick, the vendees of George Hambrick, reserving a lien for the unpaid purchase money due to the estate of George Hambrick, who had died after the institution of this suit. From this decree, Showalter and Lester obtained an appeal to this court.

That the court below correctly decided that there was a written contract, or title bond, given by Showalter to Hambrick for the land in question, seems to be uncontroverted in the argument, and the decision on this appeal (the demurrer being waived) turns solely upon the question whether or not the court below was in error in holding that the purchase price for the land had been paid by Hambrick to Showalter. The answer of Showalter, read in connection with the answer of Lester, adopted by Showalter as his answer, admits that he sold, or agreed to sell, the land in question to George Hambrick, but insists that he gave to Hambrick a title bond therefor, conditioned to convey the land to him when he

paid the purchase price, \$120, to H. B. Dowler, to whom Showalter had theretofore given a deed of trust upon his land, which included the land that he (Showalter) had agreed to sell to Hambrick, and denies most emphatically that any part of the purchase money was ever paid by Hambrick. On the contrary, he sets forth that after waiting on Hambrick for many years to pay the purchase money to Dowler, and finding that he was unable to do so, he (Showalter) then paid off his indebtedness to Dowler, and obtained a release deed from him as to all the lands included in the trust deed. Whereupon he notified George Hambrick of this fact, and demanded to know of him what he proposed to do about the land, when Hambrick asked for time to pay the purchase money to him (Showalter), which was given him, and extended until he (Showalter), having become satisfied that he (Hambrick) could or would not pay for the land, sold it to Lester and Lawson.

The principal witnesses relied on by the plaintiffs in the lower court to prove that Hambrick had paid for the land are William J. Hambrick, his son, and one James Kirby, and these witnesses pretend to know what the contract was; and, according to their testimony, the land was sold by parol agreement in 1865 or 1866 for \$40 in cash, and a wagon, which, according to their statement, were paid and delivered,—the money when the trade was made, and the wagon in 1866 or 1867. It is true that one other witness (Jacob Sumpter, a son-in-law of George Hambrick) testified that he heard Showalter promise to make a deed to George Hambrick for land which he (Sumpter) supposes was the land in controversy; and another witness (Thomas Turpin) testified that H. B. Dowler told him that George Hambrick paid him \$40 on the trust-deed debt. But if the statement of Turpin be admitted, though clearly hearsay testimony, it can only serve to prove that the evidence of W. J. Hambrick and James Kirby as to a contract for \$40 cash to Showalter, and a wagon, is not true. It is admitted in the record that 10 witnesses testified that they would not believe Jacob Sumpter on oath, while 34 testified that they would; but as this evidence, as we think, is completely overthrown by the testimony on behalf of the defendant Showalter, it is unnecessary to decide whether the testimony of this witness, Sumpter, is worthy of belief or not. The evidence is overwhelming that the statements of Kirby are not to be relied on, and shows that it was impossible for him to have been present at the time and place when and at which he states that he witnessed the contract, and saw the money—the \$40—paid, and knew that the wagon had been delivered. His own evidence and that of J. C. Hambrick, a party interested, who attempts to bolster Kirby up in his statement that he lived with George Hambrick from 1865 or 1866 to 1868, is completely overthrown by four disinterested witnesses who prove that he was not at Ham-

brick's either of those years. Mrs. Miller fixes his whereabouts in 1867 in Montgomery county, a considerable distance from Hambrick's, and where he had lived since some time in 1864, or the early part of 1865, and by facts which the witness Mrs. Miller most reasonably gave to show the correctness of her statement; and she is borne out by other witnesses,—notably, John T. Shelburn, who moved Kirby, in the fall of 1865, to Bardshaw's Creek, and testifies that for the first three or four years after the war he was about George Hambrick's frequently, had hauled up and down about Hambrick's every few days, and that Kirby did not live at or near Hambrick's Mill (at or near which George Hambrick lived) within three or four years after the close of the war. It is needless, however, to pursue further a discussion of the testimony of the witnesses relied on to show that Hambrick had paid Showalter for the land, as the evidence to the contrary is quite conclusive, even if we omit from consideration the evidence of Showalter himself, which is objected to, but which objection, in the view we take of the case, it is unnecessary to pass upon.

F. A. Dowler, a brother of H. B. Dowler, who was examined as a witness for the defendant Showalter, was asked the following question: "Did you have any transaction with said [George] Hambrick or Showalter for H. B. Dowler? If so, state where and when, and what was it about." And his answer was: "Yes; I had a transaction with them both for H. B. Dowler in March, 1882, in Floyd county, Va. H. B. Dowler held a deed of trust on certain land belonging to H. B. Showalter, to secure the said Dowler in a debt owing from him (said Showalter). I, as attorney in fact for H. B. Dowler, in about March, 1882, went to see H. B. Showalter about payment of the debt; but he did not pay me the money, but gave me an order to [George] Hambrick for \$120, amount claimed by Showalter to be owing him from said Hambrick, and I went there and saw Mr. Hambrick. He said he owed the money to Mr. Showalter, but that he did not then have it so that he could pay me." Then, in answer to other questions, this witness says that, when he took the order for \$120 to Hambrick, he said he owed that amount to Showalter, and, as witness thought, said it was for land, and said he would pay the witness that amount, and offered to secure it by deed of trust on real estate, and wanted witness to release the deed of trust held by H. B. Dowler on the land of Showalter, and said that if he would do so he (Hambrick) would secure the \$120 by other real estate. Then, in answer to the question, "State whether or not Hambrick claimed that he had paid for the land he had bought of Showalter," witness said, "He said he had not." An effort was made to show that in this conversation Hambrick had reference to money he owed Showalter on some other transaction, but the effort signally fails.

It seems that, as early as in 1871,—long after Hambrick's witnesses attempt to show that this money had been paid,—H. B. Dowler placed his claim in the hand of Mr. Trigg, a lawyer, who wrote to George Hambrick with regard to the money, and received from him a reply dated January 2, 1871, in which he says: "I will be sure to get some money next March for some land I sold last month, and I promised H. B. Showalter, some time back, to help him to \* \* \* some money that he promised you, and I am disappointed, and will be sure to pay him \$100 some time in March, 1871; and I will write to Dowler, and I think it will satisfy him." This letter is filed as an exhibit with the defendants' answer, and that it was written by George Hambrick is nowhere questioned. After Lester had purchased this land from Showalter, young Hambrick obtained a warrant against Lester for trespassing on the land, and a trial of this warrant was had; and it is shown by the justices who tried the warrant, and whose depositions are taken in this cause, that at the trial neither George Hambrick, nor either of his sons to whom he had sold the land, claimed that the land had been paid for to Showalter, although Showalter made the statement that no part of the purchase money had been paid. Nathan Phillips, one of the justices, testified that he had a conversation with G. E. Hambrick a few days before the warrant trying, in which he (G. E. Hambrick) said: "We have not paid for the land, but don't say anything about it. We are going to hold it by possession. If we can't hold it that way, we are going to give Lester all the trouble we can. We don't propose for him to run us out like dogs." Then, on cross-examination, when the effort was being made to show that, when G. E. Hambrick spoke of the land not being paid for, he meant that he and his brother had not paid their father for it, the witness Phillips states emphatically that George Hambrick never claimed that he had paid for the land, and that in the conversation with G. E. Hambrick he mentioned his father, he mentioned the whole of them, he mentions his father with the boys, and when asked the direct question, "Are you positive that George Hambrick did not state on that trial that he had paid Showalter in full for the land?" says: "Yes, sir; I am positive of it. The only man that swore in the trial that an amount had been paid was Mr. Turpin." The statement made by Turpin, referred to, was to the effect that he had been told that George Hambrick had paid Mr. Dowler \$40, or that Mr. Dowler told him so; but, be this as it may, it could not be evidence against Showalter, and is in conflict with George Hambrick's letter to Trigg, and his statement to F. A. Dowler. George E. Lester testified that, after he procured a title bond for this land from H. B. Showalter, he went to see George Hambrick, and told him of it, and said to him that, if he had any right or title

to the land, he (Lester) would take it as a favor if he would let him know; that he had not paid Mr. Showalter for the land, and if Hambrick had any title to the land he would not pay Showalter for it; and that Hambrick showed him no evidence of title, but said: "Lester, I have got a proposition to make to you: If you will give me a little strip, 70 yards wide, you may have the balance; and you can be an advantage to me, and I can to you."

We might further examine the evidence on behalf of the defendants in the court below (the appellants here) to show that George Hambrick had never paid for the land in question, but deem it unnecessary. The witnesses that we have referred to are not contradicted, and are corroborated by other witnesses, and by circumstances shown in the record. We are of opinion that the evidence is conclusive that the land was never paid for, and that the plaintiffs in the court below were not entitled to a conveyance thereof, and the decree of the lower court is therefore erroneous. The decree will be reversed and annulled, and this court will enter such decree as the lower court should have entered, dismissing the bill, with costs to the appellants.

(93 Va. 424)

HUGHES et al. v. EPLING et al.

(Supreme Court of Appeals of Virginia. July 18, 1896.)

CONVEYANCE FOR THE BENEFIT OF DEBTOR—  
VALIDITY.

A deed of trust conveying a stock of goods to secure the payment of a debt, and to secure the creditor as an indorser on certain notes, provided that the grantor should remain in the possession and enjoyment of the stock until default in payment of the notes, or any renewals thereof, or in the payment of the debt secured, and until the indorser and creditor named should demand a sale. *Held*, that the conveyance, being on its face given for the benefit of the debtor, was fraudulent per se.

Appeal from hustings court of Roanoke; George E. Cassell, Judge.

Bill by Hughes, Effinger & Co. against C. R. Epling and others to set aside a certain conveyance as fraudulent. There was a decree for defendants, and plaintiffs appeal. Reversed.

Hoge & Hoge, for appellants. Heflin & Dunlap, for appellees.

BUCHANAN, J. The only question to be decided in this case is whether or not the deed of trust whose validity is attacked by the appellants is fraudulent per se.

The grantor was engaged in the business of a retail merchant, having one store in East Radford, and another in West Radford. He conveyed his stock of goods or merchandise at each place, together with all the fixtures in both storehouses, such as show cases, stoves, and safes, and also a horse and buggy, to Heflin & Dunlap, trustees, to secure the payment of a debt due by him to G. W.

Epling, and also to secure him as indorser upon two negotiable notes.

The deed provided that the grantor should "be suffered to remain in possession and enjoyment of the said stocks of goods or merchandise until default" should be made by the grantor in the payment of the negotiable notes, or of any renewals or continuations of the same, or any part thereof, or in the payment of the debt secured, and until G. W. Epling, the indorser and creditor, should require the trustees to sell. Until there had been both a failure to pay, and a demand to sell, the grantor retained the possession and the right of disposition. There is not only no provision in the deed that he is to account to the trustees for the proceeds of sales made by him while in possession, nor any recognition that such sales are for their benefit, but the terms of the trust exclude any such idea, and necessarily imply that he had the right to dispose of the goods in his business for his own benefit, and to continue to do so as long as the negotiable notes could be renewed, and the party secured was content not to require a sale.

The law does not authorize such agreement. A creditor, in securing himself, must be careful that the contract by which he is secured does not contain provisions which do not benefit him, but which benefit the debtor, and were so intended, and are prejudicial to other creditors. It does not allow the creditor to make use of his own debt for any other purpose than his own indemnity. When he goes beyond this, and puts into the contract provisions which have the effect of shielding his debtor by allowing him to dispose of the trust subject for his own purposes, and by which other creditors are hindered and delayed in the collection of their debts, the contract cannot be upheld. The power retained was incompatible with the avowed purpose of the grantor to furnish indemnity to his creditor and indorser, and is fully adequate to the defeat of the provisions of the deed of trust.

This court, in *Lang v. Lee*, 3 Rand. (Va.) 410, held that, where such a power is retained by the grantor, his conveyance is fraudulent per se, null, and void as to other creditors.

In the case of *Addington v. Etheridge*, 12 Grat. 436, a merchant conveyed to a trustee all his stock of goods and the storehouse for the balance of the year, in trust to pay certain debts described in the deed. It provided that he should retain possession of and sell the goods in the usual line of his trade, and occupy the storehouse, until default in the payment of any of the debts, and until the trustee should be required by any of the creditors to close the deed by a sale. It was held to be fraudulent per se, because the power retained was incompatible with the avowed purpose of the trust, and fully adequate to the defeat of the provisions of the deed.

The doctrine laid down in those cases has

been uniformly recognized and followed by this court. *Sheppards v. Turpin*, 3 Gratt. 373; *Spence v. Bagwell*, 6 Gratt. 444; *Marks v. Hill*, 15 Gratt. 400, 416; *Perry v. Bank*, 27 Gratt. 755; *Brockenbrough v. Brockenbrough*, 31 Gratt., at page 590; *McCormick v. Atkinson*, 78 Va. 8; *Wray v. Davenport*, 79 Va. 19; *Saunders v. Waggoner*, 82 Va. 316.

We are of opinion that the deed of trust in this case was fraudulent per se, and should have been declared null and void by the trial court, as to the creditors who established their debts in the case. The decree appealed from must therefore be reversed, and the cause remanded to that court, to be proceeded in, in accordance with this opinion.

#### HUMPHREYS et al. v. HOGE.

(Supreme Court of Appeals of Virginia. July 16, 1896.)

REAL-ESTATE BROKER—COMMISSIONS—CONTRACT WITH PURCHASER—EVIDENCE—ASSUMPTION OF CONTRACT BY THIRD PERSON.

1. In an action by a real-estate broker for commissions on a purchase of land, he testified that, in addition to a cash commission which had been paid by defendant, there was an agreement made at another time for payment of additional commissions in case plaintiff procured a purchase for less than a certain price, and defendant testified that no contract for additional commissions was made at the time the original contract was made, but did not state that no such contract was made thereafter; and there was evidence that, after the sale had been completed, defendant stated to a third person that he had paid plaintiff a cash commission, and that plaintiff "will receive something more in the future." *Held*, that the evidence sufficiently established a contract for additional commissions.

2. In an action by a real-estate broker for commissions, it appeared that defendant H. had agreed in writing to give plaintiff a certain cash commission, and had thereafter orally agreed to give additional commissions in case plaintiff procured a reduction of the price asked by the owner, and that such reduction was made by procuring from such owner additional property without additional consideration. It also appeared that defendant H. wrote to defendant W., stating the terms of the written contract, and that he had agreed to give plaintiff a cash commission; and defendant W., without making inquiry as to any agreement for additional commissions, replied that he would take "the deal" from the hands of defendant H., and assume the payment of the commission and the price, and defendant W. obtained the additional property. *Held*, that he was liable for the additional commissions.

Appeal from circuit court, Craig county; Henry E. Blair, Judge.

Action by J. Hampton Hoge against A. E. Humphreys and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Marshall & Read and Blair & Blair, for appellants. L. H. Cocke, Scott & Staples, and Hoge & Hoge, for appellee.

RIELY, J. The plaintiff bases his claim to additional compensation for his services in making the purchase of the Mountain Lake tract of land upon an alleged agreement on

the part of the defendant Humphreys to give him, in addition to the sum of \$10,000, one-half of the difference between \$250,000 and any less price at which he might succeed in buying the land. It is conceded that he was authorized by Humphreys to buy the land for him at the price of \$250,000, and that, if he succeeded in doing so, he was to receive \$10,000 as a commission for his services. It is further conceded that he bought the land at that price, and was paid \$10,000; and it is not controverted that there was included in the purchase, as an inducement thereto, and for the said consideration, other real and personal property not contemplated at the time that the plaintiff was employed to make the purchase. It is to one-half of the value of this additional property that the plaintiff claims that he is entitled, as further compensation for his services. The amended bill sets forth fully and clearly the claim of the plaintiff, and waives an answer under oath. The defendants answered, and denied the allegations of the bill. The cause was not heard upon the bill and answer only, and the answer, therefore, was not evidence in favor of the defendants. Code Va. § 3281.

It appears from the evidence that the employment by Humphreys of the plaintiff to buy the Mountain Lake land took place while they were traveling together on the cars from Danville to Lynchburg. The plaintiff testified that the agreement authorizing him to make the purchase at \$250,000, and to pay him a commission of \$10,000, was reduced to writing on the back of an envelope, and signed by Humphreys; and that after this had been done, and just before they reached Lynchburg, Humphreys said to him that, if he bought the land for less than \$250,000, he would give him one-half of the difference. His testimony in support of the agreement for additional compensation is direct and explicit. While Humphreys, in his answer, denies any agreement for compensation beyond the commission of \$10,000, yet when he comes to testify, after stating how the contract in writing was brought about, he contents himself with saying: "That was all that was said at the time on this subject." He does not deny that an agreement for additional compensation in case the plaintiff bought the land for less than \$250,000 was subsequently made, just before they arrived at Lynchburg, where they parted. The plaintiff did not claim that the agreement for additional compensation occurred at the time the original contract was concluded, but that it took place after that time. Humphreys is no doubt correct that nothing was said as to additional compensation at the time the original contract was entered into. The plaintiff does not pretend that there was. Humphreys' statement may be entirely true, and yet the subsequent agreement, as testified to by the plaintiff, have been made. It is to be noted that, notwithstanding Humphreys did not give his deposition until nearly a year after that of the plaintiff

was taken, he does not deny, nor even allude to, the statement of the latter that the promise of increased compensation was a subsequent agreement, although the plaintiff specified the time and place, and detailed the circumstances, under which the last agreement was made. Whether the omission was intentional or an oversight we cannot know, but the fact of the omission and the inference resulting from it cannot be disregarded. The testimony of Tompkins also tends to corroborate that of the plaintiff. Shortly after the purchase became public, Tompkins met with Humphreys, and, in the course of the conversation that ensued, asked him what compensation the plaintiff received. His reply was, "We have paid him, or are to pay him, \$10,000 cash," and supplemented his reply with the remark that he "will receive something more in the future." Humphreys, in his deposition, attempts to explain it by saying that he meant that the plaintiff would probably get more if the investment should turn out to be very profitable. Without pursuing the evidence further, it is sufficient to say that it sustains the claim of the plaintiff for additional compensation.

As to the value of the additional property acquired along with the purchase of the Mountain Lake land, the evidence is not very satisfactory; but, after duly considering it, our conclusion is that the valuation put upon it by the circuit court is a fair and just estimate from the testimony. It fixed it at \$4,500, and gave the plaintiff a decree for \$2,250 against Woodman, as well as against Humphreys. It is contended that in no event should the decree have gone against Woodman; that he had not assumed to pay the plaintiff any commission beyond the sum of \$10,000; and that there was no privity between them. Bearing upon this question, there are certain facts about which there is no dispute. The plaintiff informed Humphreys, by letter, of the purchase as soon as it was made, who, aware of his inability to pay for the land, at once sought Woodman to get him to assume the purchase. He informed him that the subject of the purchase was the Mountain Lake tract of land; that the consideration was \$250,000; and that the plaintiff was to receive \$10,000 for making the purchase. Woodman agreed to take "the deal" off his hands, and pay these moneys. But along with the Mountain Lake land was included by the owner, as an inducement to the purchase, other property, of the value of \$4,500, which reduced the consideration to be paid for the land by that sum. Woodman acquired that much more property than was contemplated by him at the time he agreed to take Humphreys' place in the purchase, for it does not appear that anything was said about the additional property, and it is not probable that Humphreys knew of it, as he had not then seen the contract of purchase. It was acquired through the efforts of the plaintiff, who is entitled, by virtue

of his agreement with Humphreys, to one-half of its value. Woodman learned from Humphreys, when he assumed the purchase, that the plaintiff was entitled to compensation for purchasing the property. He made no inquiry of the plaintiff as to the amount of his commission, but chose to rely on the statement of Humphreys that it was \$10,000; and so it would have been if the additional property had not been included in the purchase, and of this Humphreys and Woodman were not then aware. Duty, as well as interest, dictated that Woodman should have inquired of the plaintiff the amount he was to receive. He did not do so. He was not misled by the plaintiff, and cannot now complain of any injury resulting from his own default. But he is not injured. He has the Mountain Lake land, which was all that he understood that he was getting when he assumed to pay therefor the sum of \$250,000, and to the plaintiff the commission of \$10,000; and he has, besides, the other property, subject to the decree in favor of the plaintiff for one-half of the value thereof. It is true that the acreage of the Mountain Lake body of land, in consequence of other patents being upon a part of it, was diminished by 20,000 acres,—from 103,000 to 83,000 acres; but for this loss he was fully compensated by a deduction by the vendor of \$50,000 from the original amount of the purchase money. Woodman has possessed himself of all the beneficial results of the services of the plaintiff in making the purchase, and cannot justly claim exemption from liability for their payment. He cannot be allowed to enjoy all the fruits of the purchase, and repudiate its burdens. He has elected to appropriate the one, and must therefore bear the other. We are of opinion that the decree appealed from should be affirmed.

(33 Va. 415)

## ANDERSON v. PHLEGAR.

(Supreme Court of Appeals of Virginia. July 16, 1896.)

ESTOPPEL — REPRESENTATIONS ACTED ON BY ANOTHER—EQUITY.

1. An assignee of an outstanding mortgage, who was a son of the mortgagors, to induce another to make a loan to his parents on the security of the property, a life estate in which was owned by his father and the remainder by his mother, executed a release of his liens, in favor of the second mortgage, in which he represented that he also held a lien by virtue of payments made on behalf of his mother on a purchase by her of her husband's life estate. Held that, as against the second mortgage, he was estopped to set up title in himself to the life estate of his father, though the records at the time of the execution of the release showed him to be the purchaser.

2. Where a bill to enjoin a sale of property under a trust deed sets up conflicting liens on the land, the court should decide the priority of rights between the parties before dissolving a temporary injunction, and allowing the sale to proceed under defendant's trust deed without further supervision by the court.

Appeal from circuit court, Montgomery county; Henry B. Blair, Judge.

Action by William G. Anderson against A. A. Phlegar, trustee. Decree for defendant, and complainant appeals. Reversed.

Scott & Staples, for appellant. Phlegar & Johnson, for appellee.

CARDWELL, J. The facts out of which this litigation arose are as follows: On the 10th of March, 1884, Mrs. S. J. Anderson, the wife of George W. Anderson, owned the estate in remainder in a tract of about 1,100 acres of land in Montgomery county, subject to the life estate of her husband therein, the title to which life estate was then outstanding in the assignee of the husband in bankruptcy; and on that date Anderson and wife, by deed duly recorded, conveyed the wife's estate in remainder to Scott and Marye, trustees, to secure to Robert Stiles the payment of \$2,000. On December 31, 1888, Stiles assigned his debt, and the trust deed securing it, to the appellant, William G. Anderson. In March, 1890, Mrs. S. J. Anderson became desirous of borrowing from Lewis H. Blair the sum of \$1,500, or to secure the indorsement of her note by Blair to enable her to get the loan from the Bank of Christiansburg, proposing to secure Blair by trust deed on her interest in the 1,100-acre tract of land; but, before indorsing the note, Blair was informed that the appellant, William G. Anderson, held the lien on the land for the debt of \$2,000 formerly held by Stiles, and laid claim to some interest in the life estate of George W. Anderson in the land, and refused to indorse the note for Mrs. Anderson until appellant, William G. Anderson, released his claims upon the land, or agreed to postpone them in favor of the deed of trust to be executed to secure him (Blair), whereupon George W. Anderson and wife procured from William G. Anderson the following deed, to wit: "Having, as security of my mother, Sarah J. Anderson, on her bonds for purchase money of my father's life estate in about eleven hundred acres of land sold under a decree of the United States court, said land being in Montgomery county, Virginia, paid a part of said purchase money, and having also taken by transfer or assignment the debt of Robert W. Stiles for two thousand dollars and interest, which was secured by a deed of trust dated March 10th, 1884, recorded in Deed Book Y, at page 82, of Montgomery clerk's office, Virginia, and being requested by my mother and father to release the lien I have for said sums in favor of a note for fifteen hundred dollars, to bear date March 7, 1890, payable four months after date to Lewis H. Blair, which my father and mother propose giving and securing by a trust deed on said land, I do hereby covenant and agree with said Geo. W. Anderson (my father), Sarah J. Anderson, Lewis H. Blair, and all future holders of such note, or any note which may be given

on renewal thereof, or of any part thereof, that I will and I do hereby release the liens which I have on said land, so far as the same are prior to the lien to be created by trust deed to secure the said \$1,500 note and all renewals thereof, and that the debts due me as aforesaid shall be subordinate to the lien for fifteen hundred dollars note for all costs and charges which may attend the collection, renewals, and discount of the same, or of any renewals in whole or part thereof, but this release and agreement shall not affect my claims as against any other debts of my father or mother. Given under my hand and seal March 10th, 1890. Wm. G. Anderson. [Seal.]" This deed, duly executed and acknowledged, having been delivered along with a deed of trust of the same date executed by George W. Anderson and wife to Phlegar, trustee, conveying the 1,100-acre tract of land to secure "the payment of a negotiable note bearing date March 7, 1890, made by the grantor, \* \* \* payable to Lewis H. Blair, four months after its date, at the 1st National Bank of Roanoke, Va., for \$1,500, all renewals thereof," etc., " \* \* and also to secure a bond of \$100 payable four months after date, on conditions therein expressed, to said Lewis H. Blair, \* \* \* both deeds being recorded together. Blair indorsed the \$1,500 note, and Anderson and wife had it discounted at the Bank of Christiansburg, and failed to meet it when due. In 1894, Blair required the trustee, Phlegar, to sell the property, and the trustee posted his notices of a sale of the property, or so much thereof as might be necessary to pay the debt secured, and cost of executing the trust, on the 23d of April, 1894, the notices of sale setting forth that the land had been laid off in parcels by the county surveyor since a former advertisement, and into more desirable parcels; that the sale would be for cash, as to \$1,900, and, as to any residue from the sale of the parcels sold, a credit would be given of one and two years, etc. Before the day of sale the appellant, William G. Anderson, obtained an injunction to restrain the trustee from proceeding with the sale till the further order of the circuit court of Montgomery county. To the bill filed by William G. Anderson, Blair, and Phlegar, trustee, filed their separate demurrer and answer, to which answer the plaintiff replied generally; and notice having been duly given of a motion to dissolve the injunction, in vacation, the cause was heard before the judge of the circuit court of Montgomery county, May 1, 1894, upon the bill and exhibits therewith, and separate answer of Blair, and Phlegar, trustee, read as affidavits, and other affidavits read on behalf of both plaintiff and defendants, whereupon the judge of the circuit court dissolved the injunction, and, at the following term of the court, dismissed the plaintiff's bill, and the plaintiff obtained an appeal to this court.

The first contention of appellant is that it was error in the court below to dissolve the injunction, and leave the trustee to sell in accordance with the advertisement he had posted, in view of the fact that he proposed to sell, not only the interest of Mrs. S. J. Anderson in the land, but the life estate of her husband, which had not passed by the deed of trust under which the trustee was acting, but the title to which life estate was at the date of the execution of the trust in the husband, George W. Anderson's assignee in bankruptcy, and subsequently conveyed to appellant by commissioner of the bankrupt court. In other words, it is contended that appellant is not estopped by his deed of March 10, 1890, from setting up his claim to the life estate of George W. Anderson in the tract of land then about to be sold by the trustee, even as against, or as having priority over, the \$1,500 debt secured to Blair. It will be observed that the deed of appellant of March 10, 1890, recites that his claim to the life estate in question was based on his having, as security for his mother, Sarah J. Anderson, the purchaser thereof, paid a part of the purchase money therefor; that he had taken a transfer and assignment of the debt to Robert W. Stiles for \$2,000 and interest, secured by the trust deed of March 10, 1884, recorded, etc., and "being requested by my mother and father to release the liens I have for said sums in favor of a note to Blair for \$1,500," etc. Then follows the agreement between him and his father and mother and Blair, in which he says: "I do hereby release the liens which I have on said land, so far as the same are prior to the lien to be created by trust to secure the said \$1,500, \* \* \* and that the debts due me as aforesaid shall be subordinate to the lien for said \$1,500 note, and for all costs and charges which attend the collection, renewals, and discounts of same," etc. Language could hardly be made plainer to convey to Blair the idea that the only claim that appellant had on the life estate of his father, George W. Anderson, in the 1,100 acres of land, was for the sums that he had paid therefor as security for his mother, who had purchased the life estate, and who owned the estate in remainder, and that he (appellant) intended by his agreement to postpone this claim, as well as the Stiles debt, in favor of the note for \$1,500 to be executed by his mother and father to Blair. If the life estate had in fact been purchased by Mrs. Anderson, it would have passed under the deed made for Blair's benefit; and the question therefore is, did Blair rely on the recitals made in the deed of appellant of March 10, 1890, and was it his right to do so? Certain it is that appellant will not be heard to say that he did not read his deed, or that he did not understand it, nor that he was ignorant of the real facts when he made the deed, especially as he now makes it to appear that at that time the life estate in the land had been sold under a decree of the bankrupt

court, and that he had become the purchaser, though there was no decree authorizing a deed to him till March 13, 1893, and it was not made till April 10, 1894, a few weeks only before he instituted this suit. It is argued, however, that it was within the power of Blair to ascertain from the proceedings in bankruptcy, in which the life estate of George W. Anderson was sold, the facts as to who was the purchaser of this life estate; but the doctrine underlying this contention only applies where the conduct affecting title to land, and creating the alleged estoppel, is mere silence. Where the real owner resorts to any affirmative acts or words, or makes any representations, it would be in the highest degree inequitable to permit him to say that the other party, who had relied upon his conduct and had been misled thereby, might have ascertained the falsity of his representations. 2 Pom. Eq. Jur. § 810, and authorities cited. It is not the silence of appellant, merely, that is relied on to operate as an estoppel, but the representations made by him in the most solemn form. He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent. *Nicholas v. Austin*, 82 Va. 825, 1 S. E. 132, and cases cited. It is, however, by his deed under his hand and seal that appellant is not only estopped from disputing the deed itself, but every fact which he recites. 3 Washb. Real Prop. (3d Ed.) p. 93; 2 Pom. Eq. Jur. § 808. The measure of the operation of an estoppel is the extent of the representation made by one party, and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true. 2 Pom. Eq. Jur. § 813, and cases cited.

In ascertaining whether or not Blair relied and acted on the representations made by appellant in his deed, the question might well be asked, what object had he in first requiring this deed from appellant before making the loan to Mrs. Anderson, other than to obtain a first lien,—a clear and unincumbered title to the land,—as a security for the loan, and what other object could appellant have supposed he had in view? It is not too much to assume that any one of fair business knowledge would know that an estate in remainder in land subject to a life estate—an estate of the most uncertain duration—would be very undesirable security for a loan, and the most difficult estate, usually, to make sale of. Moreover, appellant does not allege in his bill that appellee, Blair, did not rely and act on the representations made by him, but argues only that Blair knew, or could have known, from the bankruptcy proceedings, that the representations as to the ownership of the life estate were untrue, and further argues that the deed to Phlegar, trustee, did not convey the life estate in the land. These contentions are fully met by the answer of Blair

and Phlegar, trustee,—certainly, so far as to refute any suggestion that the representations made by appellant were not relied on, or that they knew that they were false. "A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry." "No man can complain that another has relied too implicitly on what he himself stated." *Brown v. Rice's Adm'r*, 26 Grat. 473. Some of the authorities go so far as to hold that even silence alone will make it needless to go to the record. *Bates v. Swiger* (W. Va.) 21 S. E. 874, and authorities cited. We are of opinion, therefore, that the appellant is estopped from setting up any claim to the land conveyed to Phlegar, trustee, to the prejudice of the appellee, Blair, as to the amount due on the \$1,500 note secured by the trust deed, and that there is no error in the decree appealed from, in this respect.

It is, however, equally clear that the \$100 bond secured by this trust deed does not have priority over the right of appellant to the estate for the life of George W. Anderson in the land conveyed, or as a lien thereon, nor over the debt assigned to appellant by Stiles, but that this \$100 debt is a subordinate lien on the reversionary interest in the land to the \$1,500 debt and the Stiles debt. It is admitted that this \$100 bond is included in the \$1,900 for which the trustee's notice of the sale stated that the land was to be sold, and this was at least misleading, and should have been corrected before the trustee was permitted to proceed with the sale.

This brings us to the only remaining question that need be considered, and that is whether or not it was error in the court below to dissolve the injunction and dismiss the cause, instead of retaining it with the view of supervising the administration of the trusts. It is true that whether a court, on dissolving an injunction to a sale under a trust deed, should dismiss the bill, or retain it with the view of supervising the administration of the trusts, lies within the discretion of the court. *Hogan v. Duke*, 20 Grat. 244; *Robinson v. Mays*, 76 Va. 708; *Muller's Adm'r v. Stone*, 84 Va. 839, 6 S. E. 223. But whether this discretion has been soundly exercised depends upon the facts and circumstances of the particular case. There is no suggestion in the record here that there are any other liens on the land than those mentioned in the bill and answers. Therefore there existed no good reason for an account of liens before a sale by the trustee; but, there being a conflict between the parties to the cause as to their respective rights and interests, the court should have decided the issues between them, and then decreed a sale of the property, and directed the application of the proceeds. *Muller's Adm'r v. Stone*, *supra*. The decree appealed from is therefore reversed

and annulled, and the cause is remanded for further proceedings herein in accordance with this opinion.

(93 Va. 396)

**BRISTOL IRON & STEEL CO. et al. v. THOMAS et al.**

(Supreme Court of Appeals of Virginia. July 18, 1896.)

**CREDITORS' BILL AGAINST CORPORATIONS—PARTIES —MECHANIC'S LIEN—ASSIGNEE OF CONTRACTOR.**

1. The stockholders of a corporation are neither necessary nor proper parties to a bill by a creditor, on behalf of himself and all other creditors who may choose to join, alleging the insolvency of the corporation, and asking that its property may be administered as a trust fund for the benefit of its creditors, where no relief is asked against the stockholders.

2. An inchoate right to a mechanic's lien, existing under Code, § 2475, in favor of a contractor, passes by an assignment for the benefit of his creditors; and the assignee may, on completion of the contract, perfect and enforce the lien, though the statute contains no provision for the assignment of such right.

Appeal from hustings court of Bristol; W. F. Rhea, Judge.

Bill by Alexander Thomas, as assignee of James P. Withrow, and others, against the Bristol Iron & Steel Company. From the decree the defendant and Flat Top Coal & Coke Association appeal. Affirmed.

H. G. Peters, C. R. Vance, and J. H. Wood, for plaintiffs. Fulkerson, Page & Hurt and R. A. Ayers, for defendant Bristol Iron & Steel Co. Watts, Robertson & Robertson, for defendant Flat Top Coal & Coke Ass'n.

KEITH, P. James P. Withrow entered into a contract with the Bristol Iron & Steel Company for the construction of a complete blast-furnace plant in accordance with certain plans and specifications. When the work had been partially completed, Withrow, becoming embarrassed, made a general assignment for the benefit of his creditors, including therein the contract with the steel and iron company and whatever might be due him from the said company for work performed and supplies and material already furnished. After the assignment, Thomas, the assignee, went on, with the assent of the iron and steel company, to complete the work, and in order to secure what was due him filed a mechanic's lien, complying with all the provisions of the statute law applicable in such cases. In due time he filed his bill in the hustings court of the city of Bristol, which was afterwards transferred to the hustings court of Radford city, to enforce the lien thus acquired. Numerous other lien creditors of the Bristol Iron & Steel Company filed bills, also, to enforce their demands. The defendant company answered, the several suits were brought on to be heard together, and a decree was entered for an account of all liens upon the property and franchises of the defendant corporation. Upon the coming in of the report of the com-

missioner, exceptions were taken by the Bristol Iron & Steel Company, but the court, without passing upon them, recommitted the report to Commissioner Honaker, who returned his second report on the 2d day of December, 1893. To this report numerous exceptions were filed, which the court by its decree disposed of, and with respect to them no question is here made, except as to those taken by the Bristol Iron & Steel Company, all of which were overruled, and the exceptions of the Flat Top Coal & Coke Association, which will be separately considered. The court, having by its decree disposed of the exceptions to the master's report, entered a decree appointing commissioners of sale, and directing them to sell the property of the Bristol Iron & Steel Company unless it paid all the creditors whose debts had been reported the respective amounts due them within 120 days from the rising of the court. Thereupon the Bristol Iron & Steel Company applied for and obtained an appeal and supersedeas from one of the judges of this court.

The first error assigned is that the court failed to pass upon the exceptions to the first report of Commissioner Honaker. None of the exceptions to either the first or second report of Commissioner Honaker on the part of the defendant corporation are well taken, and, as none of them present any question of interest, there is no occasion to discuss them at length. Had the court below considered them, they should have been overruled, and its failure to pass upon them is harmless error.

The next assignment of error is to the action of the court in decreeing the sale of petitioner's real estate in default of the payment of the unsecured debts of the company. It is contended that the real estate of a corporation, like that of a natural person, may be subjected to sale for the enforcement of liens thereon, but cannot be sold in order to satisfy the claims of creditors who have not acquired liens. The petitioner, however, admits that the affairs of an insolvent corporation may be settled and its property be sold for the satisfaction of its debts of every description, whether secured by liens or not, but insists that it must be upon a bill filed for a settlement of its affairs in which its insolvency is made to appear. It is admitted in the petition for appeal that Cadwallader & Co. in their petition in their suit did aver the insolvency of the corporation, and prayed that the court should administer its property as a trust fund for the benefit of all creditors, and that they sued for the benefit of themselves and all other creditors who may choose to come in and contribute to the expense of the litigation. The appellant insists, however, that this petition of Cadwallader & Co. was never treated as an amended bill, and that, even if it were considered as a bill to distribute the assets of an insolvent corporation, it is de-

fective, because the stockholders are necessary parties to such a bill, and were not made parties to any of the causes heard together in the decree appealed from. The record before us omits a very large part of the pleadings and proofs constituting the several records in the hustings court of the city of Radford; but it may be safely assumed, from the petition of the appellants, just cited, that the averments of Cadwallader & Co. in their petition were ample to call into exercise the jurisdiction of the court, and require it to take control of the property of the defendant corporation, and to administer it as a trust fund for the benefit of all its creditors. To such a suit the stockholders are not necessary parties. An incorporated company is an entity wholly separate and distinct from the individual stockholders who compose it. There are cases in which it is proper to make shareholders parties, but in a case such as the one before us it was neither necessary nor proper to implead them. The only object sought in the pleadings, so far as can be discovered from the incomplete record before us, was to subject the corporate property and franchises. No relief was sought against shareholders, and for all the purposes of this litigation they were represented by the company of which they are members, which is a party defendant. We do not perceive that in the decree complained of there is any reversible error to the prejudice of the appellant the Bristol Iron & Steel Company.

After the appeal had been granted upon the petition of the Bristol Iron & Steel Company, the Flat Top Coal & Coke Association presented its petition, praying for an appeal and supersedeas to the decree of the hustings court of the city of Radford, assigning as error to its prejudice that priority was given to the lien of Alexander Thomas, assignee of James P. Withrow. Thomas, as we have seen, claims as the assignee of Withrow, who, having entered into a contract with the defendant corporation for the construction of a blast furnace, assigned his contract and what was due under it to Thomas, who proceeded to carry it out and to perfect the lien. It is not denied that Withrow had a contract for the work, that it was properly the subject of a mechanic's lien under section 2475 of the Code of Virginia, that he had done work and furnished material in accordance with it, and that, if he had himself completed the structure, he would have been entitled to the benefit of the lien; but it is claimed that this is a personal right, and that the inchoate lien created by section 2475 cannot be assigned so as to empower the assignee to perfect the lien as provided in section 2476. It is admitted that, if the work had been completed, and the lien for its security had been perfected, the perfected lien could have been assigned, so as to vest the assignee with all the rights of the assignor. The object of the law in

creating liens in favor of mechanics was to secure to a deserving class of men the fruits of their labor. The statute upon the subject is remedial in its nature, and while courts require a strict compliance with all that the statute prescribes for the completion or perfecting of the lien, and can by construction supply no failure or omission upon the part of the claimant, and to this extent may be said to place a strict construction upon the statute, as being an innovation upon the common law, yet, when the mechanic has done all which it is necessary for him to do, has performed the work or supplied the material, and perfected his lien therefor in the prescribed mode, the duty of the courts is to see that those whom the law intended to protect shall enjoy the advantages which it confers. There seems to be conflict in the decisions as to what should be the policy of the law applicable to these liens. As is said in Phillips on Mechanics' Liens (section 16): "Adjudications will be found declaring it to be against the genius of government to make distinctions between its citizens, or to prefer one class by granting them special privileges in derogation of the rules of common law, and consequently these laws should be construed strictly. There are others equally numerous to the effect that correct policy dictates the fostering of this remedy for purposes of improvement of the country and the protection of often unlettered men, and that a free interpretation should be given them in favor of the mechanic. It will be found, however, on a comparative examination, that courts have, with scarcely an exception, adopted either one or the other line of decision, according as the statutes of the particular state were themselves equitable and just. If they bore with unnecessary severity upon others in favor of the mechanic, and palpable injustice resulted, they have uniformly declared they should not be aided by construction, and a strict interpretation should be placed upon the laws. If, on the other hand, they have secured the laborer the result of his toil and capital with a due regard to the rights of all, constant expressions are to be found in the reported cases declaring they should be favored." Our law as it now stands cannot be justly criticised as unduly favoring those for whose benefit it was enacted. It merely serves to secure to the mechanic and laborer the result of his toil and capital, and, while doing justice to them, inflicts no injustice upon any, and should therefore be fairly, if not liberally, interpreted.

That the contract under which the work is done, and the right to demand the sums due upon it, may be assigned, admits of no question; and that the assignment of a debt or contract ordinarily carries with it every lien which exists for its security will not be denied. That to deny to the holder of the inchoate mechanic's lien the right to assign the lien given by section 2475 would greatly

diminish the value of the benefit conferred upon those enumerated in that section is obvious. It must frequently happen that the artisan, builder, mechanic, or lumber dealer dies before the completion of the work upon which his labor has been performed, or to the construction of which he has furnished materials, or that from some other cause he is without fault upon his part unable to complete that which he has begun, and entitle himself to perfect the imperfect lien by doing what is prescribed in the succeeding section. To hold that he cannot impart to his assignee the faculty and power of perfecting the lien would be in all such cases to rob him of the fruit of his toil by depriving him of the only mode by which it could be secured. If he is incapable of conferring upon another by his voluntary act of assignment the power of perfecting the inchoate lien, the executor and administrator, in the event of his death, would be equally impotent. In the case before us the assignment was for the benefit of creditors. The assignee is clothed with the duty of collecting the assets committed to his care and applying them in accordance with the terms of his trust. The value of this claim is wholly dependent upon the lien by which it is secured, and we are asked to declare that by the very act of assignment for the benefit of his creditors, by the very effort which the debtor makes to comply with his engagements, the value of the subject assigned is destroyed. He was placed in this position: He could not complete that which he had undertaken, and he himself could therefore not perfect the lien; and the construction asked for denies to him the right to clothe any one else with the power of doing it for him, which would result, in the case of death or misfortune, or any unavoidable cause which prevented the completion of the contract, in the loss to himself, his family, and his creditors of all that had been done under his contract. It is admitted in argument, and has been decided by this court, that the lien, when perfected, follows the assignment of the debt which it secures. See *Iaeger v. Bossieux*, 15 Grat. 83. As a general rule, under our law, any contractual right is assignable, and the assignment carries with it all liens given for its security. As a rule, a man may authorize another to do for him whatever he himself may lawfully do. Sections 2475 and 2476 are silent upon the right to make an assignment. The exact question is for the first time presented to this court for decision, and we feel free to adopt that construction which commends itself to us as reasonable and just. We are of opinion that Thomas, as assignee of James P. Withrow, was entitled to perfect the inchoate lien which existed for the benefit of his assignor, and that there is no error in the decree complained of, which must be affirmed.

(93 Va. 404)

**BIGGS v. ELLISTON DEVELOPMENT CO.**  
et al.

(Supreme Court of Appeals of Virginia. July 18, 1896.)

**ESTOPPEL—RIGHTS OF STOCKHOLDERS—VENDOR'S LIEN.**

A stockholder of a corporation, conveying land to the corporation and reserving a vendor's lien to secure the deferred purchase money, is not estopped, by his relation as stockholder, from enforcing his lien, as against a subsequent purchaser from the corporation of a portion of the land, provided the unsold portion is insufficient to pay the unpaid purchase money.

Appeal from circuit court, Montgomery county; Henry E. Blair, Judge.

Suit by W. J. Biggs, for his wife, Annie S. Biggs, against the Elliston Development Company and others. From the decree complainant appeals. Reversed.

Thomas L. Moore, McHugh & Baker, and Hoge & Hoge, for appellant. B. Lacy Hoge and M. H. Tompkins, for appellees.

KEITH, P. W. J. Biggs sold 450 acres of land to the Elliston Development Company, reserving a vendor's lien to secure the deferred payments thereon. The development company subdivided this land into lots, streets, and alleys, and sold a number of the lots to purchasers, some of whom paid in full, and some only in part. The defendant company having failed to meet the deferred payments as they fell due, Biggs, who sues for his wife, Annie S. Biggs, to whom the debt had been assigned, filed a bill in the circuit court of Montgomery county to enforce the vendor's lien. At the December term, 1894, a decree was entered in favor of the plaintiff for the sum of \$9,550.08, with interest on \$8,575.05, a part thereof, from the 10th day of May, 1894, and costs. Thereupon W. H. Edmundson, Hulda Edmundson, Jennie B. Wilson, and Sydney Sheltman filed their answers, in which they allege that they had purchased lots of the defendant company, and had paid the full purchase price therefor, and that, at the time of said purchase and sale, W. J. Biggs was a stockholder in said company, and was thereby estopped from enforcing his vendor's lien against them. Whereupon the circuit court dismissed the bill as to the several defendants above named, except the Elliston Development Company, and directed the lots purchased by them to be discharged of the vendor's lien resting upon them, and that they should be conveyed to the parties as aforesaid, together with the streets, lanes, and alleys set out in the plat exhibited in the record.

The first error assigned is that the court erred in holding that the fact that W. J. Biggs was a stockholder in the Elliston Development Company estopped him or his assignee from asserting the vendor's lien against the lots purchased by the defend-

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ants from the Elliston Development Company; secondly, that the court erred in holding that the streets, lanes, and alleys set out in the plat and subdivision made by the Elliston Development Company, subsequent to their purchase from W. J. Biggs, should be excluded from said decree of sale. We think that both these assignments of error are well taken. An incorporated company is, in a legal point of view, wholly distinct from the persons composing it, and may make any contract with one of its members or stockholders that it might make with a stranger. See Cook, Stock, Stockh. & Corp. Law, §§ 6, 11; 3 Pom. Eq. Jur. § 1090. These propositions, however, are elementary and really call for no citation of authority in their support. It is equally clear that the mortgagor cannot bind his mortgagee by any contract prejudicial to his title, and the same principle applies as between a vendee and his vendor who has reserved a lien for the purchase money. That this, as a general proposition, is true, is, we believe, not controverted, and we are of opinion that the mere fact that the mortgagee stands in the relation of stockholder to a corporation which is the mortgagor does not, of itself, constitute any exception to the rule, unless some act or declaration tending to deceive or mislead on the part of mortgagee can be shown, or some contract, or some act of acquiescence, recognition, or affirmance on his part of the dedication to the prejudice of his rights be shown in evidence. In this case there is nothing whatever beyond the mere relation of stockholder relied upon by the appellees. We think, therefore, that the circuit court erred in excepting the lots of the appellees and the streets, lanes, and alleys from sale to satisfy the vendor's lien in favor of appellant. The utmost that the appellees can claim is that the unsold land should first be offered for sale. If that proves insufficient to satisfy the claims of the appellant, then the lots which have been sold should be exposed to sale in the inverse order of their alienation; the offer of lots to cease, of course, when a sufficient sum shall be raised to satisfy the decree. The reservation should also be made of the right to sell the tract as a whole if the sale in parcels should be found inadequate to satisfy the decree and a better price could be obtained by disposing of the subject as an entirety. We are of opinion that the decree of the circuit court is, for the reasons stated, erroneous, and this court will enter such decree as the circuit court should have entered.

(47 S. C. 67)

**STATE v. MARTIN.**

(Supreme Court of South Carolina. July 11, 1896.)

**HOMICIDE—CORPUS DELICTI—CIRCUMSTANTIAL EVIDENCE—EXPERT WITNESSES—INSTRUCTIONS.**

1. In a murder case, where the body of the deceased was burned and mutilated be-

yond recognition, testimony that a piece of charred cloth, found among the ashes with the deceased, was like the cloth of which his trousers were made, and which he wore at the time of his disappearance, and that a slate pencil found there was identical with one carried by deceased, and known to be such by a certain indentation on the side, was competent evidence of the identity of the body.

2. The sufficiency of the evidence of identity was for the jury.

3. Where irrelevant testimony is immaterial and harmless, its admission affords no ground for a new trial.

4. Where a witness testified that he did not know deceased, who was named P., but that he saw a person called P., and gave the time, place, and persons accompanying the man called P., his testimony was admissible to corroborate other witnesses, who saw P. at the same time and place and with the same persons.

5. There was evidence that blood stains had been found in several places over the floor of the house in which defendant lived at the time of the alleged homicide, and that the floor had the appearance of having been scoured. A piece of board cut from the floor a year later, after defendant had moved from the house, and while it was occupied by another, was offered as a specimen of the stains. *Held*, that the exhibit was competent as a circumstance tending to show defendant's connection with the homicide.

6. The objection that expert witnesses based their opinions of a stated question upon a crude and insufficient analysis does not affect the admissibility of the evidence, but its sufficiency only.

7. Error cannot be predicated on an isolated sentence taken from the court's charge, but the whole text must be construed together.

Appeal from general sessions circuit court of Hampton county; Buchanan, Judge.

John Martin was convicted of murder, and appeals. Affirmed.

W. S. Tillinghast, for appellant. Solicitor Bellinger, for the State.

JONES, J. The appellant was indicted for the murder of one Peter Polite; the jury found him guilty, with a recommendation to mercy; and he was, according to statute, sentenced to imprisonment for life. The proof of the corpus delicti was by circumstantial or presumptive evidence alone. No evidence was offered in behalf of the defendant. The testimony for the state tended to show that on Sunday night before Christmas in 1894, Peter Polite, having in his pocket \$40 or \$45, his savings from his labor that year, left the premises of John C. Davis, a few miles across the Savannah, in Georgia, where he had been engaged at work, and that same night arrived in Hampton county. His movements in Hampton county, in the neighborhood of Shirleys, were traced until about 11 o'clock on Tuesday, Christmas day, when he was last seen alive with the defendant, John Martin, going towards the house where defendant lived, on Mr. McKensie's place. He was described by witnesses as a small negro man, wearing a grey overcoat and dark striped pants. On the morning of the 26th of December, 1894, a small outhouse, con-

taining some hay and fodder, on the premises of Mr. Solomans, about one-half mile from where the defendant lived, was destroyed by fire, and later in the day, in the debris of the burned house, was discovered the charred body of a human being, with both arms missing, the lower part of both legs gone, face burned beyond recognition, and with the top of the skull crushed in, according to one witness,—cut off smooth, as with a heavy sharp instrument, and such a wound as to produce immediate death, as testified by the physician who made the post mortem examination. The action of the fire and heat being less upon the back than upon the other parts of the body, the physician, from an examination of some cuticle not destroyed there, testified that the human body was a negro, and it was apparent he was a man, and of small size. Among the ashes where the body was found were discovered some buttons; also, buckles, such as are used on pants and vests, a piece of dark striped cloth, a collar button, pieces of a small glass vial or bottle, a quarter dollar, some pieces of slate, and a slate pencil. A witness testified that the piece of cloth was like the cloth of which Peter Polite's pants were made, and which he wore at the time of his disappearance. A witness testified that the collar button found was of the same pattern, adjusting with a spring, as one worn by Peter Polite on the Sunday previous. Two witnesses testified that Polite carried a slate pencil the size of the one found, one of the witnesses identifying the pencil found with the pencil carried by Polite by an indentation on the side of the pencil by a piece being slit or scaled off; one having seen Polite with such a pencil on Sunday, and the other on Monday night, previous to his disappearance. This was the evidence relied on to establish the identity of the body found with the body of Peter Polite, alleged to have been killed. Defendant's counsel objected to the evidence as to the piece of cloth and the slate pencil, was overruled, and now excepts thereto, as follows: "For error (1) in allowing witness to testify as to charred cloth without first showing that it came from Peter Polite's body; and (2) in admitting, against objection, a piece of pencil, which appeared to be like other pencils, without proof that it came from the body of Peter Polite."

These exceptions seem to raise the question as to the admissibility of circumstantial evidence to prove the fact of the death of Peter Polite, and the identity of the body found with that of Peter Polite, alleged to have been killed by the defendant. Otherwise, the exceptions relate merely to the weight and sufficiency of the evidence, which we have very often declared it is not in our power to review in a case at law. Notwithstanding the old rule that, to warrant a conviction of murder or manslaughter, there must be direct evidence of the fact of kill-

ing, or of the finding and identification of the dead body, as laid down by Sir Mathew Hale in 2 Hale, P. C. 290, by Lord Stowell in *Evans v. Evans*, 1 Hagg. Consist. 105, and by Lord Abinger in *Reg. v. Hopkins*, 8 Car. & P. 591, yet there were familiar exceptions in cases where the victim's body was thrown overboard at sea, or entirely destroyed, or so destroyed as to be beyond recognition. In *Rex v. Clewes*, 4 Car. & P. 221, the body of a man after many years was identified by some peculiarity of the teeth; and in the celebrated and familiar *Webster Case*, 3 Cush. 295, Parkman's remains were identified by some mineral teeth, found in defendant's laboratory and elsewhere, which a dentist testified were part of a set made by him for the deceased. See, also, *People v. Wilson*, 3 Parker, 199, and *Hindmarsh's Case*, 2 Leach, Crown Cas. 571. Mr. Greenleaf, in his work on Evidence (section 30), says: "Even in cases of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance of moral certainty. \* \* \* It is obvious that on this point no precise rule can be laid down, except that the evidence ought to be strong and cogent, and that innocence should be presumed until the case is proved against the prisoner in all its material circumstances beyond any reasonable doubt." In Clark's Criminal Law we find this statement: "The rule is that there can be no conviction of a felonious homicide on circumstantial evidence, unless the body of the person alleged to have been killed was found; it is not enough to merely show that it is missing. This is not necessary where there is sufficient evidence to satisfy the jury that the homicide was committed; as, for instance, where parts of the body are found, and marks and indications point to the identity of the deceased." In the case of *McCulloch v. State*, 48 Ind. 109, evidence of the finding of a skeleton of a human body of the sex of the person charged to have been murdered, and corresponding to his size, justified the admission of circumstantial evidence to identify the skeleton as that of the murdered party. In the case of *State v. Williams*, 7 Jones (N. C.) 446, 78 Am. Dec. 248, it was held that to identify charred bones as those of a missing woman supposed to have been murdered, it is competent to show that certain hairpins were found with the bones, and that the woman was in the habit of wearing such pins two or three years before. The weight of modern authority is undoubtedly to the effect that all the elements constituting the corpus delicti may be proven by circumstantial evidence. The corpus delicti, in a case of murder, consists of two elements,—the death of a human being, and the criminal act of another in causing that death. The identification of the

body found with the person alleged in the indictment to have been killed, whether treated as an additional element of the corpus delicti, or as a necessary part of the proof of the other two elements, is clearly within the rule. In New York, where the Penal Code prohibits a conviction unless the death of the person alleged to have been killed is established by direct proof, it is nevertheless held that said prohibition does not exclude proof of circumstances tending to establish identity (*People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53), and that a conviction for murder without direct proof of the identity of the victim is sustainable (*People v. Palmer*, 109 N. Y. 110, 16 N. E. 529). See 4 Am. & Eng. Enc. Law, p. 309; 9 Am. & Eng. Enc. Law, p. 728; note to *Ripley v. Miller*, 62 Am. Dec. 117; note to *State v. Williams*, supra, in 78 Am. Dec. 248, and the many cases cited. The late case of *Campbell v. People (Ill.)* 42 N. E. 123, after an exhaustive review of the authorities, goes to the full length of holding that every element of the corpus delicti may be proven by circumstantial evidence, and applies this doctrine to the case of the alleged murder of a newly-born child, although it did not appear that any one had ever seen the child. Without feeling the necessity now to go that far, we feel assurance of absolute correctness, and of being safely distant from all dangerous ground, to hold that, where the body has been found, as in this case, although burned and mutilated beyond recognition by sight, circumstantial evidence, such as objected to in this case, is perfectly competent to prove the identity of the body found with the person of Peter Polite, alleged to have been murdered. The sufficiency of the evidence of identity, as of all other material facts, was wholly for the jury, and the jury in this case were fairly instructed that they must be satisfied beyond a reasonable doubt of the identity of the body found with Peter Polite, and of the criminal agency of the defendant in producing his death.

In reference to that part of the first exception which alleges error in allowing a witness to testify where Peter Polite worked a year before the alleged homicide, we need only say that, conceding the irrelevancy of such testimony, it was immaterial and harmless, and affords no grounds for a new trial. *Smith v. Walke*, 43 S. C. 331, 21 S. E. 249; *Finley v. Cudd*, 42 S. C. 121, 20 S. E. 32.

The testimony of Lawrence Atkins, to show that he had seen Peter Polite a short time before his disappearance, was competent, notwithstanding he stated that he did not know Peter Polite. He saw the person called "Pete," and gave circumstances, time, place, and persons accompanying the man called "Pete," corroborative of other witnesses who saw Peter Polite at the same time and place, and with the same persons. Exception 3 is therefore overruled.

The fourth exception is as follows: "(4)

That his honor erred in admitting, against objections, the board with stains on it, such board having been cut from the floor of the house a year after the alleged homicide, and after the house had been occupied by different families." This piece of the floor, according to the testimony, was taken from the floor of the house in which the defendant lived at the time of the alleged homicide, a few days before the trial in October, after the defendant had moved from it, and while it was occupied by another person. It was testified, without objection, that blood stains, or what resembled blood stains, were found in several places over the floor of the house after the March term, 1895, while the house was vacant, and that the floor had the appearance of having been scoured. This piece of the floor was offered as a specimen of the stains, supposed to be blood stains, found on the floor of the house. The evidence was competent as a circumstance tending to show the defendant's connection with the death of Peter Polite. The fact that the board was taken from the floor 9 or 10 months after the alleged homicide, and while the house was occupied by another, might tend to weaken the force, but could not affect the competency, of the evidence.

The fifth exception alleges error in the admission of the testimony of two physicians, who stated that in their opinion the stains on the piece of floor were blood stains; the grounds of objection being "that it was a mere opinion of said physicians, based upon crude and insufficient analysis." This objection affects the sufficiency, and not the admissibility of the evidence. The physicians gave their opinion as experts, after an examination of the stains under a microscope, and after a chemical analysis. The evidence was clearly competent.

The sixth exception complains that the circuit court erred in charging the jury as follows: "There is some evidence, however little, however insignificant, that points sooner or later, and oftentimes very soon, to the person who committed the crime,"—thereby intimating to the jury that the testimony pointed to the prisoner. This exception cannot be sustained. We have often held that the charge of the circuit judge must be construed as a whole. This is but an isolated sentence, taken from the part of the charge relating in general terms to the nature and necessity of circumstantial evidence, and in no way intimating the opinion of the court as to the guilt of the prisoner.

The seventh exception alleges "that there is, in the whole scope of the testimony, nothing to establish a corpus delicti." This exception presents no question of law. It is but another way of stating that the evidence was not sufficient to prove the death of Peter Polite, and the agency of the defendant in producing his death. This is a question of fact, that the jury has settled, and is not within our cognizance. In this opinion we

have not undertaken to state the circumstances relied on by the state to connect the defendant with the murder of Polite, but have mentioned only so much of the testimony as was proper to make clear the points in controversy here. The judgment of the circuit court is affirmed.

(47 S. C. 358)

**COLUMBIA PHOSPHATE CO. v. FARMERS' ALLIANCE STORE et al.**

(Supreme Court of South Carolina. July 28, 1896.)

**PARTIES—DISCONTINUANCE AS TO ONE—VERDICT—PAYMENT—AGENT'S AUTHORITY—INSTRUCTIONS.**

1. Where counsel for plaintiff states that he wishes to discontinue as to defendant W., who has demurred to the complaint, and an order is entered sustaining the demurrer as to him, and authorizing a judgment for his costs against plaintiff, he is practically out of the case, and the verdict need not except him from defendants by name.

2. Where the issue is whether an assignment of a mortgage was accepted by an agent for collection in payment of notes held by his principal, or as collateral security, it is incumbent on the party claiming it was a payment to establish the authority of the agent to accept something other than money in payment of the notes.

3. Requested instructions are properly refused where there is no evidence to support them.

4. Where one of two reasons given to the jury is sufficient to sustain the charge, it becomes immaterial whether the other reason is sound or not.

Appeal from common pleas circuit court of Edgefield county; Witherspoon, Judge.

Action by the Columbia Phosphate Company against the Farmers' Alliance Store, Silas Yonce, and others, on promissory notes. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The charge of the circuit judge and the grounds of appeal are as follows:

"Mr. Foreman and Gentlemen of the Jury: We are called upon by the law to discharge our respective important duties in the administration of what is known as 'public justice'; and, in the discharge of those duties, the law contemplates that we shall discharge them respectfully, calmly, dispassionately, and, I may say, fearlessly; that we will not permit feelings of sympathy, upon the one hand, or the apparent hardships that may be imposed by our action, upon the other, to influence our actions, our judgments. My duty is to give you the law as I understand it. You are bound by that law. If I should err, there is a court of higher resort, where, I am thankful to say, my errors will be corrected. Your province and duty is to accept that law, and take the evidence as you have heard it upon the stand, consider it calmly and dispassionately, apply it to the law as I will endeavor to give it to you, and then find your verdict accordingly.

"Now, Mr. Foreman, this is an action by the Columbia Phosphate Company, as plain-

tiff, against the Farmers' Alliance Store and certain individuals, to wit, Silas Yonce, W. T. Walton, J. W. Edwards, S. M. Smith, J. H. Edwards, W. S. Crouch, B. L. Caughman, W. M. Hazel, W. W. Padgett, and S. L. Ready, as defendants. Now, the plaintiff seeks in this action to obtain the judgment of this court upon two notes set out in the complaint (introduced here in evidence), alleged by the plaintiff to have been executed to the plaintiff by the defendant the Farmers' Alliance Store or Co-operative Company, chartered by the laws of the state of South Carolina; and the plaintiff further seeks in this action to obtain judgment against these individual persons named as defendants, with the exception of W. T. Walton, as indorsers upon the said two notes alleged to have been executed by the defendant the Farmers' Alliance Store to plaintiff.

"Now, Mr. Foreman, right here you will consider this action dismissed as to the defendant W. T. Walton. Your verdict cannot affect him one way or the other. And why? Because he has demurred to the complaint, and that demurrer has been sustained, and he is practically out of this case. Therefore you will consider the case with reference to the liability of the Farmers' Alliance Store, and of all the other defendants named, with the exception of defendant W. T. Walton.

"Now, one of these notes set up in the complaint, and sued upon by plaintiff, is dated March 2, 1894, payable to the order of the Columbia Phosphate Company, in the sum of \$2,461.27, payable on the 1st of November, 1894, for value received, payable at the Carolina National Bank of Columbia, S. C., with interest after maturity at the rate of 8 per cent. per annum. The second note bears the same date as the first, to wit, March 2, 1894. It is payable to the order of the plaintiff, the Columbia Phosphate Company, just as the first note referred to; but it is payable in a different sum or amount, to wit, \$2,478.90. It is payable to the order of the same plaintiff, at the Carolina National Bank, in Columbia, for value received, on the 1st of December, 1894, with interest, after maturity at the same percentage,—8 per cent. per annum. You will see both of these notes are dated the same date, one payable 1st of November, 1894, and the other 1st of December, 1894. Plaintiff alleges that, at the time of the beginning of this suit, no part of these notes had been paid either by the principal debtor, the Farmers' Alliance Store, or by the alleged indorsers. Plaintiff alleges that, at the maturity of the notes, they were protested for nonpayment, and the indorsers were notified of the protest. The plaintiff therefore demands judgment of this court for the amount due upon these two notes, with the protest fees. Now, it appears here, and it is admitted, that, since the commencement of this action, plaintiff has received the sum of \$523.54, for which amount the

defendants are entitled to a credit on said note as of date 11 May, 1895. That is admitted by the plaintiff,—that, if the defendants are liable upon this note, they are entitled to that credit, \$523.54, as of date May 11, 1895. It is alleged by the plaintiff that each of these two notes was signed by S. L. Ready as president of the Farmers' Alliance Store; that each of the said notes was indorsed by the other defendants above named, when the notes were delivered to the plaintiff. It is further alleged in the complaint that the consideration of these notes—that is, the matter for which they were given—was commercial fertilizer, furnished by the plaintiff to the defendant the Alliance Store. Now, the defendants, in their answer (I am now referring to the pleadings) deny their liability upon these notes. They deny the corporate existence; that is, that the Farmers' Alliance Store, alleged in the complaint, was chartered by the legislature. They admit that the Farmers' Alliance Store, at Johnston, S. C., did attempt to execute the two notes referred to in the complaint, and that they were indorsed as alleged, but that the said notes are not legal or binding upon the maker, the Alliance Store, or the indorsers. They allege further, by way of defense, that the Farmers' Alliance Store gave a mortgage on the stock of goods, which mortgage was turned over to plaintiff as payment of the notes referred to in the complaint as payment of the plaintiff's debt. They further allege that in November, 1894, the Farmers' Alliance Store executed a deed of assignment for the benefit of its creditors; that the plaintiff, the Columbia Phosphate Company, accepted, participated under, said assignment, and the defendants were thereby released of their legal obligation to pay this debt. That is what I understand to be the pleadings in the case, according to the complaint and answer.

"Now, what must the plaintiff prove under these pleadings? First. That this Farmers' Alliance Store was chartered by the legislature of this state. The plaintiff has introduced here a certified copy of the charter, which I have admitted as evidence tending to show charter as alleged in the complaint; that they have a charter from the state of South Carolina. They must also prove—you must be satisfied in order for plaintiff to maintain his action—that this debt is due, or some portion of it, on these notes; that the notes were signed by Ready, as president of the Alliance Store; and that they were indorsed by these several defendants, except Walton, as alleged in the complaint; not only so, but that the notes were not paid at maturity, and that at maturity of the notes the bank protested them for nonpayment, and notified these alleged indorsers of that fact. Now, when one indorses a note for another, for a corporation or individual, when the note matures, then it is the duty of the party who holds the

note to notify the indorsers if not paid,—if they are living in the same place, or where they can get at them, by giving notice at their place of business; if they do not live in the same community, by sending notice of protest by ordinary mail through the postoffice. When the holder does that, he has discharged the duty devolving upon him by the law. I should have stated to you that the plaintiff must make out his case by what is known as the 'preponderance'—the greater weight—of the testimony. The weight of the testimony you are to judge of in order to recover.

'Under the pleadings, one of the questions of fact to be submitted to you is, did these indorsers of these notes take a mortgage from the Farmers' Alliance Store? If you conclude they did, then did they assign and transfer that mortgage to the plaintiff? Well, in order to show that, you must be satisfied that they assigned it and transferred it to the agent or attorney of the Farmers' Phosphate Company; that in transacting this business, accepting it, he was acting within the scope of his agency as attorney representing the plaintiff. Now, it is alleged that this mortgage was transferred and accepted as payment of these debts. Now, that is a question of fact. If I owed you, Mr. Foreman, a note, and gave you a note which I had upon somebody else, and gave it to you as payment of my note, I must have given it as payment. You must have accepted it as payment to operate as an extinguishment of the debt. In other words, it is a matter of contract, and, like all other matters of contract, the two contracting minds must meet and concur; the one to give and transfer this other paper as payment, and the party accepting it must accept it as payment of the debt in order to operate in law as an extinguishment—a payment—of the debt. It is not necessary for me to go any further upon that matter. That's the law. You apply the facts. You have heard the testimony. It is for you to say, if this mortgage was taken by these parties who are charged as being indorsers on these notes, whether they turned it over to Mr. Evans, as representative of the phosphate company; and if so, when they turned it over to him (if they did turn it over to him), did they intend at the time, and did he accept the mortgage at the time, both concurring in the agreement, that it was to be received by him and accepted as payment of these notes, or was it accepted and received by him as a collateral, merely to secure the payment of the debt? Now, if it was accepted as payment—The defendant alleges payment. It is an affirmative defense. In order to avail themselves of that defense, they must satisfy you by the preponderance of the evidence that that mortgage was so turned over by the parties (the mortgagees) with that intent, and so accepted by Mr. Evans, as the representative

of the plaintiff, with like intent, as payment of that debt. If it was so accepted as full payment of these notes, then there is nothing due upon them. Now, whether plaintiff has established that as a question of fact by the preponderance of the evidence,—which the plaintiff must do in order for that plea to avail,—that's a matter entirely for you. If, upon the other hand, you conclude that the mortgage was not accepted as payment of the debt, but as collateral, then what obligation devolved upon plaintiff company? If Mr. Evans represented it, then, as far as his authority to accept as collateral payment was concerned, it was simply to take and act in good faith, and use ordinary prudence and discretion in collecting whatever was turned over to him, and applying it to the assets, if that was the agreement; no more and no less. So much for that.

"I have been requested to charge you, under section 2348 of the General Statutes, that there should have been an advertisement of this property, and, as there was no advertisement of the property by the plaintiff to sell it, that that, as a matter of law, released, as I understand, the plaintiffs from their legal liability upon these notes."

Counsel (interrupting the court): "You mean defendants."

The Court: "I mean defendants,—released the defendants from their liability upon these notes. I charge you this, according to my view of the law, and I hope I shall make myself plain to you. By way of illustration: If, Mr. Foreman, you were to give me a chattel mortgage, or a mortgage upon personal property, movable property, stock of goods, or horse, or anything like that, whenever that debt fell due, secured by that mortgage, the title in law vested in me. I could, without breach of the peace, go and take possession of it, and draw to the legal title the possession of the personal property; the law having invested me with title, I having procured possession without violating the law or disturbing the peace. The law says, under the statute, it being a pledge for a debt, I, in good faith, must not appropriate your property. That won't do. That is giving too much power to the mortgagee. I must show my good faith by advertising that property, so as to bring about competition in bidding, that your property may sell for something like its value; advertise in three places, or advertise in a newspaper, for the purpose of giving the public notice that there will be a sale of this property, and that your property may bring something like its value, in order that you may get the benefit of the value of the property by way of application to my debt. But in all the cases cited by counsel, which I have not been able to look into, that rule applies where the mortgagee goes and takes possession, and converts the property to his own use. Now, I am asked to apply that principle to this case. Well, now, Mr. Fore-

man, I cannot do that from my view of the law. And why not? In the first place, there is no such plea set up here in the answer. They do not plead that by virtue of violating the statute regulating such matters, that they are released from their debt. They did not put the plaintiff on notice that they were relying upon that to discharge their debt. But, outside of that, it is in evidence that the Farmers' Alliance Store made a deed of assignment. For whom? For the benefit of its creditors. Well, now, when they made that deed of assignment, if these parties who are indorsers upon these notes were interested in that store as directors or otherwise, and they, the Farmers' Alliance Store, selected Pierce as their assignee,—if these parties were directors at that time,—they selected Pierce as their representative, as their assignee, for what? To wind up the affairs of the concern of the Alliance Store, and pay the debts. Therefore I cannot charge you that there has been such appropriation. In order for this principle of law to apply, as I understand it, it must be where a mortgagee goes and takes possession under his mortgage, takes it out of the possession of the mortgagor, takes exclusive control and possession of it; and, intending to dispose of it, he must advertise it and comply with this statute.

"It is also set up in this answer that these defendants are released on account of plaintiff, the phosphate company, taking part, going into the meeting of the creditors called under that deed of assignment. I cannot charge you that. And why not? Because there is not a word, as I understand it, or a provision, under that deed of assignment, that excludes any one from any participation in that. It could not do that. But it simply provides, as it should have done, for the settlement of the Alliance Store, the effects and assets, for the benefit of its general creditors, according to their legal priorities; in other words, any judgments, any mortgages, or any liens existing on the stock of goods at the time the deed of assignment was made, subject to those legal rights. It does not say that these parties who come in and accept must give a release, and thereby discharge. I do not so understand it. Therefore I cannot charge you to that effect.

"As to the application of the payments: Now, if you believe from the evidence that any money has been collected by the plaintiff, the phosphate company, other than the \$523.54; if you believe that \$250 was collected outside of this \$523.54 by the phosphate company, applicable to the debt of the Farmers' Alliance Store,—then I charge you this as a matter of law. If you hold a note against me, and also an account, and I pay you \$100 or \$200 upon it, just pay you generally, and do not at the time of the payment direct what application should be made of that money I am paying you, it is your priv-

ilege, if you exercise it at the time of the payment, to apply it to either. I have the right to say where it shall be applied, and if I, at the time of making the payment, instruct you to put it upon the note, and you put it on the account, because the account may not be as well secured, then you violate the law, because I instructed you to put it at a certain place. That's my province and privilege, and your duty is to put it where I instruct you. But, in the absence of any instruction, you have the right to put it upon either one of the debts you have against me. There is no question about that principle of law. If there has been \$250 or any other sum collected by the phosphate company, the plaintiff, what application did they make of it, and what application should they have made of it? They should have paid it upon the existing debt against the parties here to this action if it was paid out of the assets of the store. Now, whether they have done so or not is a question of fact for you. If they paid it upon an existing debt other than these two notes,—any other notes existing against the company,—and it was the company's assets out of which they realized the money, and there was no direction at the time of payment as to how the payment should be applied, they had the right to apply it to that note, and not to the notes in suit. If there was direction, they should have followed the direction in making the application of payment.

"I do not propose to detain you any further. As I have already stated to you, be guided by the law I have given you, which can be corrected if I am in error, you being the sole judges of the facts of the case. If the plaintiff has established its right to recover judgment against the Farmers' Alliance Store and these several parties, as indorsers of these two notes, except Walton,—if the plaintiff has established that legal right by the preponderance of the evidence,—then what is your duty? You have no discretion. If that's your fair, impartial judgment upon the testimony, then your duty, under the law, to the plaintiff, will be to write a verdict for the plaintiff. In that event your verdict should be: 'We find for the plaintiff the sum of so many dollars and cents, being the aggregate amount due on these two notes, with interest after the maturity of the notes, after allowing a credit of \$523.54, as of date 11th May, 1895.' Now, upon the other hand, if the plaintiff has failed to satisfy you by the preponderance of the evidence that it is entitled to judgment according to law, you being the sole judges of the testimony, or if the defendants have shown payment by the preponderance of the evidence,—the greater weight of the evidence,—by the transfer of that mortgage, then your verdict should be: 'We find for the defendants.' So take the record, and find your verdict."

Mr. Croft: "There are three points I desire to call your honor's attention to: First.

As to the application of payments. Your honor has said something with reference to this other note. I beg you to call special attention of the jury to this view of the case, —the note signed by Steadman and Riley. It is in evidence. \$250 was applied to that. Now, I respectfully ask you to charge the jury that if the jury find that the \$250 paid came from this mortgaged property, that in that event it must go to the benefit of the persons who assigned that mortgage, and not to the Steadman and Riley note."

The Court: "Yes; if that be the fact, I so charge you."

Mr. Croft: "Another view is this: That, as a matter of evidence, if the jury find from any testimony (I refer particularly to Pierce) that although Pierce may have been the assignee, if he did go ahead and sell those goods by direction of Evans, as representing the assignees of that mortgage, that that would defeat the mortgage debt."

The Court: "I have charged you to this effect: That, in order for this to apply to defeat the rights of the plaintiff here, the defendants must show you that Pierce represented Evans alone, and not as assignee, in this matter; that he represented Evans alone, independently, and renounced his assigneeship as far as his action is concerned. In other words, he must be the representative of Evans alone. I so charge you."

Jury retired.

Jury brought out of their room.

The Court: "I have been informed by the bailiff that you want to know something about the amounts of the notes."

The Foreman: "Yes, sir; and amount of interest."

The Court: "I cannot give you the calculation, or give you a statement without consent of counsel. If you are going to find for the plaintiff, you must calculate the amounts due on the notes from the date of maturity, giving the credits allowed. You will have to make the calculation if you conclude to find for the plaintiff."

#### Exceptions.

"(1) Because his honor, the circuit judge, erred in overruling the defendants' objection, and allowing the plaintiff to introduce the certificate of the secretary of state as the charter of the defendants' company.

"(2) Because the circuit judge erred in not setting aside the verdict of the jury, and granting a new trial; for it appears from the uncontradicted evidence that the defendant W. T. Walton did not indorse the note sued upon, and he should have been excluded by name in the finding of the jury.

"(3) Because the presiding judge, in his charge, instructed the jury as follows: 'Now, it appears here, and it is admitted, that, since the commencement of this action, the plaintiff has received the sum of five hundred and twenty-three dollars and fifty-four one-hundredths, for which amount the defend-

ants are entitled to a credit on said note as of date 11th of May, 1896.' Such instruction was calculated to confuse and mislead the jury, and, in addition thereto, was a charge upon the facts of the case; for the defendants contended that a larger amount had been paid upon the note, and the precise issue was what amount had been paid on the notes, and that question should have been left to the jury to determine for themselves, without instruction as to the amount of such credit, and the presiding judge erred in not so doing."

"(4) Because his honor, the circuit judge, in charging the jury upon the assignment of the mortgage mentioned in the answer, instructed them: 'Under the pleadings, one of the questions of fact to be submitted to you is, did these indorsers of these notes take a mortgage from the Farmers' Alliance Store? If you conclude they did, then did they assign and transfer that mortgage to the plaintiffs? Well, in order to show that, you must be satisfied that they assigned it and transferred it to the agent or attorney of the Farmers' [Columbia] Phosphate Company; that in transacting this business, accepting it, he was acting within the scope of his agency as attorney representing the plaintiff.' It is respectfully submitted that such charge was calculated to confuse and mislead the jury, and that it did mislead the jury, for the proof shows that the mortgage was transferred directly to the plaintiffs; and it was error in the circuit judge to instruct the jury that, in order to find such transfer, they must be satisfied that the mortgage was transferred to the agent.

"(5) Because his honor, the circuit judge, in charging the duty of the plaintiffs in collecting the mortgage which had been assigned to them, instructed them: 'If Mr. Evans represented it [the plaintiffs], then, as far as his authority to accept as collateral payment was concerned, it was simply to take and act in good faith, and use ordinary prudence and discretion in collecting whatever was turned over to him, and applying it to the assets, if that was the agreement, no more and no less. So much for that.' It is respectfully submitted that his honor erred in such charge, for the duty of a mortgagee or the assignee of a mortgage in collecting the same is not measured by what the jury may consider prudent, but, in collecting the mortgage, he is bound to follow the method directed by the statute, under the penalty of satisfying the mortgage if he proceeds otherwise.

"(6) Because the circuit judge erred in refusing to charge the defendants' request: 'If the jury believe from the evidence that the defendant indorsers turned over to the plaintiffs the mortgage to them from the defendant corporation covering its stock of goods, and the plaintiffs afterwards authorized the mortgaged goods to be sold otherwise than the law directs or provided for in the mort-

gage, and that the mortgage did not authorize such sale in writing, then the plaintiffs have by such sale defeated the rights to collect the balance that may be due on said mortgage. After the amount received from the sale of the goods, and if the jury so find, then the plaintiffs have damaged the defendant indorsers to the amount due for such deficiency on the mortgage, and they would not, under such circumstances, be entitled to recover of the defendant indorsers."

"(7) Because, whether or not the defendants had pleaded, they were released by the plaintiffs' illegal acts in foreclosing the chattel mortgage; the evidence showing that the plaintiffs had proceeded to foreclose the same contrary to the method prescribed in the statute had been admitted without objection; and, such being the case, it was the duty of the court to instruct the jury to find their verdict according to the facts proven.

"(8) Because his honor, the circuit judge, erred in charging the jury that, if the defendants were directors of the Farmers' Alliance Store at the time Pierce was selected as assignee, they selected Pierce as their representative, and, for that reason, the principle of law which discharges a mortgage debt if the mortgagee disposes of the mortgaged property otherwise than directed by the statute did not apply; for, it is submitted, whether or not the defendants were directors of the defendant company makes no difference. In neither case would Pierce be their representative, but he was the representative of the corporation, and not of its individual members.

"(9) Because the circuit judge erred in charging the jury that the principle of law which discharges a chattel mortgage debt does not apply except when the mortgagee takes exclusive control and possession of the chattels, for it is submitted that if the plaintiff directed Pierce, the assignee, how to dispose of the mortgaged property, and he followed such instructions, and did as the plaintiff directed, they are liable for whatever forfeiture would arise from Pierce's illegal method of dealing with the mortgaged property.

"(10) Because the circuit judge erred in charging the jury that, in order for the principle of law to apply which would defeat the plaintiffs' right to recover on the notes, the defendants must show that Pierce renounced his assigneeship, and represented Mr. Evans [plaintiffs' attorney] alone; for, it is respectfully submitted, if Pierce disposed of the goods as Mr. Evans directed, the plaintiffs are subject to the forfeiture for the failure of Pierce to observe the law in disposing of the goods, whether or not he had renounced his assigneeship.

"(11) Because the circuit judge erred in striking the juror Watkins from the panel, there being no legal objection to his competency to serve as a juror in the case."

Croft & Tillman, for appellants. N. G. Evans and Sheppard Bros., for respondent.

McIVER, C. J. The plaintiff brought this action to recover the amounts mentioned in two notes bearing date the 2d March, 1894,—the one payable on the 1st of November, 1894, and the other on the 1st of December, 1894,—alleged to have been executed by the defendant corporation to the plaintiff company, and indorsed by the individuals named as defendants with said corporation. It appears that these individuals, on the 26th of November, 1894, took from the defendant corporation a mortgage on the stock of goods then in the storehouses of said corporation in the towns of Johnston and Mt. Willing, as well as all other goods which such corporation might thereafter acquire and put in said storehouses, for the purpose of securing and indemnifying these individuals against any loss or damage by reason of their having indorsed the notes of said corporation. It also appears that the defendant corporation subsequently, to wit, on the 26th of November, 1894, made an assignment of all its property to one Thomas R. Pierce, for the benefit of its creditors, providing that the said assignee should sell for cash all the stock of goods and chattels, and collect all choses in action, and, out of the proceeds thereof, should first pay the expenses of the assignment, and next pay all of the creditors of the corporation, according to their legal priorities, and, if there should be any balance left after paying all such creditors, such balance should be turned over to said corporation. This deed of assignment (a copy of which is set out in the "case") does not, however, contain any provision that such creditors as may accept the terms of the assignment shall release the defendant corporation from any balance remaining unpaid out of the proceeds of the assignment. After the commencement of this action, the mortgage above referred to was assigned to the plaintiff company, the precise date not being given in the case, except that it was some time in the year 1895. Certain payments were admitted to have been made since the commencement of this action, which were allowed by plaintiff to be credited on the amount sued for to the amount of \$523.54; the remainder of such payments having been credited on another demand held by plaintiff against defendant corporation, not embraced in the present action. The circuit judge having charged the jury, a verdict was rendered in the following form: "We find for the plaintiff the sum of four thousand seven hundred and sixty-seven dollars and thirty-six cents;" and on the next day the defendants moved to set aside the verdict of the jury, and for a new trial, "because the verdict did not except the defendant W. T. Walton from the finding;" and, this motion being overruled, judgment was duly entered on the verdict, from which judgment defend-

ants appeal, upon the 11 grounds set out in the record. These grounds of appeal, together with the charge of the circuit judge, will be incorporated in the report of this case.

The first and eleventh grounds, having been very properly abandoned upon the argument here, require no further notice.

The second ground, which imputes error to the circuit judge in not granting a new trial, because W. T. Walton was not excepted by name in the verdict, can be fully disposed of by a bare statement of what occurred at the trial. The case shows that, as soon as the complaint was read, one of the counsel for defendants said, "We have a demurrer here as to Walton," to which one of the counsel for plaintiff replied, "We desire to discontinue as to Walton. We do not ask for judgment against Walton." Thereupon an order was entered sustaining the demurrer as to Walton, and authorizing him to enter up judgment for his costs against the plaintiff. This was quite sufficient to discharge Walton from the case, to which he was no longer a party. Accordingly, the circuit judge, in his charge, expressly instructed the jury as follows: "You will consider this action dismissed as to the defendant W. T. Walton. Your verdict cannot affect him one way or the other. And why? Because he has demurred to the complaint, and that demurrer has been sustained, and he is practically out of this case." In the face of this, what necessity there could be for naming Walton in the verdict is more than we can see. It would have been worse than useless to grant a new trial as to Walton, for that is the utmost that could have been demanded when judgment had already been ordered in his favor by the order sustaining the demurrer. The second exception must be overruled.

The third ground of appeal is itself open to exception, inasmuch as it misrepresents (unintentionally, no doubt) the instructions really given to the jury by a partial quotation from such instructions. Surely, there was no error of law on the part of the circuit judge in instructing the jury to credit the amount of an admitted payment; especially in view of the fact, as shown by the charge, that the judge proceeded to say that the defendants claimed a larger credit, which should or should not be allowed according to the view which the jury might take of the testimony. The third exception must be overruled.

The fourth exception is based upon a misconception of that portion of the charge therein referred to. We do not understand that there was any controversy as to the fact that the mortgage was transferred to the plaintiff. The only controversy was as to the effect of such transfer; the defendants contending that the mortgage was accepted in payment of the notes which constituted the basis of this action; while the plaintiff, on the other hand, contended that the mortgage was accepted merely as collateral security, and not as payment; and it was in reference to this con-

troversy, manifestly, that the judge was speaking when he used the language excepted to. It is too well settled to admit of dispute now that an attorney at law has no authority to accept anything but money in payment of a claim sent to him for collection, unless he has authority from his client so to do. *Musick House v. Sumter* (S. C.) 22 S. E. 738. Hence, when any such claim is made, it is necessary to establish the authority of the attorney to accept something other than money in payment of a claim sent to him for collection. The circuit judge, no doubt, had this well-settled doctrine in mind when he made the remarks, which, it seems to us, have been misapprehended by appellants' counsel. The fourth exception is overruled.

The fifth, sixth, ninth, and tenth exceptions, which were considered together by appellants' counsel, will be so considered by us, except to say that, in addition to the other objections, we find no evidence in the case showing that any such request to charge as constitutes the basis of the sixth exception was ever made by appellants. But, in addition to this, we find no evidence in the case upon which the point raised by these exceptions can be based. They are based upon the erroneous assumption that the plaintiff, by its attorney, took possession of the mortgaged property, through the assignee, Pierce, and failed to dispose of the same as required by law. Now, as the undisputed facts are that the defendant corporation made an assignment of all its property to the said Pierce, before the mortgage was transferred to the plaintiff, and that Pierce took possession of the goods, and proceeded to dispose of them as directed by the assignment, and that the mortgage debt was entitled to be first paid after the expenses of the assignment, we see no occasion for the plaintiff, by its attorney or otherwise, to seize the goods under the mortgage; and there is no evidence that any such seizure was ever made. On the contrary, the evidence shows that the attorney for the plaintiff, when he acquired possession of the mortgage, finding the mortgaged property in the possession of the assignee under the deed of assignment (which, as we have said, provided that the proceeds should, after the expenses, be first applied to the mortgage debt), simply allowed the assignee to continue in possession, and to continue to dispose of the goods as directed by the assignment. While, therefore, the proposition of law contended for by appellants, as to the duty of a mortgagee who takes possession of the mortgaged property under the mortgage, may be sound, we are unable to perceive its application to this case. Besides, as we understand the judge's charge, the jury were instructed in accordance with the proposition contended for by appellants, but, at the same time, were properly instructed that such proposition had no application to this case, unless the jury came to the conclusion that the mortgaged property had been seized by the mortgagee under

the mortgage. It is manifest, therefore, that there is no foundation for any of these exceptions.

The seventh exception being pointed only to one of the reasons given to the jury, and there being another reason, quite sufficient to sustain the charge, it becomes immaterial to consider whether this particular reason is sound.

The eighth exception may be disposed of by a similar remark.

The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 546)

McGAHAN et al. v. CRAWFORD et al.

(Supreme Court of South Carolina. July 23, 1896.)

OBJECTIONS TO EVIDENCE—TAKING TESTIMONY DE BENE ESSE—DURESS—ADMISSIONS AGAINST INTEREST—INSOLVENCY—WHAT CONSTITUTES—FRAUDULENT CONVEYANCES—LIABILITY OF GRANTEE FOR RENTS AND PROFITS.

1. Objections to testimony must be made when it is offered.

2. A declaration against interest, made by one of the parties, whose testimony was taken by a special referee, under Rev. St. 1893, § 2345, providing for depositions de bene esse in certain cases, is voluntary, and admissible against deponent, where such referee was not an officer authorized by statute to take such testimony, but it was taken by consent of all parties. McIver, C. J., dissenting.

3. A declaration against interest, made by one whose testimony was taken de bene esse, under Rev. St. 1893, § 2345, is admissible against him, since the rule that a witness cannot be compelled to give testimony against himself does not apply to civil cases. McIver, C. J., dissenting.

4. Evidence that there were 19 unpaid judgments against defendant, based on claims due at the time of a conveyance of land by him, and that his previously large stock of merchandise had dwindled so that it was not worth \$100, sufficiently shows insolvency.

5. Where it is shown that land fraudulently conveyed was actually turned over to the grantee, it will be presumed, in the absence of evidence to the contrary, that he thereafter remained in possession, so as to authorize a judgment for rents and profits.

6. Where the grantee takes possession in good faith, and in the belief that the deed was valid, he is not chargeable, after the deed is set aside as in fraud of creditors of the grantor, with the annual rental value of the property while he was in possession, but merely with the amount of rents and profits annually received therefrom.

7. Where a fraudulent conveyance is set aside, the grantee must account for the value of land included therein and alienated by him after taking possession and before commencement of the action to set aside the deed.

Appeal from common pleas circuit court of Laurens county; Earle, Judge.

Action by Thomas R. McGahan and others against D. R. Crawford and others. Judgment for plaintiffs, and defendants appeal. Modified.

Amended complaint:

"The above-named plaintiffs, complaining, by way of amended complaint, for themselves and all other creditors of the defend-

ants D. R. and W. R. Crawford who will join in and bear their pro rata share of the expense of this suit, allege: (1) That at the time hereinafter mentioned Edwin Bates, Thomas R. McGahan, and Charles K. Bates were partners in trade, doing business under the style and firm name of Edwin Bates & Company, and that on the — day of —, 18—, the said Edwin Bates departed this life, leaving the said plaintiffs Thomas R. McGahan and Charles K. Bates surviving members of said firm, who now own the judgment hereinafter mentioned. (2) That now and at the time hereinafter mentioned said defendants D. R. Crawford and W. R. Crawford are and were partners in trade, doing business under the style and firm name of D. R. & W. R. Crawford. (3) That on the — day of February, A. D. 1883, the said firm of Edwin Bates & Company obtained judgment in the court of common pleas for said county against said defendants D. R. & W. R. Crawford in the sum of \$760.85 and \$31.30 costs, which said judgment was duly enrolled in the office of clerk of said court on March 5, 1885. (4) That execution was duly issued on the said judgment on May 14, 1890, directed to B. F. Ballew, sheriff of said county, who on the — day of —, 1890, returned the same wholly unsatisfied. (5) That at the date of said judgment, and for more than twelve months prior thereto, and ever since, said defendants D. R. & W. R. Crawford were and are totally insolvent. (6) That on or about the — day of January, A. D. 1883, said defendants D. R. & W. R. Crawford being largely indebted to these plaintiffs and others, and being totally and absolutely insolvent, purported and attempted to assign, transfer, convey, and set over to one of their creditors, their sister, D. M. Crawford, their co-defendant herein, their entire property, both real and personal, and that a list of the same is hereto attached, and made a part of this complaint. (7) That said alleged assignment and conveyance was premeditated and prearranged by and between said defendants for the purpose of defrauding, defeating, and delaying creditors of the said D. R. & W. R. Crawford, and that the same was without consideration, and was a fraud on said creditors, and void. (8) That the said defendant D. M. Crawford knew of the insolvency of her co-defendants, as well as they knew, at the date of said so-called conveyance and assignment, and she knew they covered their entire property. (9) That said conveyance or assignment was given and accepted, by and between said parties, for the purpose and with the view and intent of defeating, defrauding, delaying, and hindering creditors of said D. R. & W. R. Crawford. (10) That said transfer or assignment covered the entire property of said defendants D. R. & W. R. Crawford, and is tantamount to an assignment, and was executed in violation of the laws of this

state, and was an attempt to evade the assignment act, and, more, to transfer their property to their co-defendants without consideration, to defraud their creditors. (11) That said defendants D. R. & W. R. Crawford have been in possession of said property all the while, receiving the use and benefit thereof, and generally using it as their own, but neglect and refuse to apply any part thereof, or the proceeds arising therefrom, in extinguishment of their debts. (12) That there is great, imminent, and immediate danger of said property being lost and placed forever beyond reach of creditors of D. R. & W. R. Crawford. (13) That said defendants D. R. & W. R. Crawford have no other property out of which plaintiffs can make their debt, and plaintiffs have no adequate remedy by which to recover the same. (14) That the fraud above set out, and the facts constituting the same, were not discovered by the plaintiffs until within the last six years. Wherefore plaintiffs ask judgment (1) that said transfer, conveyance, or assignment be set aside, and be declared null and void; (2) that said defendants account for said property, and the rents and profits thereof; (3) that said defendants, their agents, servants, or assigns, be enjoined and restrained from transferring or disposing of said property, or in any manner interfering with the same; (4) that a receiver of said property be appointed, to whom it shall be delivered; (5) that all other creditors of the said D. R. & W. R. Crawford be enjoined from prosecuting their claims against them, except in or through this action; (6) that plaintiffs have the costs of this action, together with such other and further relief as to the court shall seem just and equitable."

Answer of D. M. Crawford:

"The separate answer of D. M. Crawford, a defendant in the above-stated action, respectfully shows to the court: (1) She denies each and every allegation of the complaint, except as hereinafter specifically admitted. (2) She admits that she was a creditor of D. R. & W. R. Crawford, and she alleges that all conveyances and transfers made to her by the said D. R. & W. R. Crawford were made in payment of the debt which she held against them. (3) She alleges that each of the several tracts of land conveyed to her by the said D. R. & W. R. Crawford were heavily incumbered by mortgage, and that upon each of said mortgages she has made payments, as to which she asks the protection of the court, and that she be subrogated to the rights of the original mortgagees. (4) That as to the allegations contained in paragraphs 1, 3, 4, and 5 of the complaint she has no knowledge or information sufficient to form a belief, and she denies the same. As to the allegations contained in the remaining paragraphs of the complaint, she denies of her own knowledge, except as hereinbefore admitted in her an-

swer. Wherefore she prays (1) that the complaint be dismissed, with costs; (2) failing in this, that she be subrogated to all the rights of creditors whose debts she has paid; (3) for such other and further relief as may be just."

Answer of D. R. & W. R. Crawford:

"The defendants D. R. & W. R. Crawford, through their attorneys, Ferguson & Featherstone, answer the amended complaint herein as follows: (1) They deny each and every allegation of the complaint, except as hereinafter admitted. (2) They have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1, 3, and 4 of the complaint, and therefore deny the same. (3) They deny of their own knowledge the allegations contained in paragraphs 2, 5, 7, 8, 9, 10, 11, 12, 13, and 14 of the complaint. (4) They admit so much of paragraph 6 of complaint as alleges the conveyance to their sister, D. M. Crawford, of certain tracts of land, and assignments of certain choses in action, and they also admit that said D. M. Crawford was a creditor of these defendants; but they deny that said conveyances and assignments covered their entire property, and every other allegation of said paragraph. (5) By way of defense to plaintiffs' supposed cause of action, the said defendants allege: That at the time the said conveyances and assignments were executed to said D. M. Crawford, these defendants were considerably indebted to her, and that they merely intended to convey her certain property belonging to them in payment of her debt; the consideration of the said conveyances and assignments being that she would assume and pay certain mortgages hanging over the tracts of land so conveyed to her, amounting to almost, if not entirely, as much as the said land was worth, and release her debt in part. That the said conveyances and assignments were bona fide transactions, and were executed in good faith, and without the slightest idea of defrauding anybody. Wherefore the said defendants demand judgment for the dismissal of the complaint, with costs."

Exhibit:

"The State of South Carolina, County of Laurens. This is to certify that the condition of Miss D. M. Crawford's health is such as to render her unable to leave home. Thos. D. Hairston, M. D. September 6, 1895."

Decree of Judge Earle:

"This action was brought by the plaintiffs, judgment creditors of D. R. & W. R. Crawford, December 20, 1890, after having exhausted their legal remedy by a return of nulla bona, the object of which was to set aside various conveyances, assignments, and transfers of both real and personal property to their co-defendant, their sister, D. M. Crawford, on the grounds that they were in violation of the assignment law of this state and also obnoxious to the statutes of Elizabeth. The cause was first heard by Judge

Fraser, who dismissed the complaint, on the ground that it failed to allege that D. M. Crawford was a creditor of D. R. & W. R. Crawford. The supreme court reversed this decree, remanding the cause, allowing plaintiffs leave to amend, which amendment was perfected. The cause came on for trial before me at the September term of court, 1895, upon the testimony taken before a special referee and upon the pleadings. Before discussing or deciding the case upon its merits, we are met with the preliminary question which must be disposed of. The plaintiffs offered in evidence certain books, records, and papers from the office of clerk of court and register of mesne conveyances for said county, containing the records of conveyances, assignments, and transfers of real and personal property, including choses in action, by D. R. & W. R. Crawford to D. M. Crawford. The defendants' attorneys consented for the books and papers to be introduced, waiving the production of the originals, or certified copies of the same, under the statute, reserving the right to object to this admissibility on other grounds. At the hearing of the cause it was objected to the books and papers being used, on the ground that same were incompetent, in the absence of 10 days' notice of intention to offer certified copies of the same in evidence. It appears it was generally conceded the originals had been burned or lost. I hold that the notice was waived by the defendants when they allowed the books and papers introduced in lieu of the original or certified copies. Again, the testimony of N. B. Dial, a witness on behalf of plaintiffs, was objected to on the ground he could not state what the defendant D. M. Crawford testified to when examined as a witness heretofore in this case. I hold, she being a party to the suit, that any declarations or admission made by her against her interest, either in or out of court, can be established by any one who was present and heard the testimony. From the circumstances and testimony of the case, I find that the defendants D. R. & W. R. Crawford were insolvent at the time the conveyances, transfers, and assignments were made to their sister, D. M. Crawford, their co-defendant, and that they conveyed, assigned, and transferred to her all of their property, consisting of two lots in the town of Goldville, on which was erected one store-room, and said lots containing  $1\frac{1}{4}$  acres, more or less, and bounded by lands of J. S. Blacklock, S. C. Hairston, and others; their one-sixth interest in 440 acres of land known as the 'Old James Crawford Home Place,' containing 440 acres, more or less, bounded by lands then owned by John T. Young, J. M. Young, L. L. Young, John C. Davis, and others; the Sallie P. Adams tract, containing 338 acres, more or less, and bounded by Little river, lands of John Wallace, D. R. Crawford, and others; 107 acres bounded by lands of Ellen Lindsay, Ralph Gary, William Luck,

and others, and known as the 'Taylor Land'; 667 acres, bounded by lands of John D. Williams, F. W. Nance place, C. L. Fuller, and others, and known as the 'Cal. Fuller Place' or 'William Phillips Place.' Also, the following notes, bonds, and mortgages, to wit: L. L. Young to D. R. Crawford, for \$335.45, bearing date March 24, 1884; George Metts to D. R. Crawford, mortgage for \$462.76, dated July 1, 1884, over 232 acres; mortgage, John A. Dice to D. R. Crawford, for \$800, dated March 25, 1884, over the Eichelburger place; mortgage of M. S. E. Satterwhite, for \$500. Also, judgments against John A. Dice, for \$250. Also, accounts against N. P. Whitmire, for \$150. Also, a remnant of a stock of goods, of the value of \$100 at least. Also, four mules. I further hold that said conveyances, assignments, and transfers were in effect one transaction, and intended to be an evasion of the assignment law of this state, and to transfer the whole of their property to the said D. M. Crawford, who was one of their creditors, to give her an undue and illegal preference over their other creditors; but in legal effect they constitute an assignment, and are therefore null and void as to the other creditors. I further find that D. M. Crawford has been in possession of said property since January 6, 1885, using the same, and receiving the rents and profits thereof, and collecting and appropriating to her own use the choses in action. Wherefore it is ordered, decreed, and adjudged that said conveyances, assignments, and transfers be, and the same are hereby, set aside, and declared null and void as to the creditors of D. R. & W. R. Crawford. Further ordered that F. P. McGowan, Esq., be, and he is hereby, appointed receiver, to take charge of the property above mentioned, and of any other property embraced in said conveyances, assignments, and transfers not hereinbefore specifically enumerated, or any substitution thereof, upon his entering into bond in the sum of \$5,000, with sufficient surety, to be approved by the clerk of this court, conditioned for the faithful performance of his duties as said receiver. Further ordered, upon said receiver executing said bond, the said D. R. & W. R. Crawford and D. M. Crawford surrender and turn over to him all of said property, and the defendant D. M. Crawford account for the annual value of the rents and use of the real property since January 6, 1885, and for the personal property mentioned above as having been transferred and assigned to her, and any other, if she received the same, or its value from the date of said transfer. In case any of the above-mentioned real estate has been bona fide alienated by the said D. M. Crawford before the commencement of this action, she should account for the value thereof. Further ordered that this cause be, and the same is hereby referred back to the special referee, Col. H. Y. Simpson, who is hereby directed to advertise once a week for six consecutive weeks

in one of the newspapers published at Laurens, S. C., for creditors of D. R. & W. R. Crawford to establish their claims before said referee herein on a day certain. Failing so to do in said time, they are forever barred from participating in the distribution of the funds under this proceeding. Further ordered that said referee report to this court the rank, amount, and character of the claims so presented, and that he ascertain and report a suitable fee for plaintiffs' attorneys in this action. Further ordered that any one in interest have leave to apply at the foot of this decree for such order as may be necessary to carry the same fully into effect. It is not intended to adjudicate anything in this decree concerning the right of D. M. Crawford to set up payments made by her on the mortgages covering the property, if any such there be, and if she made any such payments, nor as to any independent title to any of said property which she may have acquired."

Grounds of appeal and exceptions:

"(1) Because the presiding judge erred in holding that the defendants' attorneys 'consented for the books and papers to be introduced, waiving the production of the originals, or certified copies of same, under the statute,' the judge having reference to the books and records from the office of the register of mesne conveyances, offered by plaintiffs to show certain transfers and assignments from D. R. & W. R. Crawford to D. M. Crawford. (2) Because he erred in allowing plaintiffs to prove said transfers and assignments by the said books, and in not sustaining defendants' objections thereto. (3) Because he erred in admitting the testimony of N. B. Dial as to what the defendant D. M. Crawford testified to before L. W. Simpkins, when she was examined under the *de bene esse* act, and as plaintiffs' witness. (4) Because he erred in holding 'it appears it was generally conceded the originals had been burned or lost,' in reference to conveyances from D. R. & W. R. Crawford to D. M. Crawford. (5) Because he erred in holding that D. R. & W. R. Crawford were insolvent at the time they made certain conveyances to D. M. Crawford. (6) Because he erred in holding that said conveyances embraced and covered all the property of the said D. R. & W. R. Crawford, and were intended as an assignment, and are therefore null and void. (7) Because he erred in finding that said conveyances were made, and embraced the property described in the decree, when it is respectfully submitted there is no competent testimony to show said conveyances, or what property they embraced. (8) Because he erred in holding that said conveyances, assignments, and transfers were in effect one transaction, and intended to be an evasion of the assignment law of this state, and to transfer the whole of the property of said D. R. & W. R. Crawford to D. M. Crawford. (9) Because he erred in

finding, as a matter of fact, that D. M. Crawford has been in possession of said property since January 6, 1885, using the same, and receiving the rents and profits thereof, and collecting and appropriating to her own use the choses in action. (10) Because he erred in holding that D. M. Crawford must account for the annual value of the rents and use of said lands since January 6, 1885. (11) Because he erred in holding that D. M. Crawford must account for the value of any of said property she may have bona fide alienated before the commencement of this action. (12) Because he erred in holding that there was any competent evidence to show that D. R. & W. R. Crawford ever assigned and transferred to D. M. Crawford the real estate and choses in action which he orders turned over to the receiver."

Ferguson & Featherstone, for appellants.  
W. H. Martin and N. B. Dial, for respondents.

JONES, J. In January, 1895, the defendants D. R. & W. R. Crawford, being in debt to the plaintiffs and others, transferred and conveyed to their sister and co-defendant, Miss D. M. Crawford, certain real and personal property. On the 20th day of December, 1890, plaintiffs commenced an action to set aside these transfers and conveyances, on the ground—First, of actual fraud; and, second, as in violation of the assignment act of this state. To the complaint, as a part thereof, was attached a list of the property alleged to have been conveyed and assigned. The defendants answered, denying all allegations of fraud, and alleging that the conveyances and transfers were bona fide and for value. The cause was heard by Judge Fraser at February term, 1892, and he dismissed the complaint, holding that there was not sufficient evidence of actual fraud, and (there being no allegation in the complaint that Miss D. M. Crawford was a creditor of D. R. & W. R. Crawford) that no case was made out under the assignment act. On appeal this court remanded the case for a new trial, with leave to the plaintiffs to apply for amendments to the complaint, if so advised. 39 S. C. 64, 17 S. E. 561. The complaint was then amended, and the cause was referred to a special referee to take the testimony and report the same to the court. Upon the testimony reported by the referee, the cause was heard by Judge Earle, at September term, 1895. Judge Earle's decree, together with the exceptions thereto, as well as the complaint, exhibit, and answers, will be set out in the report of this case. This decree, while not adjudging the question as actual fraud, holds that the conveyances and transfers were in effect one transaction, and intended to be an evasion of the assignment law of this state, transferring the whole of their property to the said D. M. Crawford, giving her a preference over other creditors, thus in legal effect constituting an assignment with preference, and therefore void.

The first and second exceptions relate to the introduction in evidence of the record books of the office of the clerk of court to show the conveyances and transfers of property referred to in the complaint. When offered before the referee, the following entry was made in the referee's notes of testimony: "No objections are made to the introduction of the record of these transfers or assignments upon the ground that the originals or the copies of these records are not produced, but the defendant reserves the right to object upon any other ground." Other references followed this, but no further notice of objection was given. At the hearing before Judge Earle for the first time the objection is raised that these records could not be introduced in evidence, because 10 days' notice of intention to offer certified copies of same had not been given. Had this objection been made known on the 27th of August 1895, when the books were offered in evidence, the 10 days' notice could have been given, and the records introduced again on the 7th of September, when the reference closed. It is well settled that objections to testimony must be made when the testimony is offered. Under the circumstances, we think the circuit judge correctly held that the 10 days' notice had been waived by the defendants. These exceptions are therefore overruled.

The third exception alleges error "in admitting the testimony of N. B. Dial as to what the defendant Miss D. M. Crawford testified to before L. W. Simpkins, when she was examined under the *de bene esse* act, and as plaintiffs' witness." The circuit judge ruled that, being a party to the suit, any declaration or admission made by her against her interest, either in or out of court, can be established by any one who was present and heard the testimony. The witness N. B. Dial, on his examination in chief, spoke of statements made by Miss Crawford in her testimony taken by L. W. Simpkins, and on cross-examination by appellants' counsel spoke also of her statement made on a former trial of this case. It will be observed that the exception in no way questions the admissibility of Miss Crawford's declarations made in the former trial. Hence our inquiry is limited to so much of his honor's ruling as relates to the testimony of Miss Crawford taken before L. W. Simpkins. The voluntary declarations or admissions of a party to a civil suit, against interest, are clearly receivable in evidence. Whether such testimony was voluntary must in the first instance necessarily be addressed to the judgment and discretion of the trial judge, and the party challenging his ruling thereon as error has the burden of showing error. The sole fact relied on by appellants to show that the admissions of Miss Crawford were not voluntary is the fact that her statements were made before L. W. Simpkins, who, it is alleged, took her testimony under the stat-

ute allowing testimony *de bene esse* to be taken. Section 391, Code 1893 (section 407, Code 1870), provides that a party to an action may be examined as a witness at the instance of the adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission. The act of 1883 (18 St. at Large, 373; Rev. St. 1893, § 2345), allows depositions *de bene esse* in certain cases to be taken by a circuit judge, clerk of the court, trial justice, or notary public, and provides that any person may be compelled to appear and depose in the same manner as witnesses may be compelled to appear and testify in court. The master is another officer allowed by statute to take such testimony in certain cases. But it nowhere appears in the record before us, and we must assume it did not appear before the circuit court, that L. W. Simpkins is one of the officers allowed by law to take testimony *de bene esse*. Mr. Simpkins testified that he took Miss Crawford's testimony as a special referee, but it nowhere appears by what authority he claimed to act as special referee, unless it be in the testimony of Mr. Dial, who said: "Mr. Simpkins took the testimony of Miss Crawford *de bene esse*, by consent of parties." (The italics are ours.) There is no room for our presuming that Mr. Simpkins was an officer qualified to take such testimony. It is incumbent on the appellants to show this fact. We conclude, therefore, that the statements of Miss Crawford before Mr. Simpkins were entirely voluntary, were taken "by consent of parties," and she was a party, and that she was under no legal constraint or compulsion when she made her statements. There is not the slightest evidence, nor is it even contended, that she was imposed upon or under duress at the time of her statements. This fact destroys the foundation for the argument of defendants' counsel, forcefully presented to the court, that the testimony of a party to a suit, taken *de bene esse*, under the statutes of this state regulating the same, where the witness or party may be compelled to appear and testify, and punished for failure or refusal to do so, would not be such free and voluntary admissions as would make it competent for any one who heard the evidence to testify to it in a subsequent trial, as admissions against interest. But, even if the testimony of Miss Crawford had been taken regularly by a proper officer under the statute allowing the taking of *de bene esse* testimony, and compelling the same in case of refusal, we are not prepared to say that the circuit court erred in allowing evidence of such testimony as admissions against interest. It is true, in the case of *State v. Senn*, 32 S. C. 403, 11 S. E. 297, which was a case involving the admissibility of statements made by parties at a coroner's inquest, as witnesses, who were afterwards in-

dicted for the crime, Mr. Justice McIver, in an opinion concurred in by a majority of the court, said: "It is essential to the admissibility of admissions or confessions of a party charged with crime that they should be free and voluntary. \* \* \* It seems to me, therefore, that the only way to preserve in its integrity the well-settled rule that a person cannot be required to furnish testimony against himself, is to hold that, if examined before a coroner's jury or a committing magistrate, the testimony which he is required to give cannot be used against him in a prosecution subsequently brought against him. As there is no decisive authority in this state upon this point, so far as I am informed, and as the authorities elsewhere are conflicting, we are now at liberty to adopt such rule as we think most in conformity with settled principles; and, as it seems to me that the rule above indicated is of that character, I think it should be adopted." This rule, if applied to a civil case, would exclude evidence of the admissions of a party, if the admissions were made under circumstances of legal necessity or compulsion, as would be the case of an examination under the statute allowing testimony to be taken *de bene esse*, with authority to compel the witness to attend and testify, and to punish refusal to do so. But it may well be questioned if such a rule should be applied in a civil case. Mr. Greenleaf, in his book on Evidence (volume 1, § 193), says: "In regard to admissions made under circumstances of constraint, a distinction is taken between civil and criminal cases and it has been considered that, on the trial of civil actions, admissions are receivable in evidence, provided the compulsion upon which they are given is legal, and the party was not imposed upon, or under duress." The third exception is overruled.

The fourth exception becomes immaterial, under the conclusions reached as to the first and second exceptions.

The fifth exception alleges error in holding that D. R. Crawford and W. R. Crawford were insolvent at the time they made certain conveyances to Miss D. M. Crawford. The conveyances were made January 6, 1885. It appears that on February 13, 1885, judgments to the amount of over \$6,000 were entered against D. R. & W. R. Crawford. Suits were probably begun or threatened at the time of the conveyances. Later other judgments were entered for over \$400. All these judgments, 19 in number, were based on claims past due at the time of the conveyances. The stock of merchandise of these merchants had dwindled to a remnant of \$100 in value. In their answer they admitted the conveyances and assignments of real and personal property to their sister, Miss Crawford, but claimed that the consideration was in part the payment by her of mortgages on the land, amounting to almost, if not entirely, the value thereof, and in part the release of a portion of her debt against

them. The theory of the defense was a large indebtedness to Miss Crawford, sufficient to require for its payment the property which they conveyed and transferred to her. The proof of insolvency was clear and convincing, and there was not the slightest attempt to make a counter showing.

The sixth and eighth exceptions may be considered together. They allege error in holding that the said conveyances covered all the property of D. R. & W. R. Crawford, were in effect one transaction, and intended to be an evasion of the assignment law of this state, and to transfer the whole of their property to one creditor, giving her undue and illegal preference over other creditors. After a careful study of the testimony in the light of the pleadings, we are satisfied that Messrs. Crawford conveyed all, or practically all, of their property to their sister, Miss Crawford, knowing themselves to be insolvent, with the intention to give her a preference over other creditors, and, although there were several conveyances of specific property, they were all made about the same time, and constitute an assignment with preference, in violation of the assignment laws of this state. We concur with the circuit court that said conveyances are void. *Wilks v. Walker*, 22 S. C. 108.

The seventh and twelfth exceptions have been practically disposed of in the consideration of exceptions 1 and 2.

The evidence showing that the real and personal property was conveyed to Miss D. M. Crawford, in the absence of evidence to the contrary it will be presumed that she has been in possession of the property, and using it as her own, since the date of the conveyances, January 6, 1885. It appears in the evidence of Mr. Featherstone, a witness in behalf of the defendants, that Miss D. M. Crawford on a former trial testified that "D. R. & W. R. Crawford turned over to her their property." The ninth exception, therefore, cannot be sustained.

But we think the circuit court erred in decreeing that Miss D. M. Crawford should account for the annual value of the rents and use of the real property since January 6, 1885. The evidence does not show that she was guilty of any fraud in the transaction. From all that appears, she took conveyances for the property in payment of her claims against her brothers; and because said conveyances are void, being obnoxious to the assignment act, it does not follow that she holds said property other than as a bona fide occupant. She should, therefore, account only for the rents and profits received by her since the 6th of January, 1895. The tenth exception is well taken. *Jones v. Massey*, 14 S. C. 292; *Rabb v. Patterson*, 42 S. C. 536, 20 S. E. 540.

There was no error in decreeing that Miss D. M. Crawford should account for the personal property assigned to her, or its value, from the date of said transfer, and for the

value of any of said real estate which she may have alienated before the commencement of this action. The eleventh exception is overruled.

It is the judgment of this court that the judgment of the circuit court be modified, as above indicated, as to the rule for accountability for rents and profits, but that in all other respects it be affirmed, and the cause remanded to the circuit court for necessary proceedings to carry out the circuit court decree as modified herein.

GARY, J. I concur in the views expressed by Mr. Chief Justice McIVER as to the third exception.

McIVER, C. J. (dissenting). Being unable to concur in all the conclusions reached by Mr. Justice JONES in the opinion prepared by him, I propose to state, as briefly as practicable, without elaborating the argument, the grounds of my dissent. It seems to me that the first, second, and third exceptions are well taken, and that, upon the grounds there presented, the case should be remanded for a new trial. The first and second exceptions raise the question whether the objection to the introduction of certain record books of the office of the clerk of the court was properly overruled. When these books were offered in evidence the following statement, as appears in the case, was made: "No objections are made to the introduction of the record of these transfers or assignments upon the ground that the originals or copies of these records are not produced, but the defendant reserves the right to object upon any other ground." This occurred when these record books were offered in evidence before the referee who was appointed simply to take and report the testimony, not to hear and determine the issues in the action. When this testimony was offered before the circuit judge at the hearing, defendants objected, on the ground that the 10 days' notice required by the statute had not been given. The circuit judge held "that the notice was waived by the defendants when they allowed the books and papers introduced in lieu of the originals or certified copies." The question is whether there was error in so holding. In the first place, I do not understand, from the statement made in the case, that defendants ever did allow the books to be offered in evidence. All that they did allow was that the books would not be objected to upon the ground that the originals, which the circuit judge said had been burned or lost, or certified copies were not produced. The admission or agreement, a copy of which is set out above, made when the testimony in question was offered before the referee, practically amounted to a declaration on the part of the defendants that they would not object to these books, when offered in evidence before the court, on the ground that certified copies were the proper

evidence, but the right to object upon any other ground was distinctly reserved. It seems to me that the admission, or agreement, or whatever it may be called, simply amounted to this: that the books were to be regarded as certified copies of the papers which the plaintiffs desired to introduce. If, then, when these books, which were to be regarded as certified copies, were offered in evidence before the circuit judge, then certainly, under the express terms of the statute, the objection that the required notice had not been given was tenable, and the objection, which plaintiffs had been warned to expect, should have been sustained.

The third exception raises the question as to the admissibility of Mr. Dial's testimony as to what the defendant Dolly M. Crawford said when she was examined as a witness *de bene esse* at some point in the previous progress of this case. It seems to me that such testimony was clearly inadmissible, upon two grounds: (1) Because, under the express terms of the act of 1883, the testimony, even as taken in writing by the referee appointed for that purpose, could not have been introduced, when it appeared, as it did, that Miss Crawford was still alive at the time of the trial, and living in Laurens county, within the reach of the process of the court; for that statute provides that the testimony so taken shall not be used unless it appears to the court that the personal attendance of the witness cannot be secured at the trial. See 18 St. at Large, 374, incorporated in section 2347 of the Revised Statutes. If, therefore, the testimony of a witness taken *de bene esse*, and reduced to writing by the officer appointed for that purpose, could not be used unless personal attendance of the witness could not be secured at the trial, it seems to me it would be altogether anomalous to hold that a bystander, who happened to hear such testimony when it was taken, could be permitted to prove his recollections of such testimony. But the testimony was objectionable upon another ground. Admissions or confessions of a party to an action, whether criminal or civil, should never be received in evidence against such party unless voluntarily made; and when a party is placed upon the stand, and compelled to testify under pain of being punished for a contempt, such testimony cannot, with any propriety, be said to be voluntarily given. See *State v. Senn*, cited by Mr. Justice JONES in his opinion. I do not see why the rule there laid down should be confined to criminal cases. Section 391 of the Code provides that "a party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same measure and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission." It seems to me that to allow the statements made by a party un-

der such compulsion to be proved against such party would be a violation, not only of the fundamental principles of evidence, but also of the principles of abstract justice. If the adverse party desires to obtain the testimony of the other party, let him put such party upon the stand as a witness, as provided for by the section of the Code above copied, but do not allow him to prove by a bystander what testimony such witness may have been "compelled" to give upon a former occasion. Let it proceed directly from the party, and do not receive such portions of it as may be reproduced by the uncertain memory of a bystander. I think, therefore, the judgment should be reversed, and the case remanded for a new trial.

(47 S. C. 347)

**WAGENER et al. v. KIRVEN.**

(Supreme Court of South Carolina. July 27, 1896.)

**REVIEW ON APPEAL—CONFLICTING EVIDENCE—EFFECT OF NEW CONSTITUTION—BURDEN OF PROOF—EVIDENCE.**

1. Const. 1895, art. 5, § 4, providing that the supreme court "shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact, as well as the law, except \* \* \* where the facts are settled by a jury, and the verdict not set aside," requires the facts of a chancery case on appeal to be decided by a preponderance of the evidence; thereby abrogating the former rule that a decree will not be reversed unless it is without any testimony to support it, or is manifestly against the overwhelming weight of the evidence. Per Gary and Jones, JJ.

2. In an action to foreclose a mortgage alleged to have been executed by defendant, whose name is signed to the instrument, the burden is on plaintiff to establish such allegation, not on defendant to prove that his signature is a forgery.

3. On an issue as to whether defendant executed a mortgage which purported to secure advances to enable defendant to operate a farm, defendant's son R., whose name appeared as a subscribing witness, stated that the instrument was executed in his presence. Two experts testified to the genuineness of defendant's signature, from comparison with other signatures admittedly genuine, and it appeared that defendant had offered to compromise before suit. On the other hand, defendant denied that she ever executed the mortgage. The other subscribing witness testified that he never witnessed the instrument; and it appeared that the amount which the mortgage purported to secure was greater than required for carrying on the farm, and that R. had frequently deceived plaintiffs by signing drafts and orders in defendant's name, imitating her signature, and had intercepted letters addressed to her. Held, that the preponderance of evidence showed that the mortgage was not executed by defendant.

Appeal from common pleas circuit court of Darlington county; Witherspoon, Judge.

Action by F. W. Wagener & Co. against M. C. Kirven to foreclose a mortgage. From a decree for defendant, plaintiffs appeal. Affirmed.

The following are the decree and the grounds of appeal referred to in the opinion:

**Decree.**

"This is a suit to foreclose a mortgage of certain real estate in the county of Darlington, alleged to have been executed by the defendant, M. C. Kirven, on the 5th day of February, 1892. The answer of the defendant denies the execution of said mortgage. The case was heard by me upon the pleadings, and the evidence in the cause, taken by R. K. Charles, master for Darlington county. It will be observed that the only issue in the cause is one of fact,—the execution of the mortgage sought to be foreclosed. The case was fully argued on the circuit; and since the argument I have carefully considered the evidence, and have observed the signature to the bond, as well as that to the mortgage, under a powerful glass, and have compared the same with other signatures of the defendant, which were admitted to be genuine. The answer having put in issue the execution of the mortgage, the burden of proving its execution rests upon the plaintiffs. The mortgage was offered in evidence, and is regular in form, and purports on its face to have been executed by M. C. Kirven in the presence of R. E. L. Kirven, a son of the defendant, and T. E. Kirven, a colored man, who lived at the time on Mrs. Kirven's farm. The first witness, R. E. L. Kirven, the son, testifies positively to the fact that he witnessed the execution of the paper, and that he saw his mother sign the mortgage, and that T. E. Kirven was present at the time, and also saw her sign it. T. E. Kirven, or Tom Kirven, the other witness, testifies equally as emphatic 'that he did not witness the execution of the mortgage in question, and that the only mortgage he ever witnessed for Mrs. Kirven was to the People's Bank; that he did not witness mortgage to Wagener & Co.' As between these two alleged witnesses to the execution of the mortgage, there may be said to be a standoff. Now, let us consider the testimony of the defendant. She is emphatic that she 'did not sign the bond and mortgage to Wagener & Co.; that she never signed the mortgage; never signed anything of the kind.' This is a brief statement of the testimony of the actual parties to this transaction, and I may add it is an unusual and unpleasant spectacle; the son swearing to one state of facts, and the mother and a disinterested witness swearing to an entirely different statement. It will be seen that it is with some difficulty that a conclusion can be satisfactorily reached from these pointed and plain contradictions. Considering, however, that it is the mother, in the great majority of cases, who makes the sacrifices for the son, and considering how reluctant a mother is to destroy the reputation of a son, I am of the opinion in this case that the evidence of the defendant should outweigh that of her son R. E. L. Kirven, and especially so when she is corroborated by Tom Kirven. I am strengthened in this view in the fact that when the signature to the mortgage is compared with other signa-

tures, which are admitted to be those of the defendant, the signature to the mortgage does not appear to me to be genuine. In other words, viewing it under the glass, I am of the opinion that the signature to the mortgage is a forgery. This view is also strengthened by the fact that on numerous occasions the said R. E. L. Kirven had imitated his mother's signature, and passed it as genuine. In conclusion, however, I must say, in justice to the plaintiffs, F. W. Wagener & Co., that they were not aware at the time they furnished the money and supplies to R. E. L. Kirven that there was any suspicion about the genuineness of the signature. They acted throughout the whole transaction in good faith, and were simply the dupes and innocent victims of R. E. L. Kirven. For the reasons above stated, I conclude that the defendant, M. C. Kirven, did not execute the mortgage herein sought to be foreclosed. It is therefore ordered that the complaint of the plaintiffs be dismissed."

#### Grounds of Appeal.

"The plaintiffs except to the judgment of his honor, Ernest Gary, in the above-stated case, upon the following grounds: (1) Because it is respectfully submitted that his honor erred in finding 'that as between the two alleged witnesses to the mortgage, R. E. L. Kirven and T. E. Kirven, there may be said to be a standoff'; it appearing from the testimony in the cause that T. E. Kirven's signature as a witness to the execution of the mortgage was declared by two highly-intelligent experts to have been genuine; and, further, because T. E. Kirven's testimony to the effect that he had not witnessed the execution of the mortgage was contradicted by an unimpeached and disinterested witness, who testifies that, immediately after the execution of the mortgage, T. E. Kirven told said witness that he (Kirven) had witnessed the same; and, further, because the testimony shows that T. E. Kirven is a colored man, who, at the time he gave his testimony, was living upon the plantation of M. C. Kirven, and had been living there all of his life, and it is respectfully submitted that it is error to conclude, under these circumstances, that he was a disinterested witness. (2) Because his honor erred in finding, by implication, 'that the reluctance of the mother to destroy the reputation of her son' was a consideration of such force, in this particular instance, as to more than counterbalance her pecuniary interest in the result of this suit. (3) Because his honor erred in concluding that R. E. L. Kirven was capable of forging his mother's name to this mortgage, 'because on numerous occasions he had imitated his mother's signature, and passed it as genuine'; it not appearing from the testimony that R. E. L. Kirven had anything to gain by signing his mother's name to this mortgage, or that he had ever signed her name on any occasion, from a corrupt motive or a selfish end; and because it further appears that none of the sig-

natures of his mother which were confessedly made by R. E. L. Kirven, and introduced in evidence, were recognized by the experts on handwriting as having any resemblance to the signatures to the bond and mortgage in suit, and other confessedly genuine signatures. (4) Because his honor erred in reaching his conclusion that the defendant's alleged signature to the mortgage was a forgery, without considering any of the testimony in the case, except that given by the defendant herself and by the two alleged subscribing witnesses as to the mere signing of the bond and mortgage. (5) Because his honor erred in concluding that the signature of the defendant to the mortgage was a forgery, notwithstanding the testimony of two expert witnesses on handwriting to its genuineness, and notwithstanding the admitted fact that the defendant had received the goods to secure the payment of which the mortgage was given, marked in her name, and used the same for her benefit, and notwithstanding the further fact that a short time after the mortgage became due, and payment of the same was demanded by the plaintiffs, she authorized her son J. P. Kirven to negotiate with the plaintiffs for the payment or arrangement of the mortgage debt, which he (the said J. P. Kirven) undertook to do, without complaining or even hinting that the defendant had never executed the mortgage. (6) Because it is respectfully submitted that the overwhelming weight of the testimony is contrary to the conclusion reached by his honor, that the 'signatures to the bond and mortgage are forgeries.'"

W. F. Dargan and G. W. Dargan, for appellants. Boyd & Brown, for respondent.

McIVER, C. J. The plaintiffs brought this action for the foreclosure of a mortgage on real estate, which they alleged had been executed by the defendant. This allegation was distinctly denied in the answer, and the sole question made before the circuit court was whether the plaintiff had established, by the preponderance of the evidence, the execution of the mortgage. The case was heard below by his honor, Judge Ernest Gary, upon testimony taken and reported by the master, all of which is incorporated in the "case" as prepared for argument here. The circuit judge rendered his decree, in which he found as a fact that the defendant did not execute the mortgage sought to be foreclosed, and rendered judgment that the complaint be dismissed. From this judgment the plaintiffs have appealed, upon the several grounds set out in the record; and we think it due to all the parties concerned that the decree of the circuit court, together with the grounds of appeal, should be incorporated in the report of the case.

The appeal raises a question of fact, pure and simple, and hence, under the long-established and well-settled rule of this court, which, in the case of *Agency Co. v. Faulkner*, 24 S. E. 286, a

majority of this court has held was not changed by the provisions of the present constitution,<sup>1</sup> except in one particular, which has no application here, the only inquiry for this court is whether the conclusion reached by the circuit judge is without any testimony to sustain it, or is manifestly opposed to the overwhelming weight of the evidence. But, as some difference of opinion has been expressed as to the effect of the provisions of the present constitution in this respect, we avail ourselves of the present occasion to add, in further vindication of the conclusion reached by the majority of the court in the case above referred to, the following views:

As was there said, the term "appeal" necessarily involved the idea of a review of the facts as well as the law; and, as it would be absolutely necessary for this court to review the facts before it could determine whether the well-settled rule above referred to was applicable in a given case, it seems to us that when the present constitution required the supreme court, on appeals in cases of chancery, to "review the findings of fact," it only required, in specific terms, what was necessarily implied by the general terms "appellate jurisdiction," used in the former constitution; and that the only real change effected by the present constitution was to forbid the supreme court from reviewing facts found by a jury in a chancery case, unless the verdict had been set aside. The present constitution does not require this court to try questions of fact presented in an appeal in case of chancery de novo, without regard to the findings of fact in the court below; but the requirement is simply to review the findings of fact, for the purpose of ascertaining whether there was error; and surely, when a question of fact has been determined by an intelligent, disinterested, and experienced circuit judge, that affords a very good reason for presuming that his conclusion is correct, and it is incumbent upon one assailing its correctness to show clear error therein. If, therefore, the long-established and well-settled rule is to be applied to this case, it is quite clear that the judgment below must be affirmed, for there certainly was some (and we think a good deal) testimony to sustain the conclusion reached by the circuit judge; and we are far from satisfied that his conclusion is manifestly against the overwhelming weight of the testimony. It must be remembered that the burden of proof was upon the plaintiffs to establish, by the preponderance of the evidence, the fact that the defendant did execute the mortgage in question, not upon the defendant to show that her name, as signed to the mortgage, was a forgery. The mortgage, on its face, purports

to have been executed in the presence of two witnesses, R. E. L. Kirven and T. E. Kirven, whose names appear thereon as subscribing witnesses; but while one of these persons (R. E. L. Kirven) does testify that the mortgage was executed by the defendant in his presence, and in the presence of T. E. Kirven, whose name appears as the other subscribing witness, yet the said T. E. Kirven denies, in his testimony, that he ever witnessed the execution of the mortgage, and that his name, appearing thereon as a subscribing witness, was not written by him; and his testimony is fully corroborated by the testimony of the defendant, who denies that she ever executed the mortgage, and alleges that her name signed thereto was not written by her, or by any one by her directions or by her authority. It is true that there was testimony on the part of the plaintiffs that the said T. E. Kirven had admitted that he had witnessed the execution of the mortgage in question; but that witness, when subsequently put upon the stand, explained this by saying that, when asked if he had witnessed the execution of the mortgage, he understood the inquiry to refer to a mortgage given to the People's Bank of Darlington by the defendant, which he had, in fact, witnessed, and therefore he admitted that he had witnessed the execution of the mortgage, meaning the mortgage to the bank, and not the mortgage to the plaintiffs, which he persistently denied he had ever witnessed. On the other hand, there was testimony on the part of the defendant that R. E. L. Kirven, when asked by one of his brothers about the mortgage which plaintiffs claim to hold, denied that Wagener had any mortgage, and, when told that Josh (another brother) said the Wagener mortgage was on record, replied: "O, Josh lied. \* \* \* Wagener a'int got no mortgage. Josh lied."

The plaintiffs, among other things, seem to have relied largely upon the testimony of two experts in handwriting, neither of whom, however, seem to have been acquainted with the handwriting of the defendant, derived from having seen her write, but they based their opinions upon a comparison of handwriting, that the signature of the defendant to the mortgage was genuine, after an examination of signatures of the defendant to other papers, admitted to be genuine, and a comparison with other specimens admitted to be imitations of her signature. On the other hand, defendant relied upon many circumstances for the purpose of corroborating the theory of the defense, to some of which we will briefly refer, to wit: That the condition of the alleged bond which the mortgage purported to secure was the advance by the plaintiffs to the defendant, during the year 1892, of "five hundred dollars in cash, one thousand dollars in plantation supplies, and one thousand dollars in guano, to enable her to carry on her farming operations during the present year," making, in all, advances to the amount of \$2,500, during the year in

<sup>1</sup> Const. 1895, art. 5, § 4, provides that the supreme court "shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside."

which the said R. E. L. Kirven was conducting the farming operations of defendant's plantation; and as it was shown that defendant had already made arrangements with the People's Bank of Darlington for advances to the amount of \$2,000, for the same purposes, for that year, and as experience, both before and after that year, when the farming operations of defendant were conducted by others of defendant's sons, showed that an advance of \$1,000 was ordinarily sufficient, it was contended that there was no occasion for any such advances as the bond and mortgage purported to secure. Another very significant circumstance was that, when R. E. L. Kirven made arrangements with plaintiffs, he attempted to secure them by a bond and mortgage purporting to have been executed by defendant to her son T. J. Kirven, a brother of R. E. L. Kirven, and by him assigned to plaintiffs; and both defendant and T. J. Kirven testify that they knew nothing whatever of such papers, and T. J. Kirven testifies positively that he never assigned any such papers to plaintiffs. After plaintiffs had refused to accept these papers, saying that they wanted a mortgage direct from defendant, then it was that the papers upon which the present action was based were prepared and sent down to plaintiffs. When this arrangement was effected, R. E. L. Kirven drew a draft upon plaintiffs, signing the same, "M. C. Kirven, per R. E. L. Kirven." This draft was returned, with directions that all drafts and orders for advances must be signed by the defendant herself. After these instructions, R. E. L. Kirven signed drafts and orders, "M. C. Kirven," imitating the handwriting of his mother, thus deceiving the plaintiffs, which he says he did by the directions of his mother, though she denied that she had ever given him any such directions, and knew nothing of any drafts or orders on the plaintiffs signed in her name. Another circumstance relied upon by defendant was that the testimony showed that R. E. L. Kirven, besides signing the name of his mother to sundry papers, imitating her signature, had also signed the name of his brother T. J. Kirven, imitating his handwriting, though R. E. L. Kirven testified that, in every instance in which he did this, he had, or thought he had, authority so to do from the person whose handwriting he imitated. Another very suspicious circumstance relied on by defendant was that, when plaintiffs began to demand a settlement of advances made by them, R. E. L. Kirven directed Tom Kirven to get his mail, as well as any letter to his mother, from the post office, during his absence in Sumter where he was interested in other farming operations, and not allow any one to see his letters or the letters to his mother. During his absence, a letter from plaintiffs, addressed to the defendant, with whom plaintiffs very naturally supposed they were dealing, was received from the post office by Tom Kirven, and delivered to Luke Kirven, an-

other son of defendant, to be given to his mother; the witness Tom Kirven saying that his suspicions were aroused by these instructions, and by the fact that he had previously seen R. E. L. Kirven break open a letter addressed to his mother, and read it. He therefore told another brother, Joshua, about this latter letter, because he thought there was something wrong. That letter does not appear to have reached defendant, for Luke Kirven testified that, after R. E. L. Kirven's return, he took the letter from the table, and started to read it, when his brother R. E. L. Kirven took the letter out of his hand, and tore it up. The contents of that letter do not seem to have been made known to any other member of the family, until subsequently Joshua Kirven wrote to the plaintiffs for a duplicate of the letter; and the argument was that R. E. L. Kirven desired to conceal from his mother the fact that the plaintiffs claimed to have a large debt against her, and hence his effort to prevent any letter from the plaintiffs to his mother reaching her. These and various other circumstances, to which we do not deem it necessary to specially revert, were relied on by the defendant to corroborate the positive testimony of the defendant and the witness Tom Kirven,—the one to the fact that she never executed the mortgage, and the other to the fact that he never saw defendant sign the mortgage, and never signed his name as a subscribing witness thereto. On the other hand, the plaintiffs, in addition to the positive testimony of R. E. L. Kirven as to the execution of the mortgage, and the testimony of the experts above referred to, relied also, among other circumstances, upon the efforts made to compromise after threats of suit had been made, which it is claimed amounted to an admission of defendant's liability. But it seems to us that, in addition to the general rule as to the offers of compromise, these efforts to obtain a compromise may readily be accounted for, as prompted solely by a desire to prevent the disgrace of a very near relative.

In deference to the zeal and ability with which this appeal has been pressed, and the manifest sincerity of counsel for plaintiffs, we have examined the testimony in this case with unusual care, but such examination, so far from satisfying us that there is any error in the conclusion reached by the circuit judge, rather tends to show that his conclusion is correct. We are pleased to be able to indorse fully the very appropriate and just remarks made by the circuit judge, relieving the plaintiffs from any imputation whatever of any improper conduct throughout this whole transaction. The judgment of this court is that the judgment of the circuit court be affirmed.

POPE, J., concurs in the result.

GARY, J. My reasons for concurring in the result, only, are expressed by me in the

case of *Agency Co. v. Faulkner*, hereinbefore mentioned.

JONES, J. I concur in the result, because the preponderance of the evidence is not against the conclusions of fact by the circuit judge. I think that section 4, art. 5, of the present constitution, was intended to sweep away the rule heretofore prevailing, and announced in the opinion of the chief justice, viz. that the conclusion of a circuit judge on a question of fact will be affirmed, unless without any testimony to sustain it, or unless it is manifestly opposed to the overwhelming weight of the evidence. This rule is inimical to the search for truth which is and should be the duty of every court. In its practical operation, it makes the judgment of a circuit judge on a question of fact final, notwithstanding the jurisdiction and duty of this court to review his conclusions of fact. Of course, every appellant, on an issue of fact in chancery, has the burden of showing error in the circuit judge in his conclusions thereon; but he discharges this burden when he shows that the preponderance of the evidence is against the conclusions of the circuit judge.

(47 S. C. 256)

#### KELLEY v. KENNEMORE.

#### BARR v. SAME.

(Supreme Court of South Carolina. July 20, 1896.)

#### CLAIM AND DELIVERY — SUMMONS — TIME TO APPEAR — JURISDICTION OF JUSTICE.

Code Civ. Proc. § 88, subd. 16, provides that, when \$25 or more are demanded, the complaint shall be served on defendant not less than 20 days before the day therein fixed for trial. Section 71, subd. 12, applicable to actions of claim and delivery only, provides that the trial justice shall issue a summons directed to defendant requiring him to appear not more than 20 days from the date thereof. *Held*, in an action for claim and delivery, that a summons, otherwise sufficient, which required defendant to appear in less than 20 days from the date thereof, was sufficient to give the justice jurisdiction, though it also contained a demand for the value of the property in case it could not be returned.

Appeal from common pleas circuit court of Pickens county; Benet, Judge.

Separate actions in claim and delivery by Lowell K. Kelley and George S. Barr against George E. Kennemore. From the judgments rendered, plaintiffs appeal. Reversed.

J. P. Casey, for appellants. J. E. Boggs, for respondent.

POPE, J. In the first-entitled action, which was commenced in a trial justice's court for the county of Pickens, in this state, for claim and delivery of a certain mule, named and called Lidle, and in which the plaintiff, Lowell K. Kelley, complied with all the requirements of the law, by giving a bond, making affidavit etc., the

trial justice issued his summons, as required by subdivision 12 of section 71 of our Code of Civil Procedure, fixing the trial on the 14th day of February, 1896,—just 19 days after date of summons. At the time of trial, defendant appealed, and raised the question of jurisdiction, but answered to the merits. The trial justice overruled the objection to the jurisdiction, and, after a trial had, amended his judgment in favor of plaintiff in the form required in such cases; whereupon defendant appealed to the circuit court, on the single ground that the trial justice erred in holding that he had jurisdiction under his summons. Judge Benet, who heard the appeal in the circuit court, reversed the judgment. From this judgment, the plaintiff has appealed to this court, on grounds that impute error to the circuit judge in his adjudging the trial justice as wanting in jurisdiction. There was another case heard at the same time with the first case, which counsel for respondent admits misled the circuit judge. With great propriety, respondent's attorney, in his argument, admits that the circuit judge was in error in the first case (that we are now considering). His language in this connection is: "The two cases were heard together, and the appeal to the circuit court raised the same objection to the summons in each case. The fact that they are different passed unnoticed by the counsel on both sides. A careful examination showed that the objection urged before the trial justice and in the circuit court to the summons in the case of *Barr v. Kennemore* (the second-entitled action) does not apply to the other case, of *Kelley v. Kennemore*. It is due to the circuit judge to state that his attention was not called to this fact, as it was overlooked until the preparation of the appeal to this court. So the case of *Kelley v. Kennemore* is not considered in the argument here." It follows, therefore, that the judgment of the circuit court must be reversed in the first case, to wit, that of *Kelley v. Kennemore*.

It remains for us now to consider the second case, that of *Barr v. Kennemore*. This, too, was an action for "claim and delivery of a mule named or called Jack." The plaintiff executed the bond required by statute, and made the necessary affidavit. Both were served upon the defendant by the constable when he served him with the summons and complaint. The summons in this case differed from that in the first case (*Kelley v. Kennemore*) in these particulars, and, to make the points of difference between the two cases manifest, we will italicize such differences: "Complaint having been made unto me by the plaintiff, George S. Barr, that you are in unlawful possession of a certain black horse mule, named Jack, and that you wrongfully detain the same from him after demand, a description of said mule having been set out in the affidavit and complaint hereto attached, this is therefore

to require you to appear before me, in my office in Pickens county, at Easley, South Carolina, on the 15th day of February, 1895, at eleven o'clock a. m., to answer to the said complaint, or judgment will be given against you for the return of the said mule, or, in case the return cannot be had, for the sum of forty dollars, the value thereof, and the costs of the action." The respondent here attacks the summons, as not in conformity to the statute governing, as he alleges, the form of a summons in a trial justice's court, to wit, as required by subdivision 16, § 88, Code Civ. Proc.: "When twenty-five or more dollars is demanded, the complaint shall be served on the defendant twenty days, and when less than that sum is demanded, five days, before the day therein fixed for trial. \* \* \*" In the case now at bar the respondent claims that the summons and complaint fixed the day of trial at less than 20 days from the day fixed for trial, and that he, having interposed such defense, was entitled to have a judgment denying jurisdiction in the trial justice. After a careful consideration of this matter, we cannot agree with the circuit judge when he sustained this contention on the part of the respondent at this bar. Section 71 of our Code of Civil Procedure expressly authorizes, in subdivision 11 thereof, a trial justice to exercise civil jurisdiction in "an action to recover possession of personal property claimed, that the value of which, as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars," and in subdivision 12 of the same section, among other things, provides: "And the said trial justice shall at the same time [that is, at the time the constable seizes the property, and delivers to the defendant a copy of the bond, affidavit, and complaint] issue a summons, with a copy of the undertaking, directed to the defendant, and requiring him to appear before said trial justice at a time and place to be therein specified, and not more than twenty days from the date thereof, to answer the complaint of said plaintiff; and the said summons shall contain a notice to the defendant that in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of the action." (Italics ours.) Now, this action is, in form and substance, an action for the recovery of specific personal property, known as "claim and delivery," whose value is less than \$100, to wit, \$40. Every incident in connection with the papers prepared and served disclosed this fact to the defendant. Will the mere fact that, in addition to the statutory requirements as to the summons (and, we may add, every one of which has been scrupulously complied with by the plaintiff) to be issued by the trial justice (who also complied with every of such re-

quirements), there was inserted in such summons a notice that, in the event the property could not, from any cause, be returned to the plaintiff, a judgment for its value would be given, convert this action into one for money? We do not think so. We think the judgment of the trial justice would have to be, in case the property sued for could not be returned, for the value of such property, provided it did not exceed \$100. Besides, subdivision 15 of section 88 provides: "The provisions of this Code of Procedure respecting forms of actions, parties to actions, the rules of evidence, the times of commencing actions, \* \* \* shall apply to these courts." (Italics ours.) It follows, therefore, as before stated, that we cannot agree with the circuit judge in reversing the judgment of the trial justice, for want of jurisdiction, in the second case above entitled.

It is the judgment of this court that the judgment of the circuit court in each of the two above-entitled actions be reversed, and that each of said causes be remanded to the circuit court to dismiss the appeal in each one from the judgment of the trial justice in favor of the plaintiff.

McIVER, C. J. These two cases were both actions for claim and delivery of personal property (in each case a mule), and the difference between the two cases was this: In the case first stated, there was no allegation as to the value of the mule sued for, though it was admitted on the argument here that such value exceeded the sum of \$25; but in the second case the allegation was that the mule sued for was of the value of \$40, and judgment was demanded for that sum in case a delivery of the mule could not be had. This difference, under the view which I take of the question presented for decision, is immaterial, and hence what few remarks I shall make will apply to both cases. The question presented, as I understand it, is whether the trial justice had jurisdiction of the cases. The denial of such jurisdiction seems to be based solely upon the ground that neither of the defendants had received such notice of the time of trial as is required by statute. There are two separate and distinct provisions in the Code upon the subject,—one found in subdivision 12 of section 71, manifestly applicable to actions of claim and delivery only; and the other in subdivision 16 of section 88 of the Code of Civil Procedure, which seems to be applicable to actions for the recovery of money. In the former the provision is that the trial justice shall issue a summons directed to the defendant, "requiring him to appear before said trial justice at a time and place to be therein specified, and not more than twenty days from the date thereof, to answer the complaint of said plaintiff." But in the other section of the Code above referred to,

as amended by the act of December 22, 1891 (20 St. at Large, p. 1113), which amendment does not seem to have been incorporated in the Revised Code of 1893, the provision is as follows: "When twenty-five or more dollars is demanded, the complaint shall be served on the defendant not less than twenty days, and where less than that sum is demanded, not less than five days, before the day therein fixed for trial." So that, in actions in a trial justice's court for claim and delivery of personal property, the Code requires that the time specified in the summons for trial shall be "not more than twenty days from the date thereof" (the summons); while in actions for the recovery of money in a trial justice's court, where \$25 or more is demanded, the requirement is that "the complaint shall be served on the defendant not less than twenty days \* \* \* before the day therein fixed for trial." If, therefore, these actions should be regarded as actions for claim and delivery, as I think they must be, then the requirement of the statute has been complied with if the day fixed for trial was "not more than twenty days" from the date of the summons, and the jurisdictional objection is without foundation. Now, in the first case the date of the summons, as it appears in the "case," was the 26th day of February, 1895, which, it was conceded at the hearing, was a misprint, January being the true date, and the day fixed for the trial was the 14th of February, 1895, which was clearly within the 20-day limit; and in the second case the date of the summons, as it appears in the "case," was the 28th of January, 1895, and the day fixed for the trial of that case was the 15th of February, 1895, which was likewise clearly within the 20-day limit.

None of the cases which have been cited have any application to the question presented here. In *Simmons v. Cochran*, 29 S. C. 31, 6 S. E. 859, the time fixed for the trial exceeded the 20-day limit; and hence, the statutory requirement not having been complied with, it was properly held that the trial justice had no jurisdiction. In *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985, the action was not for claim and delivery, but for the recovery of money; and hence it was very properly held by Mr. Justice Gary that, the defendant not having received the notice as required by the statute,—the full 20 days,—the trial justice had no jurisdiction. In *Rosamond v. Earle* (S. C.) 24 S. E. 44, the court held that the defendant, having voluntarily appeared and pleaded to the merits, had waived any objection as to due notice of the trial.

For these reasons I think the judgment of the circuit court in both of the cases stated in the title should be reversed, and the cases should be remanded to the circuit court, with instructions to affirm the judgment of the trial justice in each case, inasmuch as the other grounds of appeal from the judg-

ment of the trial justice appear to have been abandoned at the hearing before the circuit court.

GARY, J., did not hear this case.

(47 S. C. 176)

GREER v. LATIMER.

(Supreme Court of South Carolina. July 16, 1896.)

EVIDENCE—ACTION ON CONTRACT—PLEADING—EFFECT OF ADMISSIONS—LEGAL CONCLUSIONS—INTEREST.

1. Upon an issue as to the expense incurred by a defendant in defending himself against liability on a certain claim, where there were other claims also involved in the same action, statements made by defendant to his attorney when he paid them for their services as to how much of the fee was to be applied on the claim in question are competent evidence, its weight being for the jury.

2. In an action on a written contract, not under seal, which does not import or express a consideration, the burden is on plaintiff to allege and prove a consideration, and defendant may rely on want of consideration without pleading it as an affirmative defense.

3. An admission in an answer that the allegations of a paragraph of the complaint are true does not admit that plaintiff is entitled to interest as stated in said paragraph; such statement being a conclusion of law, and not an allegation of fact.

4. In an action on a promise to pay plaintiff a sum of money in case the promisor should not be compelled to pay a certain claim against him, less the expense of defending against such claim, it not appearing that the money was the property of plaintiff, defendant cannot be charged with interest on the entire amount from the date of the promise, no sum being demandable until the happening of the contingency named.

Appeal from common pleas circuit court of Greenville county; Benet, Judge.

Action by P. Alice Greer against J. P. Latimer. Judgment for plaintiff, and defendant appeals. Reversed.

Charge of the Court.

"Mr. Foreman and Gentlemen of the Jury: It is not often that a case is so placed before a jury that there is scarcely any issue of law to decide, and very few issues of fact. In this case the plaintiffs set forth certain allegations in the first and second paragraphs of the complaint, and the defendant admits them. The only issue before you now is how much, if at all, is the amount of three hundred and thirty-five dollars to be reduced on account of fees and expenses incurred in defending a certain suit. As you heard repeatedly in the trial on the 2d of May, 1890, Dr. Latimer signed this paper [reading: 'This is to certify that I have received from M. F. Ansel, Atty.,' etc.]. That, of course, is binding upon Dr. Latimer. He here promises to pay Mrs. Greer three hundred and thirty-five dollars, less the expense in defending a certain suit, provided he is not called upon to account to the estate of Hewlett Sullivan for a judgment obtained by Mr. Greer against him. In the second paragraph of the com-

plaint, it says that he was not called on to account, and the defendant admits that he was not called on to account; so the only question for you is, what expense did he incur in defending that Greer judgment? and, when you ascertain that, deduct that from the three hundred and thirty-five dollars which he admits he promised to Mrs. Greer. The defendant sets up, however, a counterclaim, alleging that Mrs. Greer owes him, on account of a note, fifty dollars and interest from date at 7 per cent., and that no part of the same has been paid. The plaintiff, replying to that counterclaim, admits that she gave some note to the defendant, but demands strict proof of same, and says that the defendant had in his possession a note of about the same amount,—the Scruggs note,—which was paid."

Mr. Ansel: "The Greer note was for fifty dollars, and the Scruggs note forty-four dollars, and four payments on it, which should be credited on the Greer note; so the counterclaim now amounts to ten dollars and interest."

The Court: "Then it is admitted by the plaintiff that Mrs. Greer does owe him ten dollars and interest. It seems from the testimony that Dr. Latimer, executor of Hewlett Sullivan's estate, was sued; that an effort was made to deprive him of his office of executor, and to appoint a receiver; and that, in his answer, he set up an account of thirty-one thousand dollars. And, by the way, it was stated in testimony that the estate of Hewlett Sullivan was valued at one hundred thousand dollars, and it was stated on the stand, I think, that it was not worth that much. The Greer judgment was some eleven hundred dollars, and Dr. Latimer agreed that if he was not required to pay that, that he would pay Mrs. Greer three hundred and thirty-five dollars; and you have heard testimony of counsel who represented Dr. Latimer in that case. You heard counsel testify as to what was involved in the case, and some of them were asked what was the relative importance of the Greer judgment to the rest involved in the case. Dr. Latimer said he paid about eleven hundred dollars in fees. Now, it is for you to say whether that eleven hundred dollars was paid in defending the Greer judgment, or was it in part for defending his suit to oust him as executor and other matters? From what you have heard to-day here, you will have to decide. If the Greer judgment was defended in that suit, what was its importance with regard to the proceedings to remove Dr. Latimer as executor and the litigation for thirty-one thousand dollars? If he has paid out eleven hundred dollars in fees, was that amount paid in defending the Greer judgment, or was it paid to counsel for all of the issues, including the Greer judgment, and, if so, what amount of the fees should be regarded as a reasonable fee to be paid the attor-

neys for their services as regards the Greer judgment? You must say, therefore, how much of the bill of fees as testified to is to be regarded as defending the Greer judgment; and, in fixing the fee, you will be guided by a reasonable amount. A jury is never to be too liberal or too stingy. If you come to the conclusion from the testimony that the services rendered in defending the Greer judgment by Dr. Latimer were reasonably worth eleven hundred dollars, say so. If you come to the conclusion that simply as to the Greer judgment, that a small amount would be a reasonable fee, why, say so, on the testimony. Counsel for the plaintiff here concedes that he would not object to your finding fifty dollars as a reasonable fee. So, gentlemen, you will take the case, and decide whether Mrs. Greer has been paid anything, or has the amount which Dr. Latimer was to pay her been all taken up in defending the Greer judgment. If it has not, then you will say how much is to be paid her. If you come to the conclusion that Mrs. Greer is to recover anything at all, you will calculate the interest at 7 per cent. on three hundred and thirty-five dollars from the 2d of May, 1890, and then deduct what you think will be a reasonable amount to be allowed Dr. Latimer for lawyers' fees in defending the Greer judgment. If he has paid the lawyers for defending the Greer judgment, he is entitled to have a credit for that amount. And you will also consider the counterclaim."

#### Exceptions.

"(1) In ruling incompetent the question asked the witness Jos. A. McCullough, 'How much of that [fee] reasonably ought to have gone to your services in defending this very Greer judgment?' said question being relevant, since, under his honor's charge, the jury was required to say 'how much of the bill of fees as testified to is to be regarded as defending the Greer judgment.' (2) In not allowing the witnesses for the defendant, Jos. A. McCullough and J. A. Mooney, to tell the directions given them by the defendant at the time he paid them moneys for services rendered him individually, and as executor, in litigation of which defending the Greer judgment was a part, as to the proportion of their said fees to be credited on account of defending the Greer judgment; said testimony being competent and responsive to the issues made by the pleadings. (3) In not permitting the witness J. A. Mooney to testify as to the contents of a lost receipt which he gave the defendant for moneys paid him by defendant in his official and individual capacity for representing him in an action in which it was necessary to defend the Greer judgment, which receipt stated the amount paid on account thereof; said question and answer being relevant to show the amount actually paid by the defendant in defending the

Greer judgment. (4) In not allowing the said witness to testify as to what defendant told him at the time said receipt was given, said testimony being part of the res gestæ. (5) In not allowing the defendant to testify as to the contents of the said receipt, the loss of same having been established, and in holding with reference thereto, 'You cannot state what that receipt contains, because Mr. Mooney stated that that receipt was drawn according to your instructions,' defendant having previously testified that said receipt was drawn 'not fully' according to his instructions, and, even if it were, he had a right to direct the application of the money paid by him to his attorney. (6) In ruling incompetent and not allowing the witness George W. Dillard to answer the question, 'Do you know the contents of that receipt?' said receipt having been placed in his hands, and misplaced by him, and the said question being material to the issues in said case. (7) In not allowing attorney for the defendant to argue the question of nudum pactum to the jury as a matter of evidence, and in holding that defendant could not avail himself of such matter unless specially pleaded. (8) In charging the jury with reference to the agreement of defendant sued on, 'That, of course, is binding upon Dr. Latimer,' whereas he should have held that it was not binding unless based upon a valuable consideration. (9) In charging the jury that if the Greer judgment was part of another suit, and was defended in that suit, it was for them to decide its relative importance; such question being one of law, to be decided by the court upon an inspection of the pleadings and record. (10) In charging the jury that it was for them to fix a reasonable fee to be paid the attorneys for the defendant in defending the Greer judgment; whereas, under the agreement sued on, the only question to be determined with reference thereto was the 'expense incurred in defending the same.' (11) In charging the jury: 'If you come to the conclusion that Mrs. Greer is to receive anything at all, you will calculate the interest at 7 per cent. on three hundred and thirty-five dollars, from the 2d day of May, 1890;' said agreement not being an interest-bearing obligation, and, in any event, not from its date, since the liability of the defendant and the duty to pay did not arise, if at all, at that time."

A. C. Welborn, G. W. Dill, and Jos. A. McCullough, for appellant. Cothran, Wells, Ansel & Cothran, for respondent.

McIVER, C. J. The action in this case is based upon a contract in writing bearing date May 2, 1890, a copy of which is set out in the first paragraph of the complaint, which reads as follows: "This is to certify that I have this day received of M. F. Ansel, Atty., three hundred and thirty-five dollars, my third of

the amount, less costs, fees, and expenses, of the compromise made of the judgment of Greer & Moseley vs. A. L. Herren, and agree that if I am not made to account to the estate of Hewlett Sullivan, dec'd, for a judgment obtained by J. N. Greer against me, and assigned by J. N. Greer to Mrs. P. Alice Greer, and by her to Hewlett Sullivan, and by Hewlett Sullivan to me, then I am to pay said sum to Mrs. P. Alice Greer, less expense incurred in defending same." In the second paragraph of the complaint the allegation is that the defendant, Latimer, did not have to account to the estate of Hewlett Sullivan for the judgment obtained by J. N. Greer against him; and in the third paragraph of the complaint the allegation is "that defendant has paid no part of said sum of three hundred and thirty-five dollars, and the same, with interest, at the rate of seven per cent. per annum, from May 2, 1890, is due plaintiff." The answer of defendant, after having been twice amended, was an admission of the allegations of the complaint, with an allegation that, in defending himself against the attempt to charge him with the amount of the judgment obtained by J. N. Greer against him, he incurred an expense of \$800. The defendant also pleaded, as a counterclaim, the amount of a note for \$50, bearing date August 31, 1889, with interest from that date; and judgment was demanded by defendant against plaintiff for the amount due on said note, as well as for the sum of \$800, less the sum of \$335, mentioned in the contract, a copy of which is set out above. The counterclaim based upon the \$50 note above mentioned seems to have been reduced by payments to the sum of \$10, besides interest, as to which there does not appear to have been any real controversy; the real controversy being as to the amount of the expenses incurred by Latimer in his successful effort to avoid accountability to the estate of Hewlett Sullivan for the amount of the J. N. Greer judgment. After the testimony was closed, the jury were charged by his honor, Judge Benet, as is set out in the "case"; and the jury rendered a verdict in favor of the plaintiff for the sum of \$388.40, on the 4th December, 1895. Judgment having been entered on this verdict, defendant appeals, upon the several grounds set out in the record, which need not be repeated here, as we propose to consider the several questions presented by these grounds, instead of considering the grounds *seriatim*.

The first six grounds raise the question as to the competency of certain testimony offered by defendant, and excluded by the circuit judge. The seventh and eighth grounds raise the question as to whether there was error on the part of the circuit judge in his ruling, and in his charge to the jury, as to the point that the contract upon which plaintiff's action was based was nudum pactum. The ninth and tenth grounds impute error to the circuit judge in his instructions to the jury as to fixing what would be a reasonable fee for the pro-

professional services rendered Latimer in resisting the attempt to charge him with the amount of the J. N. Greer judgment. The eleventh and last ground raises the question whether the plaintiff was entitled to interest on the contract sued on.

Recurring now to these questions in their order, we will first consider the question as to the competency of the testimony. For a proper understanding of this question, it will be necessary to state certain undisputed facts appearing in the "case." It appears that an action was instituted by some of the parties interested in the estate of Hewlett Sullivan against the defendant J. P. Latimer and John H. Latimer, as executors of the will of Hewlett Sullivan, for the purpose, among other things, of having those executors removed, and a receiver of the estate appointed, as well for the purpose of requiring an accounting from said executors, and for a final settlement of the estate. One of the questions raised in that case was whether the defendant, J. P. Latimer, should be required to account for the amount of the J. N. Greer judgment. Several counsel were employed by the executors in that action, to whom they paid large fees; and the real controversy in this case was how much of such fees were properly to be considered as expense incurred by Latimer in resisting the attempt to charge him with the amount of the Greer judgment. To show this, defendant offered these counsel as witnesses, and the effort was to show by these counsel how much of the fees paid them, respectively, were properly to be credited to their professional services in resisting the attempt to charge defendant with the Greer judgment, and how much thereof should be credited to their professional services in defending Latimer on the other points involved in the case. As might have been expected, these gentlemen found it difficult, if not impossible, to specify what portion of the fees received by them should have been properly credited to their services in regard to the Greer judgment, and what should have been properly credited to their services on the other points involved in the case. When, therefore, Mr. McCullough, the first witness examined as to this point, after stating that the whole amount of his fee in the case was \$750, was asked what portion of that amount should have reasonably gone to his services in reference to the Greer judgment, although the question was at first objected to as speculative evidence, yet the court ruled that "the witness might state what proportion of that fee would have reasonably been applicable to the Greer judgment"; and, as a matter of fact, it appears that the witness was permitted subsequently to say that, apart from what Latimer told him, it would be impossible for him to state what would have been a fair proportion of the fee applicable to the Greer judgment. We do not think, therefore, that there is any practical basis for defendant's first ground of appeal.

The second, third, fifth, and sixth grounds of appeal all turn upon the question whether there was error in ruling that it was incompetent for the witnesses therein mentioned to testify as to what Latimer told them, at the time he paid their fees, what amount thereof was applicable to their services in the matter of the Greer judgment, and also in ruling that the witnesses could not testify as to the contents of a lost receipt, because it was dictated by Latimer. It will be observed that the question here is as to the competency of the testimony, and not as to its effect or sufficiency. The inquiry was as to amount of the expense incurred by Latimer in the matter of the Greer judgment. Surely, Latimer was a competent witness to prove what expense he had incurred, and what amount he had paid, and to whom. If so, then why would it be incompetent for these professional gentlemen, who had claims against Latimer for services rendered him in that particular matter, as well as in other matters, to say that, when they received the money, they were told by Latimer that so much was intended by him as pay for their services in one matter, and so much for other matters? Is this anything more than the well-settled doctrine that a debtor owing two debts to the same person has the right to direct the application of any payment he may make, at the time of making such payment, to the one debt or the other, as he may choose, or to direct that so much of the payment shall be applied to the one debt, and so much to the other. And was it ever doubted that it was competent for the debtor to show what directions he had given, at the time of making the payment, as to the application of such payment? The same principle applies to the offer to prove the contents of the receipt, which had been shown to be lost; and the fact that Latimer dictated the terms of the receipt cannot affect the question. We think, therefore, that these exceptions are well taken. Of course, we are not to be understood as holding that whatever the defendant may have said as to the amount to be applied to the professional services in the matter of the Greer judgment should be conclusive, for we are considering the competency of the testimony, and not its force and effect. We suppose that, under the terms of the agreement upon which the action was based, the defendant could only claim credit for any expenses reasonably incurred, and not any expense which he may have chosen to pay; and that it would be for the jury to say whether the expense incurred was reasonable and proper.

Our next inquiry is as to the question of nudum pactum, raised by the seventh and eighth exceptions. It appears that the question as to whether the agreement upon which the action was based was nudum pactum was raised for the first time by one of the counsel for defendant in his argument before the jury, in response to which counsel

for plaintiff contended that want of consideration was an affirmative defense, and must be specially pleaded. The court having held that the position contended for by plaintiff's counsel was well taken, counsel for defendant moved to amend the answer so as to plead nudum pactum, which motion was refused. The seventh exception imputes error in this ruling, and the eighth exception charges error in not instructing the jury that the agreement was not binding unless based upon a valuable consideration. It will be observed that the agreement set out in the complaint as the basis of the action states no consideration for the promise therein contained. That agreement, lacking some of the essential elements of a promissory note, and not being under seal, does not of itself import a consideration; and hence it would seem that, according to the rules of pleading, a consideration should have been averred and proved. There is nothing either in the pleading or the evidence to suggest why Latimer should have promised to pay the plaintiff the sum of money therein mentioned, expressed to be "my third" of the proceeds of a certain compromise of another claim, with which, so far as appears, the plaintiff had no connection, less the expenses incurred by him in another matter. It seems to us that this was a very proper case in which defendant might have claimed that the promise for the breach of which he was sued was without consideration, and therefore created no legal obligation enforceable by action, without specially pleading such a defense; for if the agreement did not, on its face, import a consideration, and none was either alleged or proved, then the real defense was that the plaintiff had failed to make out all the material facts of her case necessary to a recovery, and was not in fact an affirmative defense. If a consideration was necessary to give the promise upon which plaintiff relied any legal or binding force, then, surely, the defendant might, by way of defense, rely upon the fact that plaintiff had failed either to allege or prove one of the elements material and necessary to the maintenance of the action, without specially pleading such defense, because it was negative rather than affirmative in its character. It may be quite possible that if the plaintiff's action had been based upon an agreement which, upon its face, imported a consideration, as, for instance, a promissory note, then it would be unnecessary, in such a case, to either allege or prove a consideration. It might be necessary to plead specially a want of consideration before defendant could avail himself of the benefit of such a defense. But this is not such a case. These views are without the support of authority, as may be seen in 4 Enc. Pl. & Prac. 946. The case of *Derry v. Holman*, 27 S. C. 621, more fully reported in 2 S. E. 841, cited by counsel for respondent, is not in point, for there the action was based upon a promissory note

which imported a consideration; and the effort was to set up a failure, not a want, of consideration, without pleading such a defense in the answer, which it was held could not be done. Here, however, the effort was to set up a want of consideration as a defense to an action based upon an agreement which did not import a consideration. The difference, it seems to us, is obvious. It seems to us, therefore, that the point raised by these exceptions is well taken, though we could not sustain the eighth standing by itself, for the reason that the circuit judge was not requested to charge as it is claimed in that exception he should have charged. But as the circuit judge had already ruled that the want of consideration could not be set up as a defense, because not specially pleaded, it would have been useless to request such a charge.

From what has already been said, we do not think that either the ninth or tenth exceptions can be sustained. It was clearly a question of fact for the jury to determine what was the expense reasonably incurred by Latimer in protecting himself from the attempt to charge him with the amount of the Greer judgment. No amount was fixed, and hence the rule is well settled that the jury must fix what, in their judgment, under all the circumstances, would be a reasonable amount. We are unable to see how it could be regarded as a question of law.

The only remaining question is that presented by the eleventh exception,—whether plaintiff was entitled to interest. Upon this point the jury were instructed to calculate the interest on \$335 from the 2d of May, 1890, the date of the agreement, and then deduct what they might think was a reasonable amount to be allowed defendant for the expenses incurred by him in protecting himself against the effort to charge him with the Greer judgment; and this instruction is the basis of the last exception.

Before considering the general question as to whether this claim is an interest-bearing demand, it will be proper to dispose of the position taken by counsel for respondent as to the effect of the pleadings upon this question. In his argument here, he says: "But for defendant's admission that the amount claimed, with interest from May 2, 1890, was due to plaintiff, the discussion of this question would be more difficult than it is." This remark is, we think, based upon a misconception of the pleadings. While it is quite true that, in the third paragraph of the complaint, it is alleged "that defendant has paid no part of said sum of three hundred and thirty-five dollars, and the same, with interest, at the rate of seven per cent. per annum, from May 2, 1890, is due plaintiff," the allegations of which paragraph are admitted in the amended answers, yet the well-settled rule of code pleading is that allegations and admissions in the pleadings relate only to matters of fact, and do not

embrace propositions of law; and it seems to us that the statement in the third paragraph of the complaint that "the same, with interest, at the rate of seven per cent. per annum, from May 2, 1890, is due plaintiff," is a mere statement of a conclusion of law, and not the allegation of any fact. See *Addison v. Duncan*, 35 S. C., at page 172, 14 S. E. 308, where it is said: "As to the allegation that the whole amount is still due, that is more a statement of a conclusion of law than an allegation of fact." It seems to us, therefore, that the question must be considered on its merits, disembarassed by any supposed effect of the pleadings. It will be observed that in this case there was no promise to pay any definite sum of money at any specific time, for the sum to be paid was to be dependent upon the expense incurred by the defendant in defending himself against the attempt to charge him with the Greer judgment. Indeed, there was no promise to pay at all except upon a contingency which had not happened at the date of the agreement, and which, so far as then could be seen might never happen at all; and it seems to us clear that there was error in instructing the jury that the plaintiff was entitled to claim interest upon the whole amount named in the agreement from its date, for that would be making the defendant liable for interest on a greater sum than the defendant agreed to pay in any contingency, for, by the express terms of the agreement, defendant was only liable for so much of said sum as would remain after deducting therefrom the expense incurred in defending himself against the Greer judgment, the amount of which deducted had not and could not have been ascertained at the date of the agreement; and whether defendant should be liable for any part of the sum of money mentioned in the agreement depended upon the contingency whether defendant would be successful in resisting the attempt to charge him with the Greer judgment, which had not then and could not then have been determined.

It may be that on the new trial which will be ordered the plaintiff may be able to show that the sum of money mentioned in the agreement really belonged to the plaintiff, and was received by the defendant for her use; and, if so, then the plaintiff would be entitled to interest, as it is well settled in this state that one who receives money to the use of another is liable for interest on the same. *Goddard v. Bulow*, 1 Nott & McC. 45; *Barelli v. Brown*, 1 McCoord, 449; *Marvin v. McRae*, Cheves, 61; *Kimbrel v. Glover*, 13 Rich. Law, 191; *Ancrum v. Stone*, 2 Speer, at page 595, where Frost, J., after saying that it was necessary for the allowance of interest that the sum due and the

time when payable should be ascertained, adds these words: "Interest has also been allowed on liabilities to pay money, though not in writing, if the sum is certain, or capable of being reduced to a certainty, from the time when, either by the agreement of the parties or the construction of law, the payment was demandable, as in cases of money had and received" for the use of another, etc. The case of *Witte v. Clarke*, 17 S. C. 313, cited by counsel for respondent, we do not regard as in point, for there the court treated the transaction as practically a loan of money, which, of course, in the absence of any agreement to the contrary, would bear interest from the time the money was loaned. But we do not see that there is anything either in the pleadings or the evidence, as now presented in this case, to justify this court in regarding the transaction here in question as presenting a case of money had and received by the defendant for the use of the plaintiff. As would have been said under the former system of pleading, there is no count for money had and received; and, as may be now said, there is no allegation in the complaint and no evidence to show that such was the nature of the transaction. But, even if the action could be regarded as an action for money had and received, we still think there was error in instructing the jury that the plaintiff was entitled to interest on the whole amount mentioned in the agreement, from its date; for as said by Frost, J., *supra*, interest should be allowed "from the time when, either by the agreement of the parties or the construction of law, the payment was demandable." Now, it is quite clear from the terms of the agreement that the plaintiff could not demand payment of any part of the sum mentioned until it was ascertained that the defendant had been successful in defending himself against the attempt to charge him with the Greer judgment. Even then she could not demand payment of the whole amount mentioned in the agreement, but only for so much thereof as might remain after deducting the expense incurred by defendant in defending himself against such attempt; so that in no event could the defendant be liable for interest except upon the balance remaining after such expense was deducted, and then only from the time when the amount of such liability was ascertained. But as it does not appear from the "case" as prepared for argument here that either the amount due has been thus ascertained, or the time when such liability accrued fixed, we could not, even if there were nothing else in the case, order a new trial nisi. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(47 S. C. 243)

**COTHRAN v. KNIGHT et al.**

(Supreme Court of South Carolina. July 20, 1896.)

**REPLEVIN—EVIDENCE—JUSTICE'S JUDGMENT—VALIDITY—PLEADING—WAIVER OF RIGHT TO AMEND.**

1. In replevin of property levied on under an execution issued on a judgment in justice's court against plaintiff in favor of one of the defendants, it appeared that plaintiff appealed to the circuit court, and that the appeal was dismissed by the court. *Held* that, where the record in the circuit court was put in evidence, it was not necessary for defendant to prove the judgment by the justice's record.

2. It was not error to admit in evidence the return of the justice, under Code Civ. Proc. § 369, providing that to every judgment on appeal there shall be annexed a "return," on which it was heard, etc., and all orders and papers involving the merits and affecting the judgments, which shall be filed with the clerk, and "constitute the judgment roll."

3. Code Civ. Proc. § 88, subd. 16, gives defendant in an action in a justice's court 20 days to answer after summons served, provided, if plaintiff shall make affidavit that he is apprehensive of losing his debt by such delay, and the justice considers there is good reason therefore, he may make such process returnable in such time as justice may require. *Held* that, where such affidavit was filed, the justice could make his process returnable at 10 o'clock a. m. of the day of service.

4. After a party has been successful on his appeal to the supreme court, and the second trial has been entered upon, a motion by him to amend his pleading is too late.

Appeal from common pleas circuit court of Greenville county; Benet, Judge.

Action by J. R. Cothran against J. E. Knight and another for the recovery of certain personal property, and damages for the alleged wrongful detention thereof. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The charge of the trial judge is as follows:

"The plaintiff, J. R. Cothran, brings this action against J. E. Knight and Robert Coker, the defendants, claiming that they are in possession of 2,880 pounds of seed cotton and 22 bushels of cotton seed, and that they are wrongfully in possession of it, and withholding it from him, and the reason he alleges is that he received a summons requiring him to appear before Squire Scott to answer to the complaint for \$64, and that the summons was issued that day, and served that day, and judgment rendered against the plaintiff on that same day for \$64.75, and that execution was issued on that same day, and placed in the hands of Coker, the township constable, for Trial Justice Scott, and that on that day he seized the said property in the possession of the plaintiff. The plaintiff alleges that the said property was not taken for a tax assessment or fine; that the actual value of the property is about \$85; and that, by reason of this seizure, the plaintiff has suffered to the amount of \$1,000; and he demands at your hands a return of the property, and the sum of \$1,000 as damages. The defendants, J.

E. Knight and Robert Coker, allege that the judgment was rendered by Trial Justice Scott for the amount already stated; and that that was on an account for money and provisions and merchandise used in the production of the crop; and that on the same day execution was issued, and the crop levied on by the constable; and they claim that they had a right to take the property, and sell it, as was done. You have heard the testimony in the case, and the arguments on the law. I was compelled to charge that the record of the trial justice sent up in the case was admissible in evidence here. If you believe that Cothran was indebted as alleged to J. E. Knight, in the way as alleged and the amount alleged, if you believe that he was sued in the manner alleged, and that judgment was rendered against him, and execution issued, and the property sold, why then it rests upon him to show that those proceedings were illegal; and I charge you now, as I have already done, that that record cannot be attacked collaterally in this case. The records of a court are not to be attacked collaterally unless there is evidence that there was total lack of jurisdiction on the part of the court; but I charge you now that there is sufficient jurisdiction on the part of the court, and the only way that this could have been attacked was by proceedings to set aside the judgment. You will take the testimony. The plaintiffs are bound to make out their case by preponderance of the evidence. If the plaintiff has made out his case by the preponderance of the evidence, you will give him the amount he asks for. If you think that he has failed to make out his case by the greater weight of the evidence, you will find for the plaintiff whatever amount he asks; and, if you think he is entitled to damages, you will say how much. If you find for the defendants, say: 'We find for the defendants.'"

Mr. Mooney: "If the judgment shows that that is conclusive evidence of indebtedness."

The Court: "Yes; if there is a judgment proved before you by a competent court, and that judgment not appealed from, that is conclusive evidence of the judgment obtained."

Mr. Mooney: "I will ask your honor to charge the jury that where the possession is lawful, the taking a possession, a demand is necessary; but, if it is unlawful, a demand is not necessary."

The Court: "Yes, sir; that is the law. Where the possession is lawful, a demand for the return of the property is necessary before suit can be brought."

Plaintiff's exceptions are as follows:

"It is respectfully submitted that his honor, the presiding judge, erred, and that the judgment below should be reversed by reason thereof:

"(1) In refusing to allow plaintiff to amend his complaint by striking out all alleged there-

in with reference to the judgment of J. E. Knight vs. J. Cothran, said matter being redundant and irrelevant.

"(2) In refusing to allow plaintiff to testify as to the way in which he had been damaged by reason of the seizure of his property by the defendant, said testimony being relevant and responsive to the allegations of his complaint.

"(3) In ruling admissible the questions of attorney for defendants asked the plaintiff on cross-examination: First, 'Did you owe Mr. Knight anything for supplies furnished you by him to make that crop?' Second, 'You bought it [guano] from that man over there [G. H. Mahon]?'—said questions being irrelevant, calculated only to confuse the minds of the jury, and not responsive to any issue in the case of law or fact.

"(4) In allowing, over objection of plaintiff, the attorney for the defendant to contradict plaintiff by the witness G. H. Mahon, who testified, 'I never sold him a sack of guano in my life,' said matter being irrelevant.

"(5) In admitting in evidence the alleged record in the case of J. E. Knight vs. J. R. Cothran, being that referred to in the answer, because it was not the judgment of the trial justice rendered in said cause, nor any evidence there of the original papers or the book which the law requires him to keep 'being the highest and best evidence of the proceedings before him.'

"(6) In holding that the return of the trial justice for the purpose of the appeal from the judgment rendered by him as alleged in the case of J. E. Knight vs. J. R. Cothran, which appeal had been abandoned, was a part of the record, and admissible in evidence in this case.

"(7) In ruling upon the question of admissibility of said record: 'I cannot hold that the trial justice had no jurisdiction. There is sufficient evidence on the face of the record that he had jurisdiction to justify my holding that there was a prima facie right of jurisdiction, and, that appearing on the face of the record, a collateral attack upon it would not be proper,'—whereas he should have held that said alleged judgment was a nullity upon its face, in that it appeared from an inspection thereof that the trial justice court did not acquire jurisdiction of the person of the defendant therein, and was otherwise invalid, for the following reasons: First. Judgment for more than twenty-five dollars being demanded, defendant had twenty full days before judgment could be rendered against him, and the said alleged judgment, having been rendered on the day said summons was issued, was null and void. Second. The affidavit alleged to have been made by plaintiff therein, upon which said trial justice is alleged to have made said summons returnable the same day it was issued, was insufficient, and failed to comply with the provisions of the Code, in that the facts upon which plaintiff based his apprehension and belief were

not stated therein. Third. The alleged record failed to show that the testimony of the witnesses, if any, were reduced to writing, and signed by them, or that the plaintiff therein had proved his case as required by law. Fourth. There was no proof by return of the officer or party serving the papers, or otherwise, that a copy of said affidavit was served with the summons, as required by law.

"(8) In sustaining the objection of the attorney for the defendant to the following question asked the plaintiff in reply: 'At the time this paper, the summons, was served upon you, was there any other paper served?'—the purpose being, as stated at that time, to show that the plaintiff (the defendant in that action) was not served with a copy of the affidavit upon which the trial justice shortened the time, and which subdivision 16 of section 88 of the Code requires 'shall be served with a copy of the complaint.'

"(9) When asked by plaintiff's attorney to rule upon the admissibility of the execution in holding: 'I make the same ruling as to the execution that the whole return be admitted in evidence,'—whereas said ruling was not erroneous only, but entirely inapplicable to the execution which should have been excluded, for the reason that, being directed only 'to any lawful constable,' it did not authorize, and therefore could not justify, the taking of the property in question by the defendants, or either of them.

"(10) In sustaining the objection of the attorney for defendant to the question asked William Scott, the trial justice, who rendered the alleged judgment in case of Knight v. Cothran: 'Who was your regular constable at that time?'—the purpose being to show that the defendant Robt. Ooker was not a regular constable, and was not justified, therefore, in taking plaintiff's property under the said alleged execution.

"(11) In sustaining the objection of the attorney for the defendants to the question propounded W. D. Metts, clerk of the court, who had in his hand magistrate's and constable's roll kept in his office, 'Will you look in that book, and state—' thereby interrupting attorney for plaintiff, and preventing him from showing by said book that neither of the defendants had enrolled or filed the bond of a constable elected or appointed as required by Rev. St. § 783, subd. 11.

"(12) In charging the jury that the reason alleged by plaintiff of the wrongful taking and withholding of his property by the defendants was 'that he received a summons requiring him to appear before Squire Scott to answer to the complaint for \$64.75, and that execution was issued on that same day, and placed in the hands of Ooker, the township constable, for Trial Justice Scott; and that on that same day he seized the said property in the possession of the plaintiff,'—said statement being wholly unsupported by any allegation in the pleadings or evidence in the cause. On the contrary, plaintiff alleges in

paragraph one of his complaint such facts as the cause of the unlawful detention of his property by the defendants 'as they allege.'

"(13) In charging the jury that the only way the alleged judgment of Knight vs. Cothran could be attacked was 'by proceedings to set aside the judgment'; whereas, this being a judgment, if judgment at all, of an inferior court, jurisdictional facts alleged in the record might be controverted on trial.

"(14) In charging the jury that 'the records of a court are not to be attacked collaterally, unless there is evidence that there was total lack of jurisdiction on the part of the court'; whereas he should have held that, the court of trial justice being an inferior court, it is not necessary for one who assails its validity to produce evidence of total lack of jurisdiction, but, on the contrary, all facts necessary to give jurisdiction must appear affirmatively upon its face.

"(15) In charging the jury: 'I charge you now that there is sufficient jurisdiction on the part of the court [trial justice];' whereas he should have held that if the jury believed the evidence of the plaintiff that he was not served until 11 o'clock, one hour after the time fixed for trial in the summons, he had a right to disregard it, and any judgment rendered against him would be void."

Jos. A. McCullough, for appellant. Earle & Mooney and Geo. W. Dillard, for respondents.

POPE, J. This action was instituted on the 29th day of November, 1893, for the recovery of the possession of personal property, and damages for the unlawful detention thereof. It has been in this court once before. Cothran v. Knight, 22 S. E. 596. It came on for a trial the second time in the court of common pleas for Greenville county, in this state, before Judge Benet and a jury, at the November, 1895, term of court. Verdict was rendered for defendant. After judgment thereon, an appeal was taken to this court. The charge of the judge and the exceptions there-to will be reported.

It seems to us that the fundamental and controlling issue here may be stated in the question: Were the defendants (respondents) justified in seizing the property of the plaintiff (appellant) by the judgment and execution in the case of J. E. Knight, as plaintiff, against J. R. Cothran, as defendant? Appellant's attorney, in his argument, virtually admits this to be true, for he there says: "If said process was valid, and the defendants were lawfully acting thereunder, then we admit their taking was lawful; otherwise, we insist they were trespassers." This being so, we shall pass directly to this question.

In the year 1893 the plaintiff, Cothran, and the defendant Knight, were tenant and landlord, respectively. On the 23d day of November, 1893, Knight, the landlord, having a debt due to him by his tenant, Cothran, amounting to \$64.75, and being apprehensive of the loss

of his debt by Cothran's removing or disposing of his property, applied to William Scott, as the trial justice for Dunklin township, in the county of Greenville (in which both the parties lived, and where the property was located), to bring suit for said \$64.75 against Cothran. On that day, Knight made an affidavit that Cothran was due him "the said sum of \$64.75, on an account for money and merchandise procured to be used by John R. Cothran in the production of his crop in Greenville county, in the year 1893; that he has instituted suit upon the same, but is fearful that the delay of twenty days will occasion the loss of debt, by the said John R. Cothran removing or disposing of his property." Thereupon William Scott, the trial justice, issued his summons to John R. Cothran, requiring him to appear before said trial justice at his office, in Dunklin township, on the 23d day of November, 1893, at 10 o'clock a. m., to answer to the said complaint, or otherwise judgment would go against him by default. Upon default, and after proof by plaintiff of his claims, judgment was rendered by said trial justice against defendant for \$64.75 and costs. On the same day, execution was issued, directed to any lawful constable, requiring him to seize the property of Cothran to satisfy said judgment; and on the same day the constable, the defendant R. B. Coker, seized the personal property now in dispute, and, after 15 days' advertisement, sold the same at public outcry, for the sum of \$60.48. But within the five days after judgment, to wit, on the 27th November, 1893, the plaintiff here, Cothran, appealed from the judgment of the trial justice to the circuit court. The trial justice made a return as required by law, filed this return, with the other papers of the case, in the office of the clerk of the court, and, when the appeal came on to be heard, it was dismissed.

In the case at bar, Cothran seeks to deny that the judgment of Knight v. Cothran was a valid judgment:

(a) Because, he says, upon the face of the record it appears that the judgment in question should have proved by the introduction of the books required by law to be kept by the trial justice, which, he claims, is the highest and best evidence of proceedings before a trial justice. The case relied upon by appellant is that of Cherry v. McCanta, 7 S. C. 224; and he claims that this case just cited is sustained by the later case of Barron v. Dent, 17 S. C. 75, for the position that the books of the trial justice are required to be kept by him. Section 892, p. 316, 1 Rev. St. S. C., is in these words: "Each trial justice shall keep two books, the one for civil and the other for criminal cases, wherein he shall insert all his proceedings in each case by its title, showing the commencement, progress and termination thereof, as well as all fees charged or received by him, and shall produce the same when required for the inspection of the solicitor of the circuit. \* \* \* We learn from the opin-

tion of the court of appeals, in law, pronounced by Judge (afterwards Chief Justice) O'Neill, in *Eiters v. Eiters*, 11 Rich. Law, 415, that this provision was first inserted in the act of 1839 to correct the evil which followed the allowance of executions issued by magistrates to prove judgments of such officers. It may be that section 15 of the act of 1839 had much to do with this conclusion of a divided court. This case was followed by that of *Cherry v. McCants*, supra; but an examination of this case, as well as that of *Eiters v. Eiters*, supra, will show that in neither case was this question necessarily involved, for in the *Eiters* Case the magistrate, while being examined as a witness, produced the execution, but was unable to produce at the moment the summons and judgment, and, upon objection that he could not speak of the contents of the two last while they were in existence, the testimony was overruled. As to *Cherry v. McCants*, the witness was professing to speak from memory as to the contents of papers making up the record. The circuit judge allowed him to do so. Upon appeal, this court held it reversible error. So that we do not feel called upon to adopt or reject what the appellant insists is the rule, because, as we shall soon show, in the case at bar, no such question need to be said to arise. Here there was an appeal from the judgment of the trial justice court to the circuit court, which latter dismissed the appeal. This record was introduced, and, as this is so, it was not necessary to produce the trial justice's books, which formed no part of the circuit court record.

(b) The record introduced contained the report of the trial justice, and it is next objected that this report forms no part of the record, and should not have been admitted. An examination of the Code will show that the legislature has taken a different view of this matter from that entertained by the appellant, for in section 369 of the Code it is provided: "To every judgment upon appeal there shall be annexed the return on which it was heard, the notice of appeal, with any offer, decisions of the court, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgments, which shall be filed with the clerk of the court, and shall constitute the judgment roll." (Italics ours.) And, to see how careful the law is as to this "return" by the trial justice, see section 362 of the Code of Civil Procedure, which makes it mandatory upon a trial justice, when he has rendered a judgment from which an appeal is taken, to make his return, and file it in the circuit court, within 10 days; also, section 363 of the Code, which provides, if he goes out of office, nevertheless he shall make his return in the same manner and with like effect as if he were still in office; also, section 365: If he shall remove to another county of the state, the court may compel him to make this return. If, as we have seen, by law this return of the trial

justice is made a part of the judgment roll of such appeal in the circuit court, we are at a loss to understand how the circuit judge could have ruled otherwise when the record was introduced in evidence than to admit the return, which was a part of such judgment roll in a cause between the same parties.

(c) The appellant insists that this record on its face shows that the court of trial justice had no jurisdiction. Now, if this were true, it would end the case; for, as the present chief justice (Mr. Chief Justice McIver) well remarked in *State v. Cohen*, 13 S. C. 201: "So that, if the proceedings show upon their face a want of jurisdiction, or fail to show that which was necessary to confer jurisdiction, the whole is an absolute nullity, and it is no consequence in what way the defect is brought to the view of the court. *Devall v. Tayler*, Cheves, 5." Having this rule as our guide, what does the record here disclose? The respondent here brought suit in a trial justice's court for \$64.75 against the defendant. It is admitted that both of said parties resided in Dunklin township, in Greenville county, and that William Scott was the trial justice for that township, and that the respondent Robert Coker was his constable. The amount of the debt was within the trial justice's jurisdiction, being under \$100. The subject-matter (being a contention between a landlord and his agricultural tenant for money and supplies, to enable him to make his crop) was also within his jurisdiction. Let us see as to the legal machinery used by the trial justice. The amount sued for being beyond the sum of \$25 or upward, the defendant is entitled to 20 days within which to answer after the summons is served. See subdivision 16, § 88, Code Civ. Proc. But in that same section it is "provided, that if the plaintiff shall make out that he is apprehensive of losing his debt by such delay, and the trial justice considers that there is good reason therefor (the ground of such apprehension being set forth in an affidavit, and served with a copy of the complaint), he may make such process returnable in such time as the justice of the case may require." In this case the affidavit was made, and it satisfied the trial justice that he should make his process returnable at 10 o'clock a. m. of the day of service. In the absence of fraud or gross imposition, the law vests the trial justice with the responsibility of deciding if these requirements are met. This court, in *Cavender v. Ward*, 28 S. C. 473, 6 S. E. 303, when considering this very question, used this language, after having, in words, sustained the circuit judge, who had, in his turn, sustained the trial justice, in reducing the length of time to answer from 20 days to 6 days: "The trial justice must have considered, as he had a right to do, that there was good reason for the apprehension of the plaintiff." (Italics

ours.) In the case at bar, the defendant, after service, declined to attend the trial. But the appellant now insists that the record does not show affirmatively that the affidavit was served upon Cothran at the time the complaint was served upon him. It is true that the affidavit of Robert Coker, the constable, is silent on this point when he swears as to service of the complaint upon the defendant. The statute does not require that such service of the affidavit shall be made to appear by the affidavit of the constable; yet in the return of the trial justice he states as a fact that such affidavit was served upon the defendant Cothran, and, as we have already announced, this return of the trial justice is a part of the record introduced in evidence at the trial of this case before Judge Benet. We are constrained to hold that the trial justice thus acquired jurisdiction of the person of Cothran, as he already had of the subject-matter. When this conclusion is reached, all difficulties vanish so far as the exceptions of the appellant are concerned; for, according to the very admission of appellant's counsel (which admission we have already quoted), if the judgment of Knight v. Cothran was valid, the main difficulty disappears. So far as the legality of the acts of the constable are concerned, it is admitted by the appellant that Robert Coker was the constable of the township. He levied upon such property, as is now in contention, under the execution of the trial justice, whose judgment was affirmed by the circuit court; for the trial judge, Judge Benet, found that the appeal was dismissed, and there is no exception before us as to this finding of the circuit judge on that point. He sold the same after 15 days' public advertisement, as required by law. Unquestionably, the circuit judge has properly stated the rule that, except for want of jurisdiction, judgments, as between parties or their privies, cannot be attacked collaterally. *Turner v. Malone*, 24 S. C. 398, and other cases decided by this court on the same line.

Again, before closing, we ought to dispose of the first exception, relating, as it does, to an alleged error on the part of the circuit judge in refusing the motion of the plaintiff (appellant) to amend his complaint at the trial, by striking therefrom all the plaintiff's allegations as to the judgment, etc., of Knight v. Cothran. The Code is quite liberal as to amendments; yet, when a litigant waits until after he has been successful in his appeal to the supreme court, and after trial is entered upon, to make his motion to amend, we agree with the circuit judge, "He comes too late." 1 Am. & Eng. Enc. Law, pp. 554, 555; *Trumbo v. Finley*, 18 S. C. 305; *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483; and other cases of our own. We must overrule all of these exceptions. It is the judgment of this court that the judgment of the circuit court be affirmed.

(47 S. C. 233)

# WOODWARD v. SOUTH CAROLINA & G. R. CO.

(Supreme Court of South Carolina. July 20, 1896.)

## HIGHWAYS — OBSTRUCTION OF — CONSTRUCTION OF STATUTE.

21 St. at Large, p. 954, §23, providing for the recovery of a penalty or damages from any railroad company or person unnecessarily obstructing a highway, to the inconvenience of any person using the same, "at the suit of the township board of commissioners in which such offense shall have been committed, or any person suing for the same before any trial justice within the county," does not authorize a person to maintain an action to recover damages thereunder in the court of common pleas.

Appeal from common pleas circuit court of Barnwell county; Buchanan, Judge.

Action by J. Whilden Woodward against the South Carolina & Georgia Railroad Company. From the overruling of a demurrer to a cause of action set out in the complaint, defendant appeals. Reversed.

The following is the complaint: "The plaintiff complaining of the defendants above named alleges: For a first cause of action: (1) That at the times hereinafter mentioned the defendants above named were, and still are, a corporation duly organized and existing under the laws of this state, and were the owners of and operating a certain railroad known as the 'South Carolina and Georgia Railroad,' running from the city of Augusta, in the state of Georgia, through the town of Blackville, in the county of Barnwell, to the city of Charleston, in said state of South Carolina, together with the track, cars, locomotives, and other appurtenances thereto belonging. (2) That on the 18th day of April, A. D. 1895, the defendants above named, the South Carolina and Georgia Railroad Company, by their servants, agents, and employes, had under their care, control, and management a certain locomotive engine and train of freight cars, the property of said defendants, which said agents and employes were then and there running and managing upon the defendants' railroad track in said town of Blackville; that the defendants, by their servants, agents, and employes, carelessly and negligently stopped and left said train of freight cars coupled together and standing upon and extending across the entire width of Lartigue street, one of the regularly laid out and public streets of said town, and along Railroad avenue, another regularly laid out and public street of said town, on both sides of said Lartigue street, at the intersection of said Lartigue street with said Railroad avenue, which said Lartigue street and Railroad avenue are public streets of said town, and highways of said county, much used by the public generally, and unnecessarily left said train of cars standing across said Lartigue street, and along Railroad avenue, on both sides of said street, for a longer period

than five minutes, to wit, fifteen minutes, in such manner as to unnecessarily stop and deprive the public from the use of said street and avenue, and to unnecessarily obstruct said streets and highways, to the hindrance and inconvenience of travelers and any person or persons passing along or upon said streets and highways, in violation of section twenty-three of an act of the general assembly of the state of South Carolina, entitled 'An act relating to roads and highways in Barnwell county,' approved January 5, 1895. (3) That, at the time mentioned in the last paragraph of this complaint, the plaintiff was walking along said streets to said intersection of Lartigue street with Railroad avenue for the purpose of passing from the north side of Railroad avenue to the south side of said Railroad avenue, in order to attend to his business, and finding said street and avenue obstructed by the defendants, their servants, agents, and employes, as stated in the last paragraph of this complaint, attempted to cross said street and avenue by passing between said freight cars which had been placed across said street and along said avenue by the defendants as aforesaid, and left by said defendants in such position for fifteen minutes; and, while the plaintiff was passing between said cars, the defendants, their agents, servants, and employes, caused said cars to be moved and pushed together in such manner that the plaintiff was caught between said cars, his knee and leg crushed and mashed, his nervous system greatly shocked, and was otherwise greatly damaged. (4) That by reason of the aforesaid injuries, caused by the unlawful act of the defendants in obstructing said streets and highways, the plaintiff became ill for a long time, was obliged to, and actually did, expend large sums of money for surgical and other treatment and attendance in attempting to cure himself; but his injuries were and are of a permanent nature, and the plaintiff is thereby prevented from actively engaging in business, and was otherwise greatly injured, to his damage in the sum of ten thousand dollars. For a second cause of action: (1) That, at the times hereinafter mentioned, the defendants above named were, and still are; a corporation duly organized and existing under the laws of this state, and were the owners of and operating a certain railroad, known as the 'South Carolina and Georgia Railroad,' running from the city of Augusta, in the state of Georgia, through the town of Blackville, in the county of Barnwell, to the city of Charleston, in the state of South Carolina, together with the track, cars, locomotives, and other appurtenances thereto belonging. (2) That on the 18th day of April, A. D. 1895, the defendants above named, the South Carolina and Georgia Railroad Company, by their agents, servants, and employes, had un-

der their care, control, and management a certain locomotive engine and train of freight cars, the property of said defendants, which said agents and employes were then and there running and managing upon the defendants' railroad track in the town of Blackville; and that the defendants, by their servants, agents, and employes, carelessly and negligently stopped and left said train of cars coupled together, and standing upon and extending across the entire width of Lartigue street, one of the regularly laid out and public streets of said town, and along Railroad avenue, another regularly laid out and public street of said town, on both sides of said Lartigue street, at the intersection of said Railroad avenue with said Lartigue street, the said Lartigue street and Railroad avenue then and there being public streets of said town, and highways of said county, much used by the public generally, and unnecessarily, carelessly, and negligently left said train of cars standing upon and extending across said Lartigue street, and along said Railroad avenue, an unreasonable length of time, to wit, fifteen minutes, in such manner as to unnecessarily, carelessly, and negligently obstruct said Lartigue street and Railroad avenue, to the hindrance and inconvenience of travelers and persons passing along and upon said street and avenue. (3) That, at the time and place mentioned in the last paragraph, the plaintiff was walking along said streets to said intersection of Lartigue street with Railroad avenue, for the purpose of passing from the north side of Railroad avenue to the south side of said avenue, in order to attend to his business, and finding said street and avenue obstructed by the defendants, their servants, agents, and employes, as stated in the last paragraph of this complaint, carefully, and without any negligence or fault on his part, attempted to cross said avenue and street, at the intersection of said street and avenue, by passing between said cars which had been placed across said street and along said avenue, and carelessly, negligently, and unnecessarily left in such position for fifteen minutes, by said defendants, their servants, agents, and employes; and, while the plaintiff was passing between said cars, the defendants, their servants, agents, and employes, negligently and carelessly caused said cars to be moved and pushed together in such manner that the plaintiff was caught between said cars, his knee and leg crushed and mashed, his nervous system greatly shocked, and was otherwise greatly damaged. (4) That, by reason of the aforesaid injuries, the plaintiff became ill for a long time, was obliged to, and actually did, expend large sums of money for surgical and other treatment in attempting to cure himself; but his injuries are and were of a permanent nature, and the plaintiff is thereby prevented from actively engaging in business, and was otherwise greatly injured, to

his damage in the sum of ten thousand dollars. Wherefore the plaintiff demands judgment against the defendants for the sum of ten thousand dollars."

To which complaint defendant filed the following demurrer: "(1) The defendant above named demurs to the first cause of action stated in the complaint herein upon the ground that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action. (2) The defendant further demurs to the second cause of action stated in the complaint upon the grounds that the complaint does not state facts sufficient to constitute a cause of action."

On submission of the demurrer, the court made the following order: "The above-entitled cause came on to be heard before me on a demurrer to the first and second causes of action stated in the complaint, upon the ground that neither of them stated facts sufficient to constitute a cause of action. At the close of the argument, counsel for the defendant stated that he does not insist upon the demurrer to the second cause of action, and asked that, if it should be overruled, leave should be given him to serve an answer thereto. As to the first cause of action stated in the complaint, the defendant contends that the statute entitled 'An act relating to roads and highways in Barnwell county,' approved January 5, 1895, upon the twenty-third section of which the plaintiff contends this cause of action is founded, gives no remedy whatever to any private individual on his own behalf, but that the only remedy given thereby is to the public, and is a penalty for the unnecessary obstruction of a street by a railroad company for a longer period than five minutes, to wit, a fine not exceeding twenty nor less than five dollars, to be recovered by an action at the suit of the township board of commissioners, or any person suing for the same before any trial justice within the county, or by indictment in the court of general sessions for said county. Defendant further contends that it appearing from the complaint that the plaintiff's injury was caused by his being caught and mashed between the cars, which had been, as alleged, unnecessarily left across the street for a longer period than five minutes, by reason of said cars being moved or pushed together by defendant, the court should conclude that the moving of the cars, rather than the obstruction of the street, was the cause of the injury; and, as the complaint alleges no negligence whatever (in this cause of action) in the railroad company in moving the cars, no cause of action is stated. These were the only objections as to the sufficiency of the first cause of action. In reply, the plaintiff contends that the clause 'and shall be liable for all damages arising to any person from such obstruction,' in the twenty-third section of the act, should be construed as remedial, and as giving an ac-

tion to the person injured; while other clauses in said section are penal in prescribing a penalty, given the public, to be recovered by an action at the suit of the township board of commissioners or any person suing therefor, or indictment in the court of general sessions for the violation of the public law. 'There is no impropriety in putting a strict construction on a penal clause and a liberal construction on a remedial clause in the same act of parliament. This has been done in the statutes which make it a felony to burn houses and other property, and give to those who suffer from the felony a remedy against the hundred.' Best, C. J., 2 Bing. 349 (9 H. C. L. 610), cited in 23 Am. & Eng. Enc. Law, 380, note. That the object of this statute was to stop the unnecessary obstruction of the highways in Barnwell county by railroad companies, by fixing on the railroad company a liability for 'all damages arising to any person from such obstruction,' irrespective of all other questions of negligence than the 'unnecessary obstruction' of the highways, as well as to give a remedy for the obstruction to the public. As to the defendant's other objection to the statement of the first cause of action, that, under the facts stated in the complaint, the plaintiff's injury arose from the obstruction; citing *Murray v. Railroad Co.*, 10 Rich. Law, 227, where a horse was prevented from passing by an obstruction placed across a highway by a railroad company, and was, while on the track at the crossing, run over and killed by a passing train, our court said: 'The obstruction of the road was a wrong done by the company, which, under the circumstances, would have justly entitled the plaintiff to a recovery, even if the killing had been shown to be, so far as that train was concerned, wholly accidental and blameless.' See, also, *Railway Co. v. McIntosh* (Ind. Sup.) 38 N. E. 476; *Elliot, Roads & S.* 603; *Railway Co. v. Prescott*, 8 C. C. A. 109, 59 Fed. 237; and the recent case of *Littlejohn v. Railroad Co.* (recently decided by our court) 22 S. E. 789. It is ordered that the demurrer interposed by the defendant to the first and second causes of action set out in the complaint be, and the same is hereby, overruled; and defendant have leave to serve an answer to both or either of said causes of action, as he may be advised, within 20 days from the filing of this order."

Defendant's exceptions: "The defendant, the South Carolina and Georgia Railroad Company, excepts to the order of his honor, the presiding judge, overruling the demurrer interposed by defendant to the first cause of action stated in said complaint, on the following grounds: (1) That his honor erred in deciding that there was no impropriety in putting a strict construction on the penal clause of the statute referred to in said order, and a liberal construction upon the clause denominated by him as 'a remedial clause,' to wit, the clause 'and shall be lia-

ble for all damages arising to any person from such obstruction or injury to such road or highway'; whereas it is submitted that said clause should have been read and construed together with the clause immediately following the same, to wit, 'to be recovered by an action at the suit of the township board of commissioners in which such offense shall have been committed, or any person suing for the same, before any trial justice within the county where such offense shall have been committed,' as giving a remedy only in a court of trial justice, and not in the court of common pleas. (2) That his honor erred in deciding that the object of the statute was to stop the unnecessary obstruction of the highways in Barnwell county by fixing on the railroad companies a liability for all damages arising to any person from such obstruction, irrespective of all other questions of negligence than the unnecessary obstruction of the highways; whereas it is submitted that he should have decided that the object of the statute was to give a remedy before a court of trial justice or by indictment, and not to give a general remedy for an unlimited amount before the court of common pleas."

Joseph W. Barnwell, for appellant. Bellinger, Townsend & O'Bannon and Robt. Aldrich, for respondent.

POPE, J. This action was commenced in the court of common pleas for Barnwell county, in this state, on the 5th day of October, 1895. The complaint set up two causes of action, to both of which the defendant demurred. The issue thus presented came on for trial before his honor, Judge Buchanan. At such trial the defendant consented that his demurrer to the second cause of action should be dismissed. By the judgment of Judge Buchanan, the demurrer as to both causes of action was overruled. From this judgment the defendant now appeals, from so much of said judgment as dismisses the demurrer as to the first cause of action set out in the complaint. In the report of the case must be included the complaint, the demurrer, the order, and the grounds of appeal.

Confessedly the plaintiff bases his first cause of action on the provisions of the twenty-third section of "An act relating to roads and highways in Barnwell county," approved January 5, 1895 (21 St. at Large, 954). This section is as follows: "That if any person or persons, corporations, or any conductor of any train of railroad cars, or any other agent or servant of any railroad company shall obstruct unnecessarily any public road or highway of this county by permitting any railroad car or cars or locomotives to remain upon or across any street, public road or highway for a longer period than five minutes, or shall permit any timber, wood, or other obstructions to remain upon or across any such street, road or highway, to the hindrance or inconvenience of travelers or any person or

persons passing along or upon such street, road or highway, every person or corporation so offending shall forfeit and pay for every such offense any sum not exceeding twenty nor less than five dollars, and shall be liable for all damages arising to any person from such obstruction or injury to such road or highway, to be recovered by an action at the suit of the township board of commissioners in which such offense shall have been committed, or any person suing for the same, before any trial justice within the county where such offense shall have been committed, or by indictment in the court of general sessions of this county. And all fines so accruing under the provisions of this section, when collected, shall be paid over to the overseer of the district in which such offense was committed, and by the overseer applied to the improvement of the roads and highways herein. And every twenty-four hours such corporation, person or persons as aforesaid, after being notified, shall suffer such obstruction, to the hindrance or inconvenience of travelers or any person or persons going along or upon such road or highway, shall be deemed an additional offense against the provisions of this act: provided, that any individual or person reporting or prosecuting the action shall be entitled to one-half of the fine or penalty received, and the chairman of the board of township commissioners is hereby authorized to pay the same to the said person or individual or persons when collected, and take a receipt therefor."

The plaintiff, who, in endeavoring to cross over the train of defendant (which train had been allowed by the agents of the defendant to remain stationary across a street in the town of Blackville, S. C., more than five minutes, unnecessarily), was seriously injured by reason of the sudden movement of said train, claims that he is entitled to bring suit for his said injuries in the court of common pleas, under said section 23. This position is denied by the defendant. The circuit judge agreed with the plaintiff; hence this appeal.

We cannot agree with the circuit judge in the views he entertains on this point. To our minds, the intention of the legislature, as gathered from the language used by it in this section, is plain; so plain, in fact, that in its construction this intention is manifest and palpable. It is to provide a remedy to the public and private persons from any "hindrance or inconvenience" to any individual or the public from the agents or servants of railroad companies allowing a train to remain across or upon a street or highway beyond a period of five minutes. This remedy is to be punished by a suit in a trial justice's court. Every person who has written a work on the interpretation or construction of statutes admits that, if the language used therein is plain and unmistakable, there is no need to use any of the rules of construction, for, when anything is understood, that ends the whole matter. We have studied the statu-

tory provision in question to see if the circuit judge and the appellant could throw such light upon it as would convince us of error; but all in vain. We see the purpose—the intention—of the general assembly, as expressed in the language embodied in this section of this act, so clearly that it is useless to discuss the rules of construction merely to display a familiarity with text-books and decisions of court. It is the judgment of this court that so much of the judgment of the circuit court as is appealed from be reversed, and that the action be remitted to the circuit court for such further proceedings as may be necessary.

(47 S. C. 335)

**LUDDEN & BATES SOUTHERN MUSIC HOUSE v. SUMTER.**

(Supreme Court of South Carolina. July 24, 1896.)

WITNESS—EXAMINATION—EVIDENCE IN REPLY—REPLEVIN—PLEADING.

1. Where evidence of a conversation between the husband of defendant and plaintiff's agent is excluded, when offered by plaintiff in chief, on the ground that it was not shown that the husband was the agent of defendant, the fact that it is shown by the defense that he was in fact her agent does not entitle plaintiff to introduce the excluded evidence in reply, where such evidence is not in regard to a matter either brought out in the testimony in chief, or in the testimony for the defense.

2. In replevin, defendant's possession in the first instance having been rightful, the fact that in his answer he denies the title of plaintiff is insufficient to show that his possession at the commencement of the action was wrongful, and dispense with the necessity for showing a demand and refusal.

Appeal from common pleas circuit court of Sumter county; Watts, Judge.

Action by the Ludden & Bates Southern Music House against Catherine W. Sumter. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Haynsworth & Haynsworth and Lee & Morse, for appellant. Purdy & Reynolds, for respondent.

McIVER, C. J. This was an action for claim and delivery of a piano sold and delivered by plaintiff to defendant under a contract, a copy of which is set out in the case. By the terms of that contract the defendant was to pay the specified price of the instrument in certain specified installments; and, to secure the payment of any unpaid installments, the plaintiff retained the title to the piano until they should be fully paid. It appears that defendant, after paying some of the installments, made default, and the claim was sent to certain attorneys for collection. These attorneys took from defendant a note secured by a mortgage of real estate, as she claimed, in satisfaction of the balance due upon the contract; but, as these attorneys claimed, such note and mortgage were taken merely as collateral security for such balance, and

not as payment or satisfaction thereof, as they had no authority from plaintiff to accept payment in anything but money. Thereupon this action was commenced, and in the complaint, among other things, the plaintiff alleged that before the commencement of the action a demand was made for the possession of the piano, and a refusal on the part of the defendant to comply with such demand. This allegation was denied in the answer, and, as a separate defense, defendant alleged that she was informed and believed that the plaintiff claimed title to the piano under a chattel mortgage,—the contract above referred to, which practically amounted to a mortgage,—upon which a balance was claimed to be due; but defendant averred that the debt secured by such mortgage had been paid and satisfied by the execution and delivery of the note and real-estate mortgage above referred to, which she averred the said attorneys had accepted as payment of the balance of the purchase price of the piano. "Wherefore this defendant alleges that she holds the legal title to the piano aforesaid, and owes to the plaintiff nothing on said account whatsoever." The case went to trial on these pleadings, and upon the testimony then introduced, and, the defendant having obtained a verdict, the plaintiff appealed upon the single ground that the circuit judge presiding at that trial had erred in refusing to permit the plaintiff to introduce testimony tending to show that the attorneys had no authority from their client (the plaintiff) to accept the note and real-estate mortgage above referred to in payment of the balance due on the debt secured by the chattel mortgage on the piano. The court held that, in the absence of any express authority from their clients, attorneys at law have no right to accept anything but money, in payment of a debt sent to them for collection (see 22 S. E. 738), and the case was remanded to the circuit court for a new trial. The case again came on for trial before his honor, Judge Watts, and a jury, when the defendant again obtained a verdict, and from the judgment entered thereon this appeal has been taken, upon two grounds: (1) Because of error in "holding it incompetent to inquire of J. E. Gaillard as to what occurred between Thomas Sumter (the husband and agent of the defendant) and himself when he was on the way to Mrs. Sumter's residence, with the chattel mortgage, for the purpose of seizing the piano under the mortgage." (2) Because of error in refusing to charge the jury, as requested by plaintiff, "that if the jury conclude that the defendant denied the title of plaintiff to the property in dispute, prior to the commencement of this action, it is not necessary to show demand."

For a proper understanding of the question raised by the first ground of appeal, a statement of what occurred at the trial in

reference to that matter is necessary. The witness Gaillard, there referred to, was introduced by the plaintiff during the development of the testimony in chief, and, after having testified that he was the deputy sheriff instructed by the sheriff to seize the piano under the chattel mortgage, said that he started to Mrs. Sumter's residence for that purpose, but, before reaching the house, was stopped by Mr. Reynolds (who seems now to be one of the attorneys of the defendant, but whether he was such at the time referred to by the witness does not appear, though such was probably the fact). The witness was then asked if he saw Mr. Sumter, and, replying in the affirmative, the court, upon exception taken by counsel for defendant, ruled that it was not competent for the witness to testify to anything which passed between the witness and Mr. Sumter, "unless he can show that Mr. Sumter was the agent of his wife." Thereupon the plaintiff closed its testimony in chief, without any offer or attempt to show that Sumter was the agent of his wife. In the course of the testimony for the defense, the defendant was examined, and, being asked what occurred between herself and one Pressley, another witness for plaintiff, on an occasion previous to that referred to by Gaillard, denied that Pressley had made any demand for the piano, saying that he came to see her for the purpose of making "some arrangement about getting some payment on the piano," and on her cross-examination the following took place: "Did you tell Mr. Pressley that he must see Mr. Sumter? A. I do not remember telling him that. He said he wanted to see him. Q. Was Mr. Sumter your agent in this matter? A. He was the only one who approached me about it. Q. I mean, was your husband, Mr. Sumter, your agent in this matter? Did you regard him as being your agent? Did you regard this as being in his charge for you?" To which the reply was, "Yes, sir." When the testimony on the part of the defense was closed, the witness Gaillard was again offered, in reply, with the announcement from plaintiff's counsel that they proposed to ask "what he did with reference to it," and, after some altercation between counsel as to whether the agency of Sumter for his wife had been sufficiently shown, the court ruled as follows: "There is no testimony going to show that there ever was any demand on Mr. Sumter. I do not think the question is competent." There cannot be a doubt that there was no error in the ruling, when Gaillard was first upon the stand, that anything that passed between the witness and Mr. Sumter was incompetent, for there certainly was no evidence at that time that Sumter was the agent of his wife; and it seems equally clear that the testimony sought to be obtained from Gaillard when he was offered in reply was incompetent, because it was not in

reply to any testimony brought out in the defense. Sumter had been examined as a witness for the defense, and while on the stand he was not asked, either in the direct or cross examination, anything as to what occurred between himself and Gaillard, and there was no other testimony as to that matter. Hence it was clearly incompetent for the plaintiff to offer testimony in the reply as to a matter which had not been brought out in the testimony in chief, or in the testimony adduced for the defense. If it were otherwise, then great injustice might be done defendant, as the plaintiff would thus be allowed the opportunity of laying before the jury the version of the transaction or conversation between Sumter and Gaillard, as given by its own witness, without any opportunity for the defendant to lay before the jury the version of the transaction or conversation as it might have been given by the other party thereto. To prevent such injustice is one of the main objects of the rule restricting the testimony in reply to matters which had been previously referred to in the testimony. In addition to this, it seems to us that the question ruled out was indefinite to the last degree, and for that reason exceptionable. The question proposed to Gaillard was "what he did in reference to it," and what that meant is altogether uncertain and indefinite. Even if it had been shown explicitly that Sumter was at the time the agent of his wife, it seems to us that the question should have been so framed as to indicate at least that the inquiry was as to something within the scope of his agency,—something that he had authority to do. The question, as submitted, afforded no indication whatever that the purpose of it was to show any demand made upon Sumter for the piano, or any conduct or conversation on the part of Sumter showing a willingness to waive such demand. Besides, the testimony as to the agency was scarcely sufficient to show that Sumter was the agent of the defendant at that time, though possibly sufficient to show such agency at the time of the interview between defendant and the witness Pressley. The first ground of appeal must therefore be overruled.

As to the second ground of appeal, we must remark, first, that in considering the question as to the correctness of a charge, or of a refusal to charge, reference must be had to the case as made before the court from which such charge or refusal to charge proceeds. Hence, unless it appears that there is something in this case showing that the defendant denied the title of the plaintiff to the property in controversy, the request would present a mere abstract proposition of law, the refusal of which would not constitute reversible error, even though such proposition be abstractly correct. There is certainly nothing in the testimony showing that the defendant "denied the title" of the plaintiff. Even the wit-

ness Pressley, who was the first witness examined for the plaintiff, says nothing of the kind. This witness, after testifying that he went to see Mrs. Sumter for the purpose of collecting the balance due on the piano, or (to use his own language) "to repossess the instrument," he was asked the following question: "When you told Mrs. Sumter that you came up there for the purpose of either repossessing the piano, or collecting payments due thereon, what did she say to you?" to which the witness replied: "She said that she could not do anything,—she could not do anything one way or the other; Mr. Sumter was not at home." And, when asked whether Mrs. Sumter claimed to have paid for the piano, he replied that he did not remember her saying anything about that. It is very obvious that this testimony, which is all there was as to this point, does not even tend to show that the defendant denied plaintiff's title to the property in dispute,—not even by implication arising from her having claimed to have paid the balance of the purchase money,—for that witness said, "I don't remember her saying anything about that." But it is claimed that defendant, by her answer, denied plaintiff's title to the property in dispute. There is no such denial, in express terms, in the answer; and the most that can be said is that it is implied by the averment in the answer that the attorneys for plaintiff had accepted the note and real-estate mortgage in payment of the balance of the purchase money of the piano, "wherefore this defendant alleges that she holds the legal title to the piano aforesaid, and owes to the plaintiff nothing on said account whatsoever." So that this so-called denial is not only by implication merely, but was conditional upon the supposed fact that the acceptance of the said note and real-estate mortgage by the attorneys for plaintiff operated as payment, which has proved to be an erroneous supposition. Even if, however, this averment in the answer could be regarded as a denial of plaintiff's title, we are not prepared to concede that this would justify the demand that the jury should have been charged as requested. It will be observed that the complaint contains no allegation that the defendant, before the commencement of the action, had denied the plaintiff's title, and thereby dispensed with the necessity for a demand and refusal; but, on the contrary, the plaintiff's cause of action is based upon the allegation in the complaint "that before the commencement of this action the plaintiff duly demanded possession of said piano, but the defendant refused to deliver the same"; and this allegation is distinctly denied in the answer, as to the acceptance of the note and mortgage above referred to in payment of the balance due on the piano, and the averment that in consequence of such payment the defendant acquired the legal title to the piano was set up as a separate defense, based upon new matter, and not as a denial of any of the allegations of the com-

plaint, and certainly cannot be regarded as any evidence whatever that the defendant had, before the commencement of the action, denied plaintiff's title. There can be no doubt that the defendant originally acquired the rightful possession of the piano, under the contract of sale set out in the case; and there is as little doubt that under the terms of that contract the defendant was under no obligation to return the piano to the plaintiff, even if she should make default in any of the payments. All that the contract required of the defendant, in case of default in making any of the payments, was to hold the piano subject to the order of the plaintiff, whose agents were to be permitted to enter the premises of defendant, and take and carry away the piano, without incurring any liability to any action for trespass or damages therefor, and without resistance from the defendant; and, in the proviso to the section of the contract from which the foregoing terms are extracted, it is expressly stipulated that if "I [the defendant] am required by said L. & B. S. M. H. [the plaintiff company] to surrender the said instrument, by reason of failure to comply with the terms of this contract, it shall refund to me all amounts which I have paid upon the instrument in excess of a monthly rental of \$7.00 for the time it is out of its possession, together with" certain specified expenses, which need not be repeated here. It seems to us that under the terms of this contract the defendant was not only in the rightful possession of the piano at the outset, but that such possession continued to be rightful until the plaintiff made a demand for the surrender, or made some effort to regain the possession, of the piano, which was in some way resisted by the defendant. Until this was done the plaintiff had no cause of action, as there was no conversion by defendant. The plaintiff must have a cause of action before he commences his action; otherwise he will not be entitled to recover. One of the essential elements in the cause of action of the plaintiff in this case was conversion, and unless that was evidenced by demand and refusal, or by something tending to show that defendant's possession, though rightful in the outset, as all must concede, had become wrongful, by some act of defendant, before the commencement of the action, the plaintiff could not recover. So that even conceding that a denial of the title of the plaintiff, before the commencement of the action, would be evidence of conversion, and thus dispense with the necessity for showing a demand and refusal, which is only evidence of conversion, and conceding that the averments in defendant's answer can be regarded at least as an implied denial of plaintiff's title, that would not be sufficient to sustain this action; for it is obvious that such so-called denial was made, not before, but after, the commencement of the action. From this it is clear that while the request to charge upon which the second ground of appeal is based may have

embodied a correct proposition of law, in the abstract, yet there was no error in refusing such request, as there was nothing in the evidence to call for or require any such instruction. The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 324)

**MIAMI POWDER CO. v. PORT ROYAL & W. C. RY. CO.**

(Supreme Court of South Carolina. July 23, 1896.)

**CARRIERS—ACTION FOR DAMAGES TO GOODS—PREPAYMENT OF FREIGHT—EVIDENCE.**

1. In an action against a carrier for damages to goods shipped over defendant's road, where the damages are equal to or exceed the amount of the freight charges, it is not necessary that the plaintiff should allege and prove that he had paid or tendered the amount due for freight.

2. In an action for claim and delivery, and for damages for the wrongful detention of goods by a carrier, it is competent to show the condition of the goods at any time before judgment; such condition being a result of the unlawful detention.

Appeal from common pleas circuit court of Greenville county; Benet, Judge.

Action by the Miami Powder Company against the Port Royal & Western Carolina Railway Company. There was a judgment of nonsuit, and plaintiff appeals. Reversed.

The following are the remarks of the court in granting a nonsuit:

"This is a motion for a nonsuit, upon the ground that there is no evidence that the plaintiff had fulfilled the condition precedent to the bringing of an action of this character, namely, that the consignee should first pay the freight charges before he can sue the common carrier for damages done to goods in transitu, and on the additional ground that there is no evidence that the powder was injured.

"This second ground I must overrule. While the proof of injury to the powder is meager and unsatisfactory, still, such as it is, it is a matter for the jury. Williams, the consignee, does testify that, of the 400 kegs of blasting powder in the consignment, a large portion—'from one third to one half'—were badly damaged. And as to these damaged kegs he says: 'I don't think I could have sold them for more than half price.' He describes the condition of the injured kegs as being very badly indented, and as being wet, and adds that a sharp indentation breaks the japanning on the sheet-iron kegs; that japanning is intended to prevent rust and dampness; that, if dampness gets to the powder, the powder cakes and gets like dust. It is true that he gives no positive testimony that the powder was actually injured, unless it be where he says that 'strings of powder could be seen from the can to the platform.' All the rest of his testimony could only amount to a presumption that the powder inside the indented kegs may have been injured. If the case were to go

to the jury, I should particularly direct their attention to the nature of his testimony, but I should properly leave it to them to say whether or not it was sufficient to satisfy them that the powder was really injured. That the kegs were wet; that they were very badly indented; that sharp indentation breaks the japanning; that kegs are japanned to prevent rust and keep out dampness; that dampness causes blasting powder to cake and get like dust; that the japanning on many of the kegs was broken; that he could not have sold the indented cans for more than half price,—all this, as proof of injury to the powder, may simply amount to a very far-fetched and shadowy presumption, arising out of very little and unsubstantial proof of fact. But sufficiency of proof is a question solely for the jury. The case will not go to the jury, however. The motion for a nonsuit must be granted on the other ground, namely, that the consignee, the plaintiff's agent, did not pay the freight charges before bringing his action.

"The plaintiff's witness Williams testifies that the freight bill for the powder was \$137; and that it was not paid; that the railway agent refused to let him have any of the powder unless he first paid the freight; that he offered to take the uninjured powder and pay the freight, but that the railway agent said, 'No; you must pay the freight on all before you can take it;' that, as the freight was not paid, the consignment of powder was left in the depot; and that he does not know what became of the powder. The case of *Ewart v. Kerr, Rice*, 203, 2 McM. 141, is relied on by plaintiff's counsel in resisting the motion. The old court of appeals, in the year 1839, did lay down the doctrine in that case that if the property of a freighter was damaged while in the care of the common carrier, to an amount greater than or equal to the freight charges, the common carrier's lien for freight was extinguished, and the freighter or consignee not only had the right to demand the property without payment of freight, but, if delivery was refused, such retention amounted to a conversion, for which an action for trover would lie. This was the opinion of a divided court, two of the five justices not concurring, and one of the two (Judge Earle) filing a very strong dissenting opinion. The case was heard over fifty years ago, in the early days of railroads. But even then the doctrine laid down was not in accord with the decisions of the courts of England and the rest of the United States; nor has it since received support elsewhere. I have been shown no decision of any court outside of this state holding similar doctrine. So far as I am aware, the invariable rule elsewhere is that the freighter or consignee must first pay the freight charges, have the goods delivered to him, ascertain the damage he has suffered, and then bring his action. And that, I must hold, is now the rule in this state, since the decision of our present supreme

court in the appeal taken in this case after the former trial. *Miami Powder Co. v. Port Royal & W. C. Ry. Co.*, 38 S. C. 78, 16 S. E. 339. Mr. Justice Pope, speaking for the court in that case, after recognizing the rule laid down in *Ewart v. Kerr*, says: 'But we feel constrained to observe that the more recent decisions of the court of last resort in this state, notably the cases of *Shaw v. Railroad Co.*, 5 Rich. 462, and *Nettles v. Railroad Co.*, 7 Rich. 190, seem very clearly to point out the course of duty in a consignee whose property is injured while in the control of the common carrier to be to pay all freight charge, and then sue the carrier for the injury done him.' What follows is peculiarly applicable to this case: 'As a practical result, we cannot see how the character and extent of injuries to goods can be correctly ascertained by the consignee while the same are in the hands of the common carrier, and hence this consignee is without the proof requisite to establish his claim for such damages.' 38 S. C. 89, 16 S. E. 342. It was almost impossible for Williams, the consignee in this case, to adduce any evidence of injury. His testimony consisted almost entirely of presumptions based upon presumptions, and not of facts proved. If he had had the powder kegs in his possession, he would have been able to prove what was the extent of the injury. Following the doctrine announced by Mr. Justice Pope, I am clearly of the opinion that the plaintiff in this case must suffer a nonsuit, because the consignee failed to pay the freight charges before bringing his suit. It seems to me, both as matter of law and as common sense, that, before suing for damages, the plaintiff should have paid the freight, obtained possession of the goods, and ascertained the extent of the injury, if any. To hold otherwise would subject the common carrier to all the trouble and inconvenience, so well depicted by the learned associate justice, and end by compelling the common carrier to become a retail merchant in self-defense. The motion is granted."

Mr. Parker, for plaintiff, asked the court if he made any ruling that the damage did not exceed the freight charges,—\$137.

The Court: "No; for Williams stated that he did not think he could have sold the damaged kegs for more than half price. If the whole lot was worth \$860, then a third or a half would exceed the freight bill."

Mr. Parker then asked if the ruling as to the nonsuit applied to both causes of action.

The Court: "Yes, Mr. Parker: from the nature of both causes of action, my ruling necessarily applies to both."

The following are appellant's exceptions:

"Take notice that, in accordance with the notice of appeal heretofore served on you, we shall appeal to the supreme court in this case, and move the court to reverse the judgment of the circuit court for the following reasons: (1) Because his honor erred in excluding the testimony of Jas. T. Williams as

to the condition of a certain part of the powder, and of the cans containing the same, when the same were exhibited in court by Major Ganahl, one of the counsel for defendant, at a former trial of this cause. (2) Because his honor erred in excluding the testimony of Jas. T. Williams as to the condition of the powder, and the cans containing it, when the same were delivered to him for disposition, three years after the institution of this suit, by agreement of counsel. (3) Because his honor erred in granting the nonsuit in this cause so far as such nonsuit affects the first cause of action, it being submitted that there was some testimony, sufficient to be submitted to the jury, to the effect that the goods had been damaged to an extent equal to or greater than the amount of the freight, and that, after demand, the defendant had refused to deliver the goods to the consignee, who was entitled to the possession thereof. (4) Because his honor erred in holding that it was a prerequisite to an action by the consignee against a common carrier for conversion of goods that the consignee had paid the freight due on such goods, even though it appeared that such goods had been damaged in transportation to an amount greater than the amount due for freight. (5) Because his honor erred in not holding that, if goods are damaged in transportation by a common carrier to an amount equal to or greater than the freight due, it amounts to a conversion of said goods, for which the common carrier can be held liable, if it refuses to deliver the goods to the consignee, upon demand therefor. (6) Because his honor erred in ordering a nonsuit as to the second cause of action, it being submitted that there was some testimony sufficient to submit to the jury to the effect that there was damage to the goods in transportation caused by the common carrier."

Haynsworth & Parker, for appellant. M. F. Ansel and Joseph Ganahl, for respondent.

JONES, J. This action, commenced in 1889, was first tried in 1891, and resulted in a verdict for the plaintiff for \$860. On appeal this verdict was set aside, and a new trial ordered. 38 S. C. 78, 16 S. E. 339. The case then came on to be heard before Judge Benet and a jury, at November term, 1895. The plaintiff was nonsuited, and this appeal is from the order of nonsuit.

The complaint alleges two causes of action. The first cause is for damages, \$860, the full value of 400 kegs of powder, which defendant, as a common carrier, contracted with plaintiff to deliver to a consignee at Greenville, S. C., but was so negligent therein that said powder was wholly lost to plaintiff; also for \$100, damages, additional, for delay and having to furnish other goods by reason of defendant's negligence. The second cause of action was for the delivery of 400 kegs of powder, and for \$430, damages for the negligent transportation thereof. It is conceded

that \$137 is the amount of the freight charges for the transportation of the goods. Judge Benet, in his remarks granting the nonsuit, concedes that there was some evidence tending to show that the amount of damages exceeded the amount due for freight. The remarks of his honor granting the nonsuit should be incorporated in the report of the case, together with appellant's exceptions.

The principal question in this case is whether a consignee or freightee must first pay the freight charges before he has any right to sue the common carrier for damages to the goods, or for the delivery of the goods, and for damages thereto, when the damages equal or exceed the freight. The order of nonsuit is based on the affirmative of this proposition. We think, upon reason and authority, that the nonsuit cannot be sustained. There is no doubt that under our Code, § 171, in an action by the carrier for the freight, the freightee may set off or counterclaim any loss or damage he may have sustained to his goods by the negligence of the carrier in the transportation or delivery. Under the old English practice, this was not allowed, but the freighter was compelled to resort to a cross action. *Bornmann v. Tooke*, 1 Camp. 377; *Shields v. Davis*, 6 Taunt. 65. But this doctrine has been repudiated in America. It seems that in England now, under a comparative recent statute, such a set-off is allowed on an action for the freight. It is stated in 8 Am. & Eng. Enc. Law, p. 977, that "in the United States it is well settled that, if the goods are damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight, or he may recoup the amount of damage when sued for freight." In 2 Redf. R. R. p. 188, it is stated in the text: "If the goods be damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight." And, in a note on the same page, it is said: "The right of the owner of the goods to insist on any damage done to the goods, for which the carrier is liable, by way of recoupment or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to analogous cases." Our case of *Ewart v. Kerr*, Rice, 203, was one of the pioneers on this line, and the court's wisdom is being more and more vindicated. The freighter's right to set off his damages against the freight is the first logical step in the solution of the question. Undoubtedly, the carrier has a lien on the goods for the freight due upon the performance of its contract. In *Ewart v. Kerr*, supra, Judge O'Neill said: "The lien of the carrier is made exactly equal to his remedy by action." Thirty years later, the Vermont supreme court, in *Dyer v. Railway Co.*, 42 Vt. 441, said: "The carrier's lien is, of course, only co-extensive with his right to claim and recover freight." In the last case above, the supreme court of Vermont said: "It is fundamental in the law that the right of the

carrier to have his freight results from the performance, on his part, of the contract in virtue of which he undertakes and proceeds in the carriage of the property. If they fail to carry, and have ready for delivery, they could not maintain a claim for freight. If, in the carriage, they should subject themselves to liability for damage to the consignee in respect to the property carried, that would disentitle them to the extent of such liability, to demand and recover freight. And, if damage should exceed the amount of the freight to which they would otherwise be entitled, of course they would not be entitled to demand and recover anything for the carriage of the property. Such seems to be the result of unquestioned principles, and of the decided cases bearing upon the subject." This case distinctly holds that where the carrier, by delay in transporting and delivering goods, has injured the consignee to an amount equal to the charge for freight, the carrier's lien ceases, and the consignee may maintain replevin for the goods, without paying or tendering the freight. In 8 Am. & Eng. Enc. Law, p. 969, it is laid down that the carrier's lien is co-extensive with its right to recover freight; and, in same volume (page 977), that, if the damage equal the freight, the carrier's lien is gone,—citing our case of *Ewart v. Kerr*, supra, and the Vermont case supra, and other cases. *Ewart v. Kerr*, though decided in 1839 by a divided court, was again before the court in 1840, and the doctrine announced in the former decision was reaffirmed. 2 McCul. 143. This case expressly rules that the carrier's lien for freight is only co-extensive with his legal right of action for freight, and may be defeated where the damage done to the goods by the fault of the carrier equals or exceeds the freight; that in such case the freighter may maintain trover against the carrier for the goods detained under the supposed lien for freight. This case has never been expressly overruled, but it is argued that this court, in *Miami Powder Co. v. Port Royal & W. C. Ry. Co.*, 38 S. C. 78, 16 S. E. 339, announced principles in conflict with it. Mr. Justice Pope, delivering the opinion in this case, said, after stating plaintiff's contention: "This court is relieved of an extended consideration of these propositions of law, because this precise point was considered by the court of appeals years ago, in the case of *Ewart v. Kerr*, Rice, 203, 2 McM. 141; and in that case it was decided by a divided court that if the property of the plaintiff was damaged, while in the care of the common carrier, to a greater extent than the bill of freight, the lien of the latter was extinguished, and the consignee not only had the right to demand the property of the carrier without payment of freight charges, but that such retention by the common carrier, after the demand made, amounted to a conversion, and that an action of trover would lie. It must be observed that in order for the principle established in *Ewart v. Kerr*, supra, to apply, the damage to the

property, while in the hands of the common carrier, must be equal to or greater than the freight charges. There is no evidence establishing this fact in the case at bar, and the charge of the circuit judge in response to the request to charge of the defendant (appellant) failed to place this essential element before the jury." It is obvious from the above quotation that the court not only did not overrule, but distinctly reaffirmed, the doctrine of *Ewart v. Kerr*. It is true, and, without attempting to explain by hair-splitting distinctions, we frankly confess, that there follow the above quotation expressions that may mislead as to the opinion of the court concerning *Ewart v. Kerr* as authority. These expressions quoted as tending to impeach the doctrine established in *Ewart v. Kerr* must be taken, and were meant to be taken, as words of caution merely, in view of the practical difficulties in the way of establishing the facts necessary to be established in the application of that doctrine. As a general rule, it is wisest and safest for the freighter to pay the freight, and then sue for damages, since the possession of the goods by the consignee would earliest put the goods to their designed use, would tend to diminish the injury arising from the detention for that use, and especially would afford the consignee better means of ascertaining the amount of damage already done; but this is a rule of caution, and not a rule of law. The case of *Shaw v. Railroad Co.*, 5 Rich. 462, decides what is the rule of measurement of damages in a case where the goods in the carrier's possession are not injured in quality, but deficient simply in quantity. In this case 10 barrels of molasses were shipped to the consignee in Camden, who received 8 of the barrels, and declined to receive the other 2, because some 30 gallons, worth \$8.40, had leaked out. The court decided under these circumstances that the owner could not abandon the 2 barrels, and recover their entire value; that he could only recover the price at the place of delivery of the goods actually lost. The value of the goods actually lost being only \$8.40, the case was dismissed for want of jurisdiction, not because the owner refused to receive the goods on tender by the carrier. We have no doubt that, if the damages proven had been an amount within the jurisdiction of the court, recovery would have been allowed for that amount. In the case of *Nettles v. Railroad Co.*, 7 Rich. 190, there is nothing inconsistent with the doctrine of *Ewart v. Kerr*. This case was a suit for \$120, damages for nondelivery within a reasonable time of the two cases of wool hats, the original cost of which was \$90, upon which plaintiff proved he could have realized a profit of \$30. The goods ought to have been delivered in May, whereas they were tendered in September. The jury were told by Judge O'Neill that the plaintiff ought to have received them on tender in September, and claimed damages which he had sustained for their nondelivery in time.

The jury found a verdict for \$100. The appeal court said: "When they [the goods] were tendered to him, he should have accepted them, and thereby the extreme measure of damages would have been reduced by deduction therefrom of the value of the goods according to their condition at the time and place of tender;" and further said: "It would have been more satisfactory if, by accepting the goods, the plaintiff had been enabled to show exactly the deterioration they had sustained." But it is not intimated in either of the cases last mentioned that payment of the freight and receipt of the goods are essential to maintain an action by the owner for damages thereto by fault of the carrier. On the contrary, so far as the *Nettles Case* shows, no freight was tendered by him for the goods, and he refused the goods when tendered apparently without demand for freight; yet the verdict was sustained. If it had been a rule of law for the freighter to first pay the freight and receive the goods before suing for damages, it is impossible that the verdict in this case could have been sustained.

The title to the goods in the hands of the carrier is in the freighter or consignee, and it follows that, for damages to that property by fault of the carrier, the owner may sue the carrier for damages, even though the property be held by the carrier for the payment of freight thereon, when the damages equal or exceed the freight, in which the freight charges may go to cancel or diminish the damages. When the damage equals or exceeds the freight, the carrier's lien for freight is gone, and the owner's right of possession of his property is complete, and he may maintain an action for claim and delivery for the property, and for damages. The carrier thus loses no right. He either holds the goods under his claim for freight, or he is protected by the bond given by the plaintiff for the return of the property in the event he fails in his action; while, on the other hand, nothing would protect the freighter against his loss in the event of insolvency of the carrier if the freighter were compelled first to pay freight before suing for damages. It follows from these conclusions that the circuit judge erred in granting the nonsuit on either or both causes of action.

We think there was error also in refusing to allow evidence as to the condition of the powder some considerable length of time after its arrival in Greenville. The evidence was competent for whatever it was worth on the question of damages sustained at the time the powder was tendered by the carrier upon condition of payment of freight. Whether the jury could infer what was the condition of the powder at that time by its condition at a later time would depend upon the facts and circumstances of the case. The sufficiency of the evidence was wholly for the jury. It is clear that it would be competent for the defendant to exhibit to the jury the powder at any time of trial for the purpose of show-

ing that it was not damaged then, from which the jury could infer that, necessarily, it was not damaged at the time of tender. For a like reason, the plaintiff may show the condition of the powder at any time before trial, as a means, however weak may be the force of the evidence, to show its condition at the time of tender. Besides, if there is evidence tending to show that the powder was damaged at the time of tender to an amount equal to or exceeding the freight, then it becomes relevant in an action for claim and delivery and for damages to show the condition of the powder at any time before judgment, because, if the damage at the time of tender exceeded the freight, the detention of the goods by the carrier was unlawful, and damage resulting from that unlawful detention becomes relevant. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial.

(47 S. C. 307)

## STRANG v. WEIR et al.

(Supreme Court of South Carolina. July 22, 1896).

## EQUITY—PRACTICE—NONSUIT—TRUSTS.

1. In equity, the law as to nonsuits has no application.

2. Where a person authorizes the payment of money due him to a third person, and directs such person, on receipt thereof, to invest it in land for another, without retaining any further control over the money, a complete trust is created, which is irrevocable, even before the money is so invested.

Appeal from common pleas circuit court of Fairfield county; Benet, Judge.

Suit by Jesse Beam against Thomas Weir and others. On the death of the plaintiff, the suit was continued in the name of his executor T. E. Strang. There was a judgment for plaintiff, and defendants appeal. Reversed.

The report of the referee, referred to in the opinion, was as follows:

"This cause was referred to me by an order of this court of date the — day of —, 1893, for the purpose of having the testimony taken and a report made on all the issues both of law and of fact. By virtue of the said order I held references at my office in Chester, S. C., on the 14th of June, July 6th, July 20th, and September 13th of this year, at which I was attended by the parties and their attorneys. I heard the pleadings, took all the testimony that was offered, which is herewith submitted, heard argument on all the issues, and I would respectfully submit, as my report, the following outlines of the pleadings, the facts that are established by the testimony, and my conclusions of the law of the case, to wit:

"(1) The pleadings:

"(a) The summons and complaint was served on the defendants on August 22,

1892. The complaint, in substance, set forth that one of the defendants, Thomas Weir, while acting as the agent of the plaintiff, received certain moneys, to wit, \$476.18, belonging to the plaintiff, and invested it in a tract of land, which is particularly described, taking the conveyance to himself and the other defendants; that he paid more than the said sum for the tract of land, and that, in case the court directed that the land be conveyed to the plaintiff, he (the plaintiff) was unable to pay the difference, and praying that the land be sold, and that out of the proceeds the plaintiff be repaid his money. The defendants demurred to the complaint, alleging that it did not state a cause of action. The demurrer was overruled, and (b) the defendants answered, admitting that the defendant Thomas Weir received the money as stated in the complaint, and that he invested it in the tract of land as stated, but avoided, by alleging that Thomas Weir invested the money in the tract of land by the direction and at the instance of the plaintiff, taking the conveyance, also, as he directed, and praying that the complaint be dismissed. After the testimony for the plaintiff was in, the defendants moved a nonsuit, which was refused. The plaintiff also asked that he be allowed to amend his complaint by the addition of a paragraph which asserted that the defendants had nothing which could respond to a judgment at law, which amendment was also refused.

"(2) The facts:

"There was considerable testimony taken, amounting to something like 40 pages, but much of it was cumulative, and the real important facts can be put in a small space. The plaintiff, Jesse Beam, is a feeble old man, slow of speech, and whose memory is impaired; but I cannot go as far as the defendant's attorney, and say that he is childish, or that his intellect is impaired, but he is fully competent to attend to ordinary business. Some time in November, 1891, the plaintiff was at the house of his son, Elijah Beam, and the defendant Thomas Weir was also there. While there, these three entered into a verbal agreement for the 'old man,' the plaintiff, to dispose of his property in the following manner: He was to give to his daughter, Mary Peay, the home place, containing about 112 acres, and she, in return, was to allow him to make that his home, though he reserved the right to stay with either of the others if he desired, and she was to pay him \$20 per year. He was then to sell the 97-acre tract, put his rent money with the proceeds, and then buy a place with \$500 of the money for his son Elijah, and with the other \$500 buy a place for his daughter, the defendant Sarah J. Weir, and they were each to pay him \$20 per year, and he was to have the privilege of staying with either of them when he desired. The defendant Thomas Weir told

them, at this meeting, that he knew a man that would give \$300 for the 97-acre tract. He testified, on the trial, that some time before this meeting his grandfather had told him that he wanted to divide out his property, so as to give each of his children a home, and also get a living for himself, and that he advised his grandfather against it; but I do not think he was sincere in this advice, as he immediately went to looking out for a purchaser for some of the property, so as to enable him to make the division. Had he been honest in his opposition, he would have told the 'old man' that the only way he could compel his children and grandchildren to treat him properly would be to hold on to his property himself. After the meeting at 'Lige's' house, at which neither Mary Peay nor Sarah Weir were present, Lige decided that, instead of letting his father sell the 97-acre tract of land, and giving him \$500 of the money, he would take that tract, and pay his father \$300 on it, which sum his father would invest, together with the money he got from his rent, in a place for Sarah. Jesse Beam agreed to this change, and he and Lige and Thomas Weir, the defendant, went to Blackstock, and there he executed and delivered to Elijah a deed for the 97-acre tract of land, which was, as expressed in the deed, upon the consideration of \$300. None of the money was paid down, and the understanding was that it would be paid as soon as the rent money was collected, and would be used in purchasing a home for Sarah. On the same day Jesse Beam had a letter written to Sarah, or, rather, to Sarah and her husband, advising them that he had decided to divide out his property, and that they would get \$500 to put into the land, and saying, to them to make the arrangements, and he would have the money. He was unable to write himself, and the letter was written by Elijah's wife. Thomas Weir was also there, and had something to do with the letter. Mr. Beam swears that he had the letter written for the reason that he could not write himself, and says that what he intended to say was that he meant to help them get a home, and to ask them what that 'Cohen place' could be bought for. I am inclined to think that the 'old man's' ideas were not properly expressed in the letter, and that Thomas Weir, the defendant, who was there when the letter was written, and who impressed me as being something of a schemer, and as a man who had his eye on the main chance, 'had something to do' with the contents of the letter; but the letter is here, and its contents are as I have stated. To this letter no reply was ever received, and Mr. Beam swears positively that Sarah and David never accepted his plan for the division, but that Sarah refused to help support him, or to give him the \$20 a year. This was not contradicted, though David was at the refer-

ence. The only testimony that conflicts with it is the statement of Elijah, who said, in his testimony, that he saw his father, with David and Sarah, in January, and heard him say to them that he would have \$500 to put into a place, and that when they got ready they must let him know, and he would bring it or send it. I am, under these circumstances, obliged to find that the agreement as stated in the letter was not accepted by the defendant Sarah Weir. A deed to the 'home place' was made and delivered to Mary Peay by the plaintiff, and he has been living there since, so that she accepted the divide. Elijah had attended to the business of the plaintiff—that is, collecting his rents, selling his cotton, etc.—for a number of years, and, after this agreement had been made among some of the parties, the plaintiff sent his tenant to Elijah with the rent cotton, for Elijah to sell, as had been his custom. Elijah sold the cotton, and paid the proceeds, and also the \$300, to Thomas Weir, although he says himself that his father's directions to him were to pay it to Jane Weir, to be invested in a place for her. He says that he paid the money to Thomas Weir in December, and that his father demanded that the money be paid to him on the 8th of January, 1892. His exact statement is that his father never told him to give him the money, but that they met on the 8th of January, and his father then demanded a settlement. It was just about this time that Sarah Weir and her husband came up to see the 'old man,' and, as he says, they did not take to his plan of making a divide, and it is possible, and in reality, the whole trouble began just then. Thomas Weir, although the 'old man' swears that he was not his agent, I believe, from the testimony, from his connections with the various parties in the case, and from the circumstance that he did act in that capacity to a certain extent. Elijah Beam testified that there was a written authority to Thomas from the plaintiff, but this writing, if there was one, was not produced, and under the rule it must be held that its being withheld is a circumstance going to show that it would be against Thomas Weir's interest if it were shown. I am satisfied that at one time the plaintiff fully intended putting the \$465 that he got from Elijah and from his rent cotton into land for the defendant Sarah Weir, and that he meant to consult Elijah and also Thomas Weir about it, but I am equally as well satisfied that he had never decided upon any particular tract, and that he never intended to allow Elijah and Thomas to go and buy any place they saw fit without consulting him. This is shown conclusively by the fact that, when Thomas Weir got ready to go to Winnsboro to fix up the title, he went to see the plaintiff, although there was then a breach. The plaintiff then demanded from Thomas Weir his money, \$465, and told him not to buy

land with it. Thomas Weir admitted having the 'old man's' money in his pocket, but, when he was asked for it, cursed him, and told him he could not get it. Thomas Weir then went to Winnsboro, and, holding himself out as the 'managing agent of Jesse Beam's estate,' bought the tract of land described in the complaint, paying for it in part with the money belonging to the plaintiff, amounting to \$465, and having the title made to his father and mother for life, with remainder in fee to himself and brother. The amount of \$20 which Sarah was to pay plaintiff has not been paid. There is some testimony that it was tendered, though it was not enough to make it a legal tender. The defendants are all poor, and have no property besides this tract of land.

"(3) Conclusions:

"(a) The contention of the plaintiff is: That the circumstances under which the defendants got the land make them trustees for him. This was well and carefully argued by plaintiff's attorney. (b) The defendants contend that, at the time the tract of land was conveyed to Elijah Beam, and he agreed, as they contend, to pay the \$300 excess to Sarah J. Weir for her benefit, and the plaintiff also agreed, as they contend, that the money which he got from his rent cotton should go to her, that the plaintiff had nothing further to do with it, and, it was an executed contract,—a complete gift. This was ably and forcibly presented by the defendants' attorney, and I think it is good law; but the facts do not support it, and I believe, with the plaintiff, that the defendants are his trustees, and that he is entitled to the relief sought. I recommend that the land be sold, and out of the proceeds the plaintiff be paid his \$465."

Henry & Gage, for appellants. Barber & Marlon, for respondent.

GARY, J. The allegations of the complaint herein are substantially as follows: (1) That during the year 1891 the defendant Thomas Weir received and took possession of the sum of \$476.18, which was paid to him by Elijah Beam. (2) That the said Thomas Weir admitted having said sum of money in his possession, and admitted plaintiff's ownership thereof, but positively and wrongfully refused, after demand, to return it to the plaintiff. (3) That the plaintiff is an old man, and the said defendant claimed to be, and held himself out to the world as, plaintiff's "managing agent"; but plaintiff avers that such claim is a mere pretense, without plaintiff's knowledge or authority, and contrary to his wishes. (4) That on the 22d day of January, 1892, the said defendant, for a consideration of \$612.50, paid by the said defendant as "managing agent of the estate of Jesse Beam," purchased from the defendant David J. Weir, who is the father of the said Thomas Weir, a certain tract of land, de-

scribed in the complaint. (5) That the said deed of conveyance is to Thomas Weir and his brother, David Weir, Jr., and contains the following provision, to wit: "I reserve to myself and wife, Sarah Weir, a lifetime interest in said estate after our death, with remainder to Thomas Weir and David Weir, Jr." (6) That \$476.18 of the money paid for said land belonged to this plaintiff, and was used without plaintiff's authority and against his express direction. (7) That he is informed and believes the defendants are in the joint possession of said tract of land. (8) That, should the court direct a conveyance of the land by the defendants to this plaintiff, he is unable to pay the difference between the amount of his money used, and the total purchase price. Jesse Beam was the plaintiff when the action herein was commenced, but died thereafter, and the plaintiff above mentioned was substituted in his stead upon the record. The defendants answered the complaint, denying the allegations thereof, except as admitted in the following defense, interposed by them, to wit: "(1) That during the year 1891 the plaintiff divided his property among his children, with the purpose to secure to each of them a home, and they agreed to pay \$20 each for his annual support. (2) That in pursuance of his said purpose, he conveyed to his daughter Mary E. Peay, née Beam, a home place of 112 acres, more or less, and to secure a home for his daughter Mary Jane Weir, née Beam. The defendant Thomas Weir, under the directions of the plaintiff, collected from Elijah Beam \$300 and \$176.18 (the last amount proceeds of rent cotton delivered to said Elijah Beam for that purpose), and invested the same for the said Sarah Jane Weir in a tract of land, described in the complaint, following the special instructions of the plaintiff as to character of title." The case was referred to J. C. James, Esq., as special referee, to take the testimony and report upon all the issues, both of law and fact. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled.

The following testimony throws light upon the disputed points which are regarded as material in view of the conclusion at which the court has arrived: Jesse Beam, the plaintiff, in his testimony says: "Thomas Weir was not managing my business then, and has never managed my business. I never appointed Thomas Weir as my agent to manage my affairs. Thomas Weir admitted having my money in his pocket, and said he would be damned if I should have it. \* \* \* I never authorized Thomas Weir to invest money in land, but told him not to take my money to buy land. \* \* \* Nobody lived with me before Mr. Peay and his wife came to live with me. They have been living with me something over 18 months. I deeded my home place to Mary shortly after

they moved there. It was the understanding, before they moved there, that I was to deed the place to her, and they and Elijah and the others were to support me, and each of them was to give me \$25 a year. The ones who were to support me and give me \$25 a year were Elijah, Mary, and David Weir's wife, Sarah. David Weir's wife refused to support me or give me money, and then I said she should not have any of my money. Elijah also refused to support me. I deeded the place to Mary, because I wanted her to have a home. I deeded 87 acres of land to Elijah in the same way. I had no more land, but Elijah was to give me \$300 on the place I deeded to him, and I intended to use that money, together with my rent, paid me by Elijah Halsell, in buying a home for David's wife, Sarah, provided they carried out their part of the understanding about providing for me. I went into the arrangement with a view of providing a home for each of my children, and for getting a support for myself. They were to let me live among them,—first, one; then, with the other,—and each was to give me \$25 per year. \* \* \* There was no time for the payment of the \$25 per year considered at the time I made the arrangement with my children, but I thought they would give it to me whenever they [I] needed it. They were to give me a written contract, but they never did. I deeded Elijah the 87 acres notwithstanding he didn't give me the contract. \* \* \* I have never gone to any of the parties and asked them for the money. David Weir offered me \$20 last spring, but I didn't take it, as I didn't consider that I had given them anything for them to give me \$20 for. Thomas Weir got it from David, and wanted me to take it, but I wouldn't. They didn't tell me what they offered it to me for. \* \* \* Thomas Weir didn't get the money from Elijah on my order. The \$300 that Elijah was to pay was to come into my hands, and I didn't give any order for it to be paid to Weir. I wanted the money to buy a place for Sarah J. Weir, but they hampered me and bothered me, and then I said they shouldn't have a cent of my money. Elijah Halsell came and told me my rent was ready, and I told him to take it to Elijah, as I had nothing to do with it now. I don't know whether Halsell brought me the rent before I deeded the 87 acres to Elijah, or after. I did not tell my son Elijah to sell the rent cotton, and then turn the rent over to Weir. There was an understanding, before there was any deed made, that I would use the \$300 that Elijah was to pay on his 87 acres of land in purchasing a place for Sarah J. Weir. \* \* \* Elijah attended to my business, and that was why I sent Elijah Halsell to him with my rent cotton. \* \* \* The money that was to be paid to me—that is, the \$25—was to be paid some time in 1892. \* \* \* Elijah Beam, a son of the plaintiff, Jesse Beam, in

his testimony says: "In 1891 my father made some arrangements with us about a division of his property, after talking over the matter for some time, in which he said he wanted to make the division, so that he could make a living for himself, and have one of his girls to take care of him, and his first idea was to give me and my sister, at Long Town, \$500 apiece, and give the 112-acre farm to my other sister, Mrs. Peay. The way he raised the \$500 for me and my sister was this: Some time after he decided to make the division I have mentioned, he found that he couldn't sell the Pinks place, as was his intention. So he gave that to me for my \$500, and required me to pay \$300 towards raising the money for my sister Jane Weir. The balance of the \$500 he got from Elijah Halsell for rent, and also rent from me. He gave the home place to Mrs. Peay. The rent from myself and Elijah Halsell was only \$165, so that my sister Jane Weir did not get quite \$500. She did get exactly \$465, i. e. \$300 that I paid on land, and the \$165 the proceeds of rent cotton. The understanding that we had was that we were to take the advancement, and give to my father \$20 each per year. We—that is, Jane Weir, Mrs. Peay, and I—were to pay him the \$20 each once every year. I was not to pay anything for the first three years, as I had to pay \$300 on my land; but the other two were to pay it from the start. No special time was mentioned for the payment of the \$20. It was understood that it would be paid in the fall. I was to pay \$300 on my tract to my sister Jane Weir, and it was to be invested in land for her. I sold the cotton under my father's instructions, and was to pay the money to Jane Weir for the same purpose. I paid the money to Thomas Weir, my sister's son. My father directed Thomas Weir and I to invest the money in land for Jane Weir. My father made me a deed to the tract of land I got in October. He made the deed to me first. He made deed to my sister Mrs. Peay for the land she got some time in November or December. I paid the money to Thomas Weir in December. When my deed was made Mr. Thompson said I ought to give Jane Weir a note for the \$300 I was to pay her. Thomas Weir said there was no use for a note, and my father said, 'No, not to make a note.' The arrangement was made in October for this money to be invested in the Long Town place for Jane Weir. My father gave instructions about buying the Long Town place, both in person and by letter. These instructions were given to me and Thomas Weir. The instructions were that the property was to go to David Weir and Jane Weir for life, and at their death it was to go to their two sons. The instructions by letter were given to David and Jane Weir. The letter was written by my wife. I was present when it was written, and it was read over to him by my wife, and after-

wards by Thomas Weir. The letter was written in October, the same day my title deed was made. \* \* \*. My father never got a reply to the letter we were talking about awhile ago. The Weirs came up some time in November. Thomas Weir came up with the other Weirs. My father went with Thomas Weir to Blackstock to give him written notice to handle the money for Jane Weir. When all this happened, I had not sold the cotton, and had not delivered the money to Thomas Weir. My father did not ask me to give him the money, nor did he tell me not to give it to Weir. \* \* \*. I was not present when David Weir and Jane Weir came up to see my father. I saw them together the next day, and heard my father say to them to let him know when they got ready for the land trade, and he would come down, or that the money would be ready. My father said, all along, that he wanted me and Thomas to put the money down in a place for Jane Weir." Thomas Weir, one of the defendants, in his testimony says: "When Thompson finished writing the deed, he said to my uncle, 'Now, when you get this title, the land will be yours, and you ought to pay the money.' My uncle said, 'I am to get the money from Mr. McDonald.' And then I spoke up, and said, 'There is no use giving a note, as I am to manage the matter for my mother, and I can trust you all for it.' \* \* \*. We decided to get this place from Cohen at the time of the original agreement. My grandfather understood we would buy this place from Cohen on the very day of the agreement. We did not buy the place until some time in January, for the reason that we could not see Mr. Cohen, and some time in December my grandfather forbid me spending the money for the land. I had made all arrangements to take this particular place [Cohen place] at the time my grandfather forbid me to put his money in it. \* \* \*. I had the money with me at the time he forbid me spending it for the land. He did not demand the money from me. He simply forbid my spending it. I offered to pay my grandfather the \$20 under the terms of the agreement, telling what I meant it for. The money tendered him was gold. \* \* \*. The money for the cotton and from my uncle was paid to me some days before my grandfather forbid me putting it into the land." Elijah Halsey in his testimony says: "I told him [Jesse Beam] as soon as it [the rent] was ready, and he told me to take it to Mr. Elijah Beam and Mr. Thomas Weir, saying that all the business was in their hands. \* \* \*. I told Mr. Beam the rent was ready about the latter part of November that year." N. P. Varnadore says: "I was with Mr. Jesse Beam when he gave the cotton to Thomas Weir. At that time [he said] that [he] had nothing more to do with it,—that he, Thomas Weir, and Elijah Beam were in charge of it."

At the close of plaintiff's testimony the defendants moved for a nonsuit. The special referee filed his report, which will be set out in the report of the case, in which he recommended that the land be sold, and out of the proceeds the plaintiff be paid his \$465. Numerous exceptions were filed by the defendants to the report of the special referee. His honor, Judge Benet, heard the case upon exceptions to the report of the special referee, and ordered that the report be confirmed and the exceptions overruled. His order then provided for a sale of the land, and payment out of the proceeds of the amount claimed by the plaintiff. The defendants appealed to this court upon numerous exceptions, which will be incorporated in the report of the case.

The first exception complains of error in overruling the demurrer. A demurrer will not be sustained if the allegations of the complaint show that the plaintiff is entitled to any relief whatever. The allegations contained in paragraph 2 of the complaint are, in themselves, sufficient to show that the demurrer cannot be sustained. *Stroman v. O'Callin*, 13 S. C. 100.

The next exception imputes error in failing to sustain the motion for a nonsuit. The plaintiff seeks relief within the equitable jurisdiction of the court, and the law as to nonsuits has no application in such cases. *Woolfolk v. Manufacturing Co.*, 22 S. C. 332.

The conclusion reached by the court will render it unnecessary to consider the other exceptions seriatim. The testimony shows that Jesse Beam did not intend that the money itself should be delivered to Mrs. Sarah Jane Weir, and therefore the law as to gifts has no application in this case. The testimony, however, shows clearly and unequivocally that it was the intention of Jesse Beam that the money should be invested in the Long Town place, or some other place, as a home for Mrs. Sarah Jane Weir, without further control over the money by the said Jesse Beam; and this created a complete trust, which could not be revoked by afterwards giving notice to Thomas Weir not to invest the money in a home for Mrs. Sarah Jane Weir. As we have hereinbefore set out the testimony upon which we base this finding, we do not deem it necessary to refer to each circumstance herein mentioned bearing upon this question, but will proceed to cite a few authorities to sustain the views of the court as to the law governing this case. In 8 Am. & Eng. Enc. Law, p. 1323, the law is thus stated: "The title to choses in action, as well as that to any other class of property, may be voluntarily transferred in another manner, without even a delivery, and that is by a declaration of trust. The title to a chattel can ordinarily be transferred by way of gift, as we have heretofore seen, by delivery of the article, actually or constructively, to the donee or to some person in trust for him. It is also possible for the donor to constitute himself a trustee for the donee. In order to do this, it is only neces-

sary for the owner, in clear and unequivocal language, or by acts amounting to the same thing, to declare that he henceforth holds the choses in action or property as trustee for the donee. When this is duly executed by the owner by an act intending to be binding on himself, equity will uphold it, whether the property be legal or equitable, or whether it be capable of transfer or not. If the trust is perfectly created, so that the donor or settlor has nothing more to do to create it, and the party seeking to enforce it has no need of further conveyance from the settlor, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed." On page 1340 of the same volume it is said: "If the property is delivered to a trustee for the benefit of the donee, the trustee, if he accepts the trust, must execute it, and the cestui que trust has a good right of action against him if he does not. The donor or settlor has no control over it, unless some reservation is lawfully made in the trust. So, in case of a valid declaration of trust, like other gifts, when completely executed, it is irrevocable." See, also, *Gadsden v. Whaley*, 14 S. C. 210; *Caldwell v. Wilson*, 2 Speer, 75; *Richardson v. Inglesby*, 13 Rich. Eq. 59. When a trust is complete in its creation, it is not rendered revocable by reason of the fact that certain things remain to be done to carry its terms into effect. The creation must be in present. The execution of its provision may be, and generally is, in futuro. The testimony does not show that Mrs. Sarah Jane Weir did or failed to do anything by which she was estopped from insisting upon the execution of the trust and the enjoyment of its benefits. It is the judgment of this court that the judgment of the circuit court be reversed, and the complaint dismissed.

(47 S. C. 297)

**MICHALSON v. MYRICK et al.**

(Supreme Court of South Carolina. July 22, 1896.)

**DEED—MERGER OF LIFE ESTATE IN FEE—RIGHTS OF CREDITORS OF GRANTOR.**

Where, after execution of a deed of a life estate to defendants, a creditor of the grantor sued to subject his interest to the payment of the debt, and thereafter such grantor executed to defendants another deed to the fee of the same land, which was found to be in fraud of such creditor, there was no merger of the life estate in the fee, so as to affect the rights of the grantees under the first deed, as against such creditor.

Appeal from common pleas circuit court of Barnwell county; Aldrich, Judge.

Action by Esther Michalson against Smart Myrick and others. Judgment for defendants, and plaintiff appeals. Affirmed.

**Master's report:**

"This is an action for the recovery of real estate; the plaintiff basing her right to re-

cover upon a deed executed by the sheriff of Barnwell county, bearing date the 4th day of February, 1895. The defendant Smart Myrick, Sr., in his answer, sets up two defenses: First, a general denial; and, second, that he is entitled to a homestead in the land mentioned and described in the complaint. The defendants Smart Myrick, Jr., J. Angus Myrick, and David Myrick, by their answer, put in a general denial, and plead the statute of limitations. The facts, as they appear from the evidence, are as follows: (1) That on the 2d day of January, A. D. 1880, the said defendant Smart Myrick, Sr., being the owner in fee of the lands mentioned and described in the complaint herein, in consideration of natural love and affection, made and executed a deed thereof to his wife, Matilda Myrick, and to his sons, Smart Myrick, Jr., J. Angus Myrick, and to his grandson, David Myrick, the habendum clause of said deed reading as follows: 'To have and to hold, all and singular, the said premises, unto the said Matilda Myrick, trustee as aforesaid, for and during the term of her natural life, and at her death to be equally divided between my said sons, Smart and J. Angus, and my grandson, David Myrick, share and share alike; the child of any deceased child to take the share the parent would take if living at the time of the death of the said Matilda Myrick.' The word 'heirs' does not appear in said deed, except in the warranty clause. (2) It further appears from the record in the case of *Isaac Michalson v. Smart Myrick, Sr.*, that the said Smart Myrick, Sr., became largely indebted to the said Isaac Michalson and others during the years 1890, 1891, and 1892, and that action was commenced thereon on the 10th day of March, 1894, and that on the 4th day of November, 1894, judgment was duly rendered in favor of the said Isaac Michalson against the said Smart Myrick, Sr., for the sum of \$722. Execution was duly issued on said judgment, and lodged with the sheriff of said county for enforcement. Thereafter the said sheriff levied upon the property mentioned and described in the complaint as the property of the said Smart Myrick, Sr., to satisfy said execution, and, after due and legal advertisement, sold said property at public auction on the 4th day of February, 1895, to the plaintiff, Esther Michalson, for the sum of \$510. The plaintiff complied with her bid upon the day of sale, and the sheriff thereupon executed and delivered to her his deed of conveyance to said property. (3) That the said Matilda Myrick, wife of the said Smart Myrick, Sr., died on or about the — day of August, 1890. (4) The master also finds that soon after the summons and complaint in the action of *Isaac Michalson v. Smart Myrick, Sr.*, was served upon the said Smart Myrick, Sr., that he, for the purpose of evading the payment of said debt and defrauding his said creditor, executed and delivered a deed of conveyance of the

land mentioned and described in the complaint herein to his co-defendants,—the consideration expressed in said deed being for natural love and affection, and the sum of three dollars,—the habendum clause in said deed being as follows: "To have and to hold, all and singular, the premises, unto the said Smart Myrick, Jr., Angus Myrick, and Dave Myrick,—the last-mentioned one (Dave Myrick) to only take one-fourth of said estate,—their heirs and assigns forever: provided, always and nevertheless, it is the true intent and meaning of these presents that I, the said Smart Myrick, Sr., am to retain the possession of the said tract of land for and during my natural life: and provided, further, that the true intent and meaning of these presents that the said Smart Myrick, Jr., and Angus Myrick are to hold their shares of said estate (after my death) for and during their natural lives, and after their death to the lawful issue of their body: and provided, further, that the share of the said Dave Myrick, after his death, shall descend to his heirs at law." Said deed is dated the — day of April, 1894, and was duly probated on the 13th day of April, 1894, and recorded in the office of R. M. C. for said county on the same day. (5) That the land mentioned and described in the complaint is worth about eight hundred dollars. (6) It further appears from the evidence that Smart Myrick, Sr., is about eighty years old, and that he has never married since the death of his wife, the said Matilda Myrick, and has no children except his co-defendants herein, and that his co-defendants are all over twenty-one years of age, and the heads of families, and that they and their families are in possession of the land in dispute, and that the said Smart Myrick, Sr., is living with, and being supported and cared for by, his said co-defendants.

"Matters of law:

"(1) That there being an entire absence of words of inheritance in the deed of 1880 from Smart Myrick, Sr., to his wife, Matilda Myrick, and his co-defendants in this action, the said Matilda Myrick took only a life estate in the land mentioned and described in the complaint herein, with remainder after her death to the defendants Smart Myrick, Jr., J. Angus Myrick, and Dave Myrick, during their lives; the fee remaining in the grantor, Smart Myrick, Sr. (2) That the execution and delivery by Smart Myrick, Sr., to his co-defendants, of the deed dated the — day of April, 1894, operated as a legal fraud upon the rights of his creditors to have the land mentioned and described therein subjected to the payments of his debts; he being at that time largely indebted, and said deed having been executed for the purpose of evading payment of the same, and the consideration expressed therein being only for love and affection. Said deed is therefore null and void, and conveyed no estate to the parties therein named, but their

interests remained as they were prior to the execution of said deed. See *Suber v. Chandler*, 18 S. C. 523, 529; *Ferguson v. Harrison*, 41 S. C. 341, 19 S. E. 619. (3) That at the sale made by the sheriff on the 4th of February, 1895, in the case of *Isaac Michalson v. Smart Myrick, Sr.*, of the land mentioned and described in the complaint, the purchaser, the plaintiff in this action, took only the interest that the defendant Smart Myrick, Sr., had therein, which was the fee, the life estate remaining in his co-defendants, and that by said sale the plaintiff, Esther Michalson, was subrogated to all of the rights of the plaintiff in execution. See *McGee v. Jones*, 34 S. C. 147, 13 S. E. 326. (4) That this being an action strictly upon the law side of the court, to recover possession of land, it was not necessary for the sheriff to make a return of nulla bona upon the execution in the case of *Isaac Michalson v. Smart Myrick, Sr.*, but that he could proceed to sell said land as being the property of said defendants. See *Thomas v. Jeter*, 1 Hill (S. C.) 380; *Smith v. Culbertson*, 9 Rich. Law, 106. (5) That the defendant Smart Myrick, Sr., is not entitled to a homestead in the land in dispute, he not being the head of a family, in the meaning of the constitution of this state; and, if he were the head of a family, he would not be entitled to a homestead in said land, as possession of the same could not be given to him, he having conveyed the life estate therein to his co-defendants under the deed of 1880.

"At the argument of this case before the master the plaintiff's counsel, in substance, contended that the co-defendants of Smart Myrick, Jr., took a life estate under the deed of 1880, and the fee under the deed of 1894, and that, when the two estates met, merger took place, and that thereupon all rights of the parties under the deed of 1880 were destroyed. They then proceeded to remove the deed of 1894 from the path of their client's right to recover by showing that said deed was null and void on the ground that it operated as a legal fraud upon the rights of the creditors of the said Smart Myrick, Sr. Having disposed of the deed of 1894 by declaring it null and void, they then contended that the plaintiff, Esther Michalson, took both the life estate and fee in said land under the sale made by the sheriff, and that she is therefore entitled to the possession of same. There is no doubt the co-defendants of Smart Myrick, Sr., took a life estate under the deed of 1880, and would have taken the fee under the deed of 1894, if it had not been null and void, and also that merger of the two estates would have taken place, provided said deed had been valid. But, said deed being void ab initio, merger did not take place; and, even admitting that merger did take place, it was only temporary, and as soon as the deed of 1894 was declared null and void the life estate and the fee would have separated, and the

parties reinstated to their rights as they existed under the deed of 1880. If the deed of 1894 is null and void as to one, it is null and void as to all. It cannot be held to be null and void as to the plaintiff's rights, and not null and void as to the rights of the defendants prior to its execution. The plaintiff cannot blow hot and cold at the same time. It is difficult to understand how the co-defendants of Smart Myrick, Sr., could have lost the life estate in said lands by merger under a deed that is null and void. When a deed is declared null and void, it must be considered as having never existed, and without force or effect. The correct mode of arriving at a solution of this matter is as follows: What interest did Smart Myrick, Sr., have in said land before he made the deed of 1894, and which was subject to levy and sale for the payments of his debts? It is admitted that he had only the fee, the life estate being in his co-defendants. Therefore when he executed said deed of 1894 he merely conveyed to the grantees therein the fee, and nothing more; and, if said deed is null and void, then the purchaser at sheriff's sale took only the interest that the said Smart Myrick, Sr., held in said land prior to the execution of said deed. The mere fact that Smart Myrick, Sr., stated in the deed of 1894 that he reserved a life estate in said land to himself did not give it to him; for it was not his reserve, as he had previously, under the deed of 1880, conveyed the life estate to his co-defendants, and they never conveyed it back to him. The plaintiff's action is not brought upon the equity side of the court, to have the deed of 1894 set aside and canceled of record on the ground of fraud, but she has brought her action upon the law side, to recover possession; treating said deed as being null and void,—as having never existed. Therefore it does seem strange that, although she claims that said deed is null and void, yet she, in the same breath, claims that it conferred a greater estate upon herself than Smart Myrick, Sr., really had in said land himself. It will be well to state here that the defendants did not introduce the deed of 1894 in evidence, and do not claim under it, but that the same was introduced in evidence by the plaintiff. The master therefore, in brief, concludes as follows: That the plaintiff, Esther Michelson, is not entitled to recover possession of the land mentioned and described in the complaint herein, and that she be required to pay the costs of this action."

"Order for judgment:

"This action came before this court upon the pleadings, the report of the master, and exceptions thereto filed by plaintiff. After mature consideration, I am of the opinion that the report of the master is correct, and that exceptions thereto should be overruled. I think that the conclusion of the master can be supported upon grounds other than those stated by him, but I need not refer to

them, as the report is sufficient. Wherefore it is ordered, adjudged, and decreed that the exceptions of the plaintiff to the conclusions of the master herein be, and hereby are, overruled and dismissed, and that said conclusions are hereby adopted and made the judgment of this cause, and the complaint herein is dismissed. This order does not affect, nor is it intended to affect, the questions of the fee in the land, and plaintiff's right to the possession thereof, if any, before the termination of the life estate now held by Smart Myrick, Jr., J. Angus Myrick, and David Myrick, defendants above named."

Patterson & Holman, for appellant. Jas. H. Davis and Thos. S. Moorman, for respondents.

GARY, J. The following statement of facts appears in the case: This action was commenced on the 14th day of February, A. D. 1895, by the service of the summons and complaint. The said complaint was in the usual form for the recovery of real estate, and alleged that the plaintiff was seized in fee of the land herein described, and that the defendants were in possession thereof, and withheld the same from the plaintiff wrongfully. The description of the land in the said complaint was the same as that mentioned and described in the sheriff's deed herein. The defendant Smart Myrick, Sr., answered the said complaint, and denied the allegations thereof; and, for a second defense, he set up that he was the head of a family, and entitled to a homestead, under the laws of this state. The other defendants answered, and denied the allegations of the complaint, and set up the statute of limitations as a bar to the plaintiff's action, and alleged that they were in possession. A jury trial was waived, in the manner allowed by law, and, by consent, all the issues, both of law and fact, were referred to the master to hear and determine. The master filed his report, and fully set forth all the facts necessary to a full understanding of the cause. The sheriff made return that he could find no other lands belonging to Smart Myrick, Sr., before he levied upon the land in dispute. The report of the master, and the order confirming the same, will be set out in the report of the case.

The exceptions raise substantially but the single question whether merger took place when Smart Myrick, Sr., delivered the second deed of conveyance to the other defendants herein. Merger is not favored either in the courts of law or of equity. "At law, when a greater and lesser, or a legal and equitable, estate coincide in the same person, the lesser or equitable estate is immediately merged and annihilated; but this rule is not inflexible in equity, whether or not a merger takes place depending upon the intention of the parties, and a variety of other circumstances. Notwithstanding the technical rule of law, equity will prevent or permit a merger, as will

best subserve the purposes of justice, and the actual and just intention of the parties; and in the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all circumstances, would be best subserved by keeping them separate, the intent will ordinarily be implied. \* \* \* A merger will be prevented by equity only, however, for the purpose of promoting substantial justice. It will not prevent a merger where such prevention would result in carrying a fraud, or other conscientious wrong, into effect." 15 Am. & Eng. Enc. Law, pp. 314, 315; Boykin v. Annum, 28 S. C. 486, 6 S. E. 306; Mangum v. Piester, 16 S. C. 330. The master finds, as matter of fact, "that soon after the summons and complaint in the action of Isaac Michalson v. Smart Myrick, Sr., were served upon the said Smart Myrick, Sr., he, for the purpose of evading said debt and defrauding his said creditor, executed and delivered a deed of conveyance of the land mentioned and described in the complaint herein to his co-defendants; the consideration expressed in said deed being for natural love and affection, and the sum of three dollars." The testimony is not set out in the case, and, even if it should be admitted that the exceptions are sufficient in form to raise a question as to the finding of fact by his honor, the circuit judge, that there was actual and moral fraud in the execution of said deed of conveyance, still this court, in the absence of the testimony in the case, must assume that it was of such a nature as to sustain the finding of fact by the circuit judge. City Council of Greenville v. Elchelberger (S. C.) 22 S. E. 345. We will now proceed to consider whether merger took place, when the facts show that at the time said deed was executed it was the purpose of Smart Myrick, Sr., to evade the payment of his debt, and to defraud his creditor hereinbefore mentioned. The difference, in effect, between actual and legal fraud, is thus expressed in Suber v. Ohandler, 18 S. C. 528, to wit: "\* \* \* It has been held by our courts that while a voluntary conveyance of property is not itself fraudulent, even by one in debt, yet if it was intended to hinder, delay, and defeat present creditors, or shall ultimately have that effect, it will be held fraudulent and void. If, at the time of its execution, the wrong was intended, the fraud is positive and active, and attaches to the act at that moment. If, however, no wrong was then intended, and the conveyance becomes injurious to creditors afterwards, because at some future time the grantor's property has failed to meet the just demands of the creditors whose claims existed at the time of the deed, then a passive and legal fraud is developed, which, attaching to the deed, renders it void, not from the beginning, but at that moment." If, as the authorities show, the said deed was null and void ab initio, then there was not a meeting of a greater and a lesser estate in the same persons, and

consequently merger did not take place. The exceptions are therefore overruled. It is the judgment of this court that the order of the circuit court be affirmed.

(47 S. C. 288)

## MILLER et al. v. GRAHAM.

(Supreme Court of South Carolina. July 22, 1896.)

## DEED—CONSTRUCTION—FEE CONDITIONAL—ALIENATION.

A deed granting land to a woman and "the heirs of her body," to have and to hold the same unto said woman "and the heirs of her body," to her and their heirs and assigns, forever, creates a fee conditional in said woman, and therefore, after issue born, she had power to convey the estate in fee simple, and it does not create a fee simple in said woman and her children, share and share alike.

Appeal from common pleas circuit court of Barnwell county; Aldrich, Judge.

Action by B. E. Miller and others against Benjamin Graham for partition of certain land. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

The judgment and grounds of appeal referred to in the opinion are as follows:

## Judgment.

"This is an action in partition, brought by the plaintiffs, who are the children of India J. Miller, alleging that they are each entitled to one undivided one-fifth portion of the premises described in the complaint, and the defendant to the remaining fifth. The defendant answers, denying the title of the plaintiffs, and alleging absolute title in himself; and an issue is thus raised on the law side of the court. A jury trial is waived, and the case comes on to be heard before me upon such waiver and the agreement of counsel, by which it appears that both plaintiffs and defendant claim from a common source,—the deed of Bryant Weathersbee, dated 25th March, 1882; the plaintiffs contending that under that deed they are tenants in common with their mother, India J. Miller, and the defendant, that no estate was conveyed to them by said deed, but, on the contrary, that the deed conveyed an estate in fee conditional to their mother, and he being the purchaser at the foreclosure sale of the premises under a mortgage executed by the said India J. Miller, she having issue alive at the time, he is the owner of the absolute fee. The practical question, therefore, is the proper construction of the deed of 25th March, 1882.

"The deed in question is written on the ordinary printed form of conveyance used in this state, and the effort of the draftsman to fill the blanks may in some degree account for the grounds for contention. The deed purports, 'in consideration of the sum of five hundred dollars, and love and affection, to me in hand paid at and before the sealing and delivery of these presents by my daughter, India J. Miller,' to convey 'to the said India J. Mill-

er and the heirs of her body' the premises described therein; 'to have and to hold, etc., unto the said India J. Miller and the heirs of her body, to her and their heirs and assigns, forever.' The warranty is to 'the said India J. Miller and the heirs of her body, and their heirs and assigns,' etc. The contention is as to the proper construction of the words I have taken from the habendum and warranty clauses; plaintiffs contending they show an intention to use technical words, 'heirs of her body,' as words of purchase, 'children,' in analogy to the use of such words in this connection in those cases where the rule in Shelley's Case would otherwise apply. There is no precedent life estate in the case under consideration, and therefore it could never fall under the rules adopted to take a case out of the operation of that celebrated case; and the deed in question must be construed by the ordinary rules applicable to such instruments, the first of which is to ascertain the intention of the grantor from the terms used under the rules of law, giving the technical words their technical meaning, unless some other meaning is forced from the context. The words 'heirs of her body' are never equivalent to or synonymous with 'children' where they follow and are attached to terms granting an estate to the ancestor. Here these terms are words of limitation, and indicate the grantee takes a fee conditional at common law.' *McCown v. King*, 23 S. C. 235.

"The granting clause, the habendum, and the warranty clause are all to 'India J. Miller and the heirs of her body,'—the most apt words to convey a fee conditional. So, unless the words 'to her and their heirs and assigns,' which are superadded, have the effect of cutting down the estate granted, by the interposition of new grantees, the plaintiff must fail. I do not think, as used in this case, they have any such effect. In *Jordan v. Neece*, 36 S. C. 301, 15 S. E. 202, it is held the warranty clause cannot enlarge the estate granted; in *Wright v. Herron*, 5 Rich. Eq. 441, that the word 'assign' cannot have such effect; and in *Danner v. Trescot*, Id. 356, that the words 'their heirs and assigns,' following the 'right heirs of the said S. P.,' have no such effect, and this although a life estate was interposed, and the words occurred in the limitation over after the death of the life tenant. The words 'her heirs,' in this connection are construed in *Burnett v. Burnett*, 17 S. C. 545, to mean the same class of heirs; that is, heirs of the body. So that the deed, read in the light of those authorities, will convey the premises to 'India J. Miller and the heirs of her body, to her and their said heirs and assigns, forever,' etc., which is strictly per formam doni, and every part of the deed will be given effect, and there is no repugnance between the premises, habendum, and warranty. I am of opinion that India J. Miller took a fee conditional under this deed, and, having aliened after the birth of issue, the defendant has a fee-simple estate in the premises."

### Exceptions.

"(1) Because his honor erred in holding that the words 'heirs of the body,' as used in the deed of Bryant Weathersbee, were words of limitation, and that India J. Miller took a fee-conditional estate at common law under said deed to said land. (2) Because his honor should have held that the words 'heirs of the body,' as used in said deed, were words of purchase, and meant 'children'; and that, therefore, the plaintiffs were tenants in common with the defendant, who is now the owner of the interest of said India J. Miller under said deed. (3) Because his honor erred in holding that the plaintiffs had shown no title to the land in question in said action; whereas his honor should have held that the plaintiffs took as purchasers directly under the Bryant Weathersbee deed, and not through or under India J. Miller. (4) Because his honor should have held that as the plaintiffs and defendant claim from a common source of title [the deed of Bryant Weathersbee], that they were tenants in common under the limitations contained in the said deed, and were therefore entitled to partition of said land."

Patterson & Holman, for appellants. Allen J. Green, Bates & Simms, and Halcott P. Green, for respondent.

POPE, J. This action was commenced in September, 1895, in the court of common pleas for Barnwell county, in this state, for partition of a tract of land among the plaintiffs and defendant as tenants in common therein. The defendant, in his answer, denied such tenancy in common, and alleged that he was in sole and exclusive possession of said tract of land, as the sole owner in fee simple thereof. It seems that Bryant Weathersbee made a deed to said tract of land on the 20th day of March, 1892, to his daughter, Mrs. India J. Miller, who was the mother of the plaintiffs. Mrs. India J. Miller made a deed by way of mortgage, wherein she undertook to convey the entire tract of land, as her own, to the American Freehold Land Mortgage Company, of London, Limited; and, having made default in the payment of the debt secured by such mortgage, it was foreclosed, and, at the sale, was purchased by the defendant, Benjamin Graham, who paid the purchase money bid at the sale, received a draft therefor, and entered upon the possession thereof. This being a legal issue (we mean the question of title), it was properly triable before a jury, but, by consent of both parties, plaintiffs and defendant, a jury trial was waived, and the trial of this issue committed to the court. Judge Aldrich heard the cause, and, by his judgment, sustained the defendant. The plaintiffs have appealed from such judgment, and the judgment and grounds of appeal should be included in the report of the cause. As the whole question depends upon the construction of the deed of Bryant Weathersbee, we will insert it as a

whole in this opinion, and it is as follows: "The State of South Carolina: Know all men by these presents, that I, Bryant Weathersbee, in the state aforesaid, in consideration of the sum of five hundred dollars, and love and affection, to me in hand paid at and before the sealing of these presents, by my daughter, India J. Miller, in the state aforesaid (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said India J. Miller and the heirs of her body, all that tract or parcel of land, containing one hundred and fifty acres, more or less, \* \* \* together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining; to have and to hold all and singular the said premises before mentioned unto the said India J. Miller and the heirs of her body, to her and their heirs and assigns, against me and my heirs and all others lawfully claiming or to claim the same, or any part thereof. Witness my hand and seal. \* \* \* Bryant Weathersbee. [L. S.]"

Now, let us look at the question here raised that we are to decide. Defendant contends that the grant in the aforementioned deed to "India J. Miller and the heirs of her body" creates a fee conditional estate in said lands unto the said India J. Miller, and, upon the happening of birth of issue, such estate became alienable by the ancestor, the said India J. Miller; and that, she having aliened the same in her lifetime, the purchaser now holds the same in fee simple. The plaintiffs admit that the foregoing is the law of this state, but they contend that under a proper construction of the words in the habendum, "unto the said India J. Miller and the heirs of her body, to her and their heirs and assigns, forever" (italics ours), and also the words in the warranty clause, "unto the said India J. Miller and heirs of her body, and their heirs and assigns" (italics ours), it will be manifest that, instead of a fee conditional, it will be found that the grantor intended an estate in fee simple to be vested in India J. Miller and her four children, share and share alike. Undoubtedly, the rule is that, in construing any instrument, the goal to be reached is the intention of the writer; but it must always be remembered that this intention, by construing the words of the instrument, is to be derived, not "by conjecture, or by what seems to be natural justice, or what the court would have done under the circumstances, but it must be had by the application of the rules of construction laid down in the books, and which the wisdom of the past has established as the best means of reaching the true meaning and intent of such papers." As before remarked, the existence of an estate in fee conditional in this state is not doubted, nor could be, in view of the many adjudications of the question in our reports. *Wright v. Herron*, 5 Rich. Eq. 441, and the 25 cases

cited in the note to that case at foot of page 449; *Burnett v. Burnett*, 17 S. C. 545; *McCown v. King*, 23 S. C. 232,—to which list other cases might be added. We regard the reference to this estate, so far as its characteristics are concerned, in the opinion delivered by Mr. Justice (now Chief Justice) McIver in the case of *Burnett v. Burnett*, supra, so pertinent to the present inquiry, that we will quote a part of such opinion: "The fundamental difference between an estate in fee conditional, after the condition has been performed, and an estate in fee simple, is (1) that in the former the course of descent is confined to a particular class of heirs, and upon failure of such heirs, the estate reverts to the dower; (2) that the holder of such an estate can only dispose of it by some act which takes effect during his life. In all other respects their qualities and incidents are the same. In the grant of an estate in fee conditional, heirs of the body are not named on account of any benefit intended for them, or for the purpose of controlling or limiting the ancestor's power of disposition during his life, but simply for the purpose of prescribing the course of descent in case no such disposition is made. In the case of a fee-simple estate, the law prescribes that the estate shall descend to the heirs generally in case the ancestor makes no disposition of the estate, while in the case of a fee conditional the instrument creating the estate confines the estate to a particular class of heirs. Both classes of heirs take by succession from the ancestor."

There can be no doubt, under the repeated adjudications of our courts, that the words in the granting clause of this deed, "to India J. Miller and the heirs of her body," create an estate in fee conditional. The words used are technical words in law; and we observe that the grantor uses these technical words both in the habendum and warranty clauses of this deed. Under our laws, where the grantor or deviser uses technical words, the conclusion is irresistible that he meant them to be so operative, unless a clear intention appears to the contrary. Can the words used in the habendum and warranty clauses, "unto the said India J. Miller and heirs of her body, to her and their heirs and assigns, forever," and "unto the said India J. Miller and heirs of her body, their heirs and assigns," be legally construed to mean "children," so that the grant of the land shall be made to operate as creating a fee simple in the said India J. Miller and her four children, share and share alike? We do not think so. To do this would require that we would destroy the power of reversion to grantor in the lands in case India J. Miller died "without heirs of her body" living, provided she had issue of her body born to her, and, secondly, provided she did not alienate the lands after birth of issue. By the words used by him, he must be understood to have so intended to create a fee conditional. Besides all this, the granting clause

of a will is usually the controlling clause. It is true that sometimes words of inheritability, such as the word "heirs," occurring in the habendum, when no such words occur in the premises or granting clause, of the deed, are allowed to increase the estate therein from a life estate to that of one in fee. *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. 773; 3 Washb. Real Prop. (5th Ed.) p. 466. It has been held by this court that the object of the premises of a deed "is that part of a deed that sets forth the number and names of the parties, recitals necessary to explain the transaction, the consideration, and the certainty of the grantor, grantee, and thing granted. 2 Bl. Comm. 241." While in the same case, touching the habendum, its office is thus described: "The office of the habendum in a deed is properly to determine what interest or estate is granted by the deed. 2 Bl. Comm. 241." *McLeod v. Tarrant*, supra. In the case last cited, decided by a divided court, it was held that one named as a grantee for the first time in the habendum, along with a grantee who was named in the premises alone (where a life estate was given him), should be held as a grantee under such deed; but this conclusion was concurred in by Mr. Justice McGowan on the grounds that the deed was evidently inartificially drawn, and that, by construing all the parts of the deed together, it was manifest that it was intended by the grantor there to include both parties as grantees under the deed; but Mr. Chief Justice McIver, in an elaborate dissenting opinion, refused to acquiesce in such result. The case at bar is entirely distinct in all its features from that of *McLeod v. Tarrant*, supra, for here the grantor, from first to last, always used the words "unto India J. Miller and heirs of her body." In the case of *Wright v. Herron*, supra, the word "assigns" was added to words creating a fee conditional; but the court sustained the chancellor on the circuit in holding that this word "assigns," whether it means the assignees of Nancy Herron or the assignees of the heirs of her body, can have no modifying influence upon the interpretation. Certainly, the estate in fee conditional is assignable absolutely when the condition is performed; and, before birth of issue, it is assignable for the life of the tenant, for the time being, and so for the life or lives in succession. Thus, the rule of construction which demands, where it is possible, that every part of a deed must have some meaning, is satisfied without resorting to a forced construction to defeat the obvious intention which the grantor had, of giving some interest to the "heirs of the body." So, we think, the words "her heirs," and "their heirs," which, as we have said, occur in the habendum and warranty clauses of this deed, should be construed as giving to the tenant in fee conditional, in case she could alien the land after issue born, the power she already had, to convey the estate away in fee simple.

It is a solemn thing to interfere, in the slightest degree, with titles to land, by so construing words so that they shall have a meaning at variance with adjudications in our state, hoary with age, and hallowed by a practice thereunder for more than a century. The circuit judge refused to do so; and, we think, he acted wisely. We, too, shall refuse to take such a step. It is the judgment of this court that the judgment of the circuit be affirmed.

(47 S. C. 344)

**BAUM v. BEARD et al.**

(Supreme Court of South Carolina. July 24, 1896.)

**MORTGAGE FORECLOSURE—DEFENSES—PAYMENT—EVIDENCE.**

In a suit to foreclose a mortgage, where it appeared that the mortgagor had assigned to the mortgagee, as collateral, rent liens payable in crops from tenants of the mortgagor; that such tenants had large crops when the liens became due; and that they carried such crops to the place where the mortgagee did business as a merchant; and several witnesses testified that such liens were paid by such tenants to the mortgagee,—the value thereof should be credited as a payment on the mortgage. *Jones, J.*, dissenting.

Appeal from common pleas circuit court of Kershaw county; Townsend, Judge.

Action by Mannes Baum, trustee, against Mattie Beard and others, heirs at law and distributees of John J. Nelson, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

J. D. Kennedy, for appellant. J. T. Hay and B. B. Clarke, for respondents.

POPE, J. This action, for the foreclosure of a mortgage executed by John J. Nelson, deceased, in his lifetime, in favor of the plaintiff above named against the defendants, as heirs at law and distributees of the estate of the said John J. Nelson, deceased, was commenced in 1894. Defendants alleged in their answer that the debt intended to be secured by the mortgage had been fully paid, and therefore the mortgage was invalid as a subsisting lien. By consent of all the parties, the issues of law and fact were referred to T. J. Kirkland, Esq., as special referee. To his report, defendants excepted. These exceptions came on to be heard before his honor, Judge Townsend, who sustained a few of such exceptions. From his decree, plaintiff alone appeals, on two grounds: (1) Because his honor erred in overruling the finding of facts by the referee that the liens of Elijah Brooks and A. A. Simons had not been paid, and concluding "that as Baum Bros. had the liens, and failed to collect them, it was their fault," whereas his honor, it is respectfully submitted, should have held that the weight of the testimony sustained the findings of the referee that said liens had not been paid. (2) Was abandoned. (3) Because his honor erred in holding that there was no contest over the fourth exception of defendants

to the report of the referee, to wit, "that the referee errs in not charging the plaintiff, and crediting the defendants with the value of the mortgage of A. J. A. Williams and Ben Murphy, assigned to Baum Bros. as collateral for this same account," whereas, it is respectfully submitted, there was a contest between plaintiff's and defendants' attorneys, before his honor, as to this exception, and plaintiff denies the legal position taken by defendants as to crediting the account of defendants with the value of the mortgage of Williams and Murphy; and, as his honor has made no ruling on this issue, plaintiff excepts anyhow, in event that the silence of his honor may be construed against him.

As to the first exception, after a careful review of the testimony, we cannot say that the circuit judge was in error,—not for the reason, however, given by him for his conclusion, as it is stated by him. Because the Baum Bros. had in their possession the two liens given by Elijah Brooks and A. A. Simons as collateral security, and had not collected the money, as rent, secured thereby, would not of itself make them responsible for these two liens; but when it is in proof, and nowhere contradicted, that these lienors made fine crops during the year 1884, and carried them to Camden, where Baum Bros. did business as merchants, and also that these liens had been delivered up by Baum Bros. to the Nelsons, and also that certain witnesses swore that these liens were paid, we agree with the conclusion of the circuit judge that these two liens ought to be credited as a payment, as far as it will go, on plaintiff's debt. This exception is overruled.

Now, as to the third exception, we are at a loss what to say; for certainly the circuit judge made no such ruling as that the mortgages of Williams and Murphy, respectively, should be credited on plaintiff's debt. It is admitted, and established as well, that these mortgages are on real estate, and are only assigned as collateral, and that the whole of the debt secured by Murphy is still due and unpaid, while the debt secured by the mortgage of Williams has been partly paid, and duly credited where so partly paid, and it is nowhere suggested that defendants have any equity to have these mortgages credited on plaintiff's debt. It was the defendants' duty to have the circuit judge pass on the question raised by their exception. He did not do so. Therefore the appellant is not harmed, for it cannot be assumed by defendants, when the cause goes back to have the two liens credited upon the plaintiff's debt—we mean the lien debts of Elijah Brooks and A. A. Simons for the year 1894, which were considered by us under the first exception—that they are entitled, under Judge Townsend's decree, to have these two mortgages of Williams and Murphy also credited on plaintiff's debt. We have felt called upon to make this explanation, so that no mistake can occur. It is the judgment of this court that the circuit court judgment be

affirmed, and that the cause be remanded to that court to have the two liens of Elijah Brooks and A. A. Simons for the year 1894 credited as a part payment of plaintiff's debt herein.

JONES, J. I dissent. The weight of the testimony supports the finding of the referee that the liens of Elijah Brooks and A. A. Simons (Nos. 3 and 4) have not been paid. The first exception should be sustained.

(99 Ga. 207)

#### MILLER v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

COMMON CHEAT—FALSE REPRESENTATIONS—SUFFICIENCY.

1. The offense of being a common cheat and swindler is not committed by making false and fraudulent representations for the purpose of inducing another to contract, and by means of which the latter is defrauded, when such representations, whether in the form of a promise or in any other form, are mere statements of what the person who makes them deems the future will bring forth. To be the basis of a prosecution for this offense, the false representations must relate either to the past or to the present. 2 Bish. New Cr. Law, § 420; 2 Russ. Crimes (6th Ed.) 511 et seq.; 7 Am. & Eng. Enc. Law, 714. And see *Ryan v. State*, 45 Ga. 128; *Ratteree v. State*, 77 Ga. 774.

2. Accordingly, to knowingly, falsely, and fraudulently represent that a cow would give three gallons of milk per day, for the purpose of inducing another to buy her, is not an indictable offense. In *Parks v. State*, 20 S. E. 430, 94 Ga. 601, the representations as to the cow related to her then present milk-yielding capacity.

3. The court erred in overruling the demurrer to the accusation.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

H. N. Miller was convicted of being a common cheat, and brings error. Reversed.

The following is the official report:

Miller was tried in the criminal court of Atlanta upon an accusation and affidavit to the following effect: On December 21, 1895, by deceitful means and artful practices, he cheated and defrauded J. W. Robbins out of one cow, of the value of \$20, and \$10 in money, in the following way: In order to induce Robbins to buy his (defendant's) cow, defendant represented to Robbins that his cow would give three gallons of milk a day, and was all right in every respect. Believing this representation to be true, Robbins was induced thereby to buy the cow, and did buy her, and paid for her by giving Robbins' cow, which he valued at \$20, and \$10 in money, in payment for defendant's cow. Said representation was false, and the cow was not right in every respect, for she did not give three gallons of milk a day, and she died, without any apparent cause, within three weeks after Robbins had bought her; and defendant knew at the time he made said representations that they were false and fraudulent, and made them for the purpose of cheating and defraud-

ing Robbins out of the amount aforesaid. Defendant demurred, upon the grounds that it was not set out in the accusation in what respect the cow was not all right; that the statement that the cow was all right was too indefinite to base a criminal charge upon; and because the allegation that the cow would give three gallons of milk referred to the future, and could not be the basis of a criminal charge as set up in the accusation, being a prophecy, and not a statement of facts existing at the time of the trade. The first and second grounds of demurrer were sustained, but the third was overruled. To the overruling of said third ground, defendant excepted.

Rosser & Carter and Walter Visauska, for plaintiff in error. Jas. F. O'Neill, for the State.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 209)

#### TILLERY v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

COMPETENCY OF JUROR — INVOLUNTARY MANSLAUGHTER—FAILURE TO CHARGE.

This case presents no new or important legal question. The evidence pro and con as to relationship between the prosecutor and one of the jurors was confused and conflicting, and the judge was warranted in finding that the alleged relationship did not exist. The evidence did not demand a charge upon the law of involuntary manslaughter, and, even if the statement of the accused authorized a charge upon this subject, no such charge was requested. No error of law was committed at the trial, and there was ample evidence to support the verdict.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

Louis Tillery was convicted of homicide, and brings error. Affirmed.

J. E. Hightower and H. P. Howard, for plaintiff in error. T. L. Griner, H. G. Lewis, Sol. Gen., and Anderson, Felder & Davis, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 247)

#### WHEELRIGHT et al. v. DYAL et al.

(Supreme Court of Georgia. July 13, 1896.)

APPEARANCE — EFFECT — WAIVER — EVIDENCE OF CUSTOM—GOODS SOLD.

1. Whether a county court to which an attachment against a nonresident was made returnable did or did not have jurisdiction of the same, if the defendant appeared, filed a plea to the merits, and, upon judgment having been rendered against him, entered an appeal to the superior court, it was too late for him, in that court, to move to dismiss the case on the ground that the court to which the attachment was

originally returned was without jurisdiction in the premises; his appearance and pleading in the first instance being a waiver of the question of jurisdiction which it was his right to make under section 3480 of the Code.

2. There was no error in refusing to allow proof of an alleged custom of trade, when it did not appear from the evidence offered for this purpose that it was "of such universal practice as to justify the conclusion that it became, by implication, a part of the contract." Code, § 1, par. 4. And see 27 Am. & Eng. Enc. Law, "Usages and Customs," pp. 755, 756, and cases cited in notes.

3. The evidence warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

The following is the official report:

Dyal & Upchurch sued out an attachment, July 13, 1894, before the justice of the peace of Charlton county, making the attachment returnable to the September quarterly term of the county court of Ware county. The same having been levied, the defendants, Wheelright & Co., replevied the property; their bond reciting that they reserved any and all right of exception to the attachment, and to the jurisdiction and authority of the officer who issued it, and of the county court of Ware county, to entertain, hear, and determine the cause. Plaintiffs obtained judgment in the county court, and the defendants appealed to the superior court, where they moved to dismiss the case, for the reason that the attachment was returned to a court which was without jurisdiction, and should have been returned to the superior court. The motion was overruled. At the conclusion of plaintiffs' evidence, defendants moved for a nonsuit, on the ground that the evidence was insufficient to make a prima facie case in favor of plaintiffs, which would warrant a recovery in their favor. This motion was overruled, and defendants bring error. Affirmed.

The evidence for plaintiffs was, in brief, as follows: The account sued on, which was for 40,000 feet of lumber, is correct, due, and unpaid, and defendants owe plaintiffs the money. Plaintiffs contracted with them to cut for them the lumber mentioned in the account, 3x9, 30 feet and up, multiples of 2 feet, of the quality Savannah merchantable by the rule of 1893, at the price charged in the account. One of plaintiffs cautioned their sawyer and inspector to be extra careful in sawing the order. It was good lumber, was inspected at plaintiffs' mill, and was fully up to the Savannah rule of 1893, and was certainly up to the specifications. Had defendants notified plaintiffs that it was not up to specifications, plaintiffs would have made it right with them; but defendants, after receiving it, cut it up into short lengths, without any authority from plaintiffs to do so. The court refused to allow defendants to prove that the custom of lumber merchants as to the making of inspec-

tions was that inspection made at the point of delivery by the consignee should control, the contract between the parties being silent thereon.

Each of the foregoing rulings is assigned as error, and it is further alleged by defendants, in their motion for a new trial, that the verdict is contrary to law and evidence. The testimony in the defendants' behalf was, in brief, that the lumber which they received from plaintiffs which was merchantable aggregated 25,721 feet. The balance was not merchantable, not according to the contract, and, upon inspection at Brunswick by defendants, was rejected, and notice given to plaintiffs that it was so rejected, and subject to their order. The payments admitted by plaintiffs to have been made upon the account covered the lumber which defendants received and accepted, and left nothing due by them. Much of the lumber would have been rejected, but defendants found, by cutting some of it, they could use a part, and so had it cut into multiples according to the contract wherever it could be done; and this required extra labor, for which they paid, and charged the amount to plaintiffs, and the same is due by them to defendants. If plaintiffs had cut the lumber according to the contract, this would not have been necessary. The recutting was done in order to use as much as possible, and reduce the loss to plaintiffs to as small an amount as possible.

Crovatt & Whitfield and W. M. Toomer, for plaintiffs in error. Hitch & Myers, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 249)

#### WHEELRIGHT et al. v. MURRAY.

(Supreme Court of Georgia. July 13, 1896.)  
BILL OF PARTICULARS—AMENDMENT—GOODS SOLD.

1. The controlling question in this case was this day decided in the case of Wheelright v. Dyal, 25 S. E. 170.

2. The bill of particulars attached to the plaintiffs' declaration, though defective, was cured by amendment, and the amendment set forth no new cause of action.

3. The evidence was conflicting, but warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

The following is the official report:

On July 14, 1894, Murray sued out an attachment which was issued by a justice of the peace of Ware county, and made returnable to the September quarterly term of the court of said county. The same was levied, and defendants, Wheelright & Co., replevied the property. Plaintiff obtained judgment, and defendants appealed to the superior court,

where they moved to dismiss the case for want of jurisdiction in the county court, as the attachment should have been made returnable to the superior court. The motion was overruled.

The account sued on was in words and figures as follows:

Feb'y. 1st, 1893.	By balance.....	\$ 60 51	
" 13th, "	Proceeds car 123..	63 80	
" 17th, "	Proceeds cars 549,		
	487, & 569.....	197 88	
			\$321 99
Less freight on car 123.....	\$12 10		
Less freight on car 569, 489,			
549 .....	37 63		
		\$49 73	49 73
			\$272 26

Defendants having demurred on the ground that no intelligible bill of particulars was attached to the declaration, plaintiff amended by attaching the following:

Feb'y. 1st. 1 car load cross-ties.....	\$ 60 51
" 13th. 1 " " " car 123	63 80
Feb'y. 17. 3 car loads cross-ties, car	
549, 497, 569.....	197 88
	\$321 99

Cr.

Mch. 4th, 1893. Freight on car 123..	\$ 12 10
Mch. 13, 1893. Freight on cars 487,	
549, 569 .....	37 63

	\$ 49 73
By cash .....	100 00
	\$149 73

At the trial in the county court, the defendants moved to strike the amendment, on the ground that it was not germane, and was the addition of a new and distinct cause of action, and that the original bill of particulars and declaration contained no cause of action, and nothing to amend by. The motion was overruled. There was a verdict for plaintiff, and defendants' motion, on the general grounds, for a new trial, was overruled, and defendants bring error. Affirmed.

The evidence was somewhat conflicting, but plaintiff's testimony appears to support his contention as to the contract between the parties, and his compliance with the same.

Crovatt & Whitfield and W. M. Toomer, for plaintiffs in error. Hitch & Myers, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 573)

#### JACOBS PHARMACY CO. v. SOUTHERN BANKING & TRUST CO.

(Supreme Court of Georgia. Dec. 2, 1895.)  
CORPORATION—LIABILITY AS ACCOMMODATION ENDORSE—BONA FIDE PURCHASER.

1. Although it may not have been within the power of a given corporation to become ac-

commodation indorser upon promissory notes, yet where it was a trading corporation, having undoubted authority, under its charter, in the due course of its business, to make or indorse promissory notes for value, it was liable upon a promissory note payable to itself, and duly indorsed by it, though the indorsement was made for accommodation only, to an innocent purchaser, who, bona fide and for value, acquired title to the note before its maturity, and without notice of the real character and purpose of the indorsement. Under such circumstances, the innocent purchaser was warranted in acting upon the assumption that the indorsement was for value; there being no presumption that the corporation had acted *ultra vires*.

2. The evidence in this case being sufficient to justify a finding that the plaintiff was such an innocent purchaser of the note in controversy, and that the secretary of the corporation had authority to make and indorse promissory notes in its corporate name, the verdict against the corporation was warranted. There was no error of law and no abuse of discretion, in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; I. P. Westmoreland, Judge.

Action by the Southern Banking & Trust Company against the Jacobs Pharmacy Company and others. Judgment for plaintiff, and the pharmacy company brings error. Affirmed.

Simmons & Corrigan, for plaintiff in error. Brandon & Arkwright, for defendant in error.

**SIMMONS, C. J.** This was an action by the Southern Banking & Trust Company against the maker and indorsers of a promissory note payable to the order of the Jacobs Pharmacy Company, and indorsed "Jacobs Pharmacy Co., Joseph Jacobs." No plea was filed by the maker. The Jacobs Pharmacy Company pleaded not indebted; also, that it was a corporation, and did not, through its proper officer, indorse the note sued upon; that, while its name was signed thereon by Joseph Jacobs, who was its secretary at the time, he had no authority to make the indorsement; that its relation to the note was merely that of an accommodation indorser, and the transaction was therefore *ultra vires*; and that the fact that the indorsement was for accommodation only was known to the plaintiff at and before the time when the note was accepted by the plaintiff. It appeared on the trial of the case that the Jacobs Pharmacy Company was a trading corporation, but its charter was silent as to its power to make or indorse negotiable paper. It appeared, also, that the indorsement was for accommodation only, but the evidence was conflicting as to whether the plaintiff had notice of this fact when the note came into its hands. The note was discounted by the plaintiff before maturity, and, according to the testimony of its cashier, who represented it in the transaction, nothing was known by him as to its being accommodation paper. It appeared, further, that Joseph Jacobs, as secretary of the Jacobs Pharmacy Company, had been

accustomed, in the due course of its business, to sign and indorse notes in the corporate name, which were recognized and paid by the corporation. There was a verdict against the maker and against the Jacobs Pharmacy Company as indorser, and a motion for a new trial was made by the latter, which was overruled, and it excepted.

One of the grounds of the motion is that the court charged the jury as follows: "If you find from the evidence that the plaintiff received the paper before it was due, signed and indorsed as it appears, and that it received it in the due course of business, and for value, and without notice of any defense, it would be protected, and would have the right to recover against the maker and all the indorsers the amount of the note and interest, and against the defendant who filed pleas, if not sustained, 10 per cent., attorney's fees." This was alleged to be error, for the reason that the court, in this part of the charge, placed the defendant corporation upon the same footing, and held it subject to the same liability, on an indorsement as an individual. There was no error in this instruction. Every trading corporation, unless forbidden by its charter, has the power to issue negotiable paper in the due and ordinary course of its business; and where a corporation having this power makes or indorses such paper, although for an unauthorized purpose, the defense of *ultra vires* will not avail it as against an innocent purchaser, who, bona fide and for value, acquires title to the paper before maturity. This has been frequently held in cases where, as in the present case, the defense was that the indorsement was for accommodation only. See 1 Am. & Eng. Enc. Law (2d Ed.) "Accommodation Paper," pp. 348, 349, and cases cited; 27 Am. & Eng. Enc. Law (1st Ed.) "Ultra Vires," pp. 387, 388; 5 Thomp. Corp. § 6027; 2 Mor. Priv. Corp. § 597; and cases cited; 2 Cook, Stock, Stockh. & Corp. Law, § 774.

The fifth, sixth, and seventh grounds of the motion for a new trial are without merit, and indeed were not insisted upon in the argument here.

The only other grounds of the motion are that the verdict was contrary to law and the evidence. There was ample evidence to warrant the verdict, and there was no error in denying a new trial. Judgment affirmed.

(97 Ga. 445)

**WILLIAMS et al. v. EMPIRE PRINTING CO.**

(Supreme Court of Georgia. Dec. 21, 1895.)

RES JUDICATA.

When a personal property levied upon under execution is claimed and replevied by the claimant, and, at the trial of the claim case, judgment is entered dismissing the claim, and ordering the execution to proceed, this is so far an adjudication that the property is subject to the execution as to render the claimant and

the surety on the replevy bond liable thereon for a failure to deliver the property to the levying officer at the time and place of sale; he having duly readvertised the property for sale after the rendition of the judgment above mentioned, and no second claim having been filed.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Empire Printing Company against Noble C. Williams. Judgment for plaintiff, and, on levy of execution, Virginia C. Williams and Caroline C. Williams claimed the property. Claim dismissed in an action brought on the forthcoming bond. Judgment for plaintiff, and defendants bring error. Affirmed.

Albert & Hughes, for plaintiffs in error. S. D. Johnson and T. W. Latham, for defendant in error.

**SIMMONS, C. J.** An execution founded upon a judgment against Noble C. Williams was levied upon certain furniture, which was claimed by Virginia C. and Caroline C. Williams. The claimants gave a bond for the forthcoming of the property at the time and place of sale, provided it should be found subject. When the case came on for trial, the claimants were not present, and the court dismissed the claim, and ordered the execution to proceed. The constable readvertised the property for sale, but the claimants failed to produce it at the time appointed for the sale. No second claim was interposed after the dismissal of the first. Suit was brought upon the forthcoming bond, and the main question argued before us was whether the judgment of the court dismissing the claim, and ordering the execution to proceed, was such a judgment as would bind the principals and their sureties on the forthcoming bond.

It was argued by counsel for the plaintiffs in error that, under the condition expressed in the bond, the parties who made the bond would be liable only in case the property should be found subject, and that the judgment of dismissal was not such a finding that it was subject as would bind them. We are of the opinion that where a party who has filed a claim and given a bond of this kind fails to prosecute his claim, and a judgment is entered dismissing the claim, and ordering the execution to proceed, this is such an adjudication that the property is subject as will authorize a recovery on the bond, if no second claim has been filed. If this were not so, any person, by filing a claim and giving such a bond, could get possession of property when levied upon, and consume it, or place it beyond reach, and then, by failing to prosecute the claim, leave the plaintiff without any recourse upon the bond. In the case of *Anderson v. Banks*, 92 Ga. 121, 18 S. E. 364, the property claimed was delivered to the surety on the forthcoming bond, who disposed of the property, and the claim was afterwards withdrawn, and this court held that a recovery could be had on the bond. Judgment affirmed.

(97 Ga. 650)

### NISBET v. CITY OF ATLANTA.

(Supreme Court of Georgia. Jan. 13, 1896.)

CITY—LIABILITY—NEGLECT OF OFFICER.

A municipal corporation is not liable in damages for the death of one convicted in a corporation court, and sentenced to work upon the public streets, although his death was occasioned while the convict was engaged in such work, and resulted from negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, and from the failure of such foreman to provide the convict, after his injury, with the proper medical attention and treatment.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Mattie Nisbet against the city of Atlanta. Judgment for defendant. Plaintiff brings error. Affirmed.

E. A. Angier, for plaintiff in error. J. A. Anderson and Geo. Westmoreland, for defendant in error.

**LUMPKIN, J.** The question involved in this case has been too often passed upon by this court to require further elaboration. Neither the law of master and servant, nor the doctrine of respondeat superior, applies in a case where a prisoner undergoing punishment for a violation of a municipal ordinance is injured or killed in consequence of the negligence or misconduct of the officer having the custody or control of such prisoner. This is true because in such matters the municipal corporation is exercising governmental powers and discharging governmental duties, in the course of which it, of necessity, employs the services of the officer in question. See the case of *Wilson v. Mayor, etc.*, 88 Ga. 455, 14 S. E. 710, which is directly in point, and the authorities there collected, and also the opinion of Justice Atkinson in the more recent case of *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, which, in principle, is decisive of the case now in hand. Judgment affirmed.

(97 Ga. 670)

### ODELL v. CITY OF ATLANTA.

(Supreme Court of Georgia. Jan. 20, 1896.)

ORDINANCE—VALIDITY—BETTING ON HORSE RACES.

A so-called "business," conducted for the purpose of enabling persons to bet upon horse races, though not made criminal by any statute of this state, is contrary to public policy, and is not such a useful or necessary occupation as that a city may not, by appropriate ordinance, make penal, and prevent the carrying on of the same; and it is perfectly lawful and proper to enforce such ordinance against anyone violating its provisions, notwithstanding the fact that he may have been granted by the city a license generally to do business on commission.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

W. J. Odell was convicted of violation of the city ordinance, and brings error. Affirmed.

Glenn & Rountree, for plaintiff in error. J. A. Anderson and Geo. Westmoreland, for defendant in error.

**LUMPKIN, J.** While there are differences of opinion as to the propriety of betting upon horse races, and it is doubtless a practice in which many respectable people engage, we feel perfectly safe in saying it is not one conducive to good morals, or to the promotion of good order, in the locality where it may prevail. Certainly, the keeping of an establishment for the purpose of enabling persons to bet upon horse races is not a useful or necessary occupation, which any citizen has either a common-law or constitutional right to carry on. Indeed, it is, in our opinion, a misnomer to characterize the keeping of such a place as a "business" occupation. No good to the public can come from it, and its inevitable tendency is to promote vice and disorder. We are not aware of any statute of this state which makes the carrying on of this so-called "business" penal, and it is therefore strictly within the purview of municipal legislation. Under the general welfare clause of the charter of the city of Atlanta, the mayor and council had authority to pass the ordinance of which the plaintiff in error complains. That ordinance forbade, under a penalty, the keeping or maintenance of any office or place of business in the city in which any persons were allowed to bet on horse races, or any other kind of races, whether run within the city, or outside of its limits. We think it was perfectly lawful and proper both to adopt and to enforce an ordinance of this kind.

It was insisted, however, that the city had granted to the agent of the plaintiff in error a license "to do business on commission," and that he was operating under this license. The alleged license consisted of a paper signed by the city tax collector, acknowledging the receipt of "\$10, registration tax, as commissions, No. 9½ W. Hunter street, in the city of Atlanta, from August 1, 1895, to Dec. 31, 1895." Regarding this as a formal and complete license, authorizing the agent to engage in and conduct on commission any recognized and legitimate business enterprise he might wish to establish, it certainly cannot be said to constitute an express warrant to engage in the questionable occupation of selling pools on horse races. We have no hesitation in saying that this paper was entirely insufficient to authorize the transaction of the pretended "business" in which the plaintiff in error, through his agent, sought to engage. Judgment affirmed.

(97 Ga. 718)

#### LACKEY v. POOL.

(Supreme Court of Georgia. Feb. 7, 1896.)

#### ESTOPPEL BY ACQUISITION.

One whose personal property was levied upon under an illegal or void process, and who not only failed to take any steps to prevent its

sale thereunder, but, by his attorney, consented to an order of court directing a speedy sale, and who was present at the sale, making no objection, and either then or previously informed others that the purchaser at the sale would get a good title, was estopped from complaining of the illegal levy, and denying the validity of the sale, though he gave no express consent to the same.

(Syllabus by the Court.)

Error from city court of De Kalb; H. C. Jones, Judge.

Action by George W. Lackey against Thomas J. Pool. Judgment for defendant, and plaintiff brings error. Affirmed.

A. C. McCalla and Glenn & Irwin, for plaintiff in error. W. W. Braswell, for defendant in error.

**LUMPKIN, J.** A suit in the nature of an action of trover was brought by Lackey against Pool for the recovery of certain personalty, which the declaration alleged had been sold under a void distress warrant, and purchased by the defendant. It is unnecessary to determine whether the distress warrant was or was not a valid process. For the purposes of this case, it may be treated as absolutely void; for, granting it was so, the plaintiff, under the evidence, could in no event recover. It appeared that, after the distress warrant had been levied upon the property in question, the defendant, by his attorney, consented to an order of court directing a speedy sale under this warrant. It is true that Lackey testified that he spoke to an attorney "to fight the granting of the order of sale," but he swears further that this attorney consented to the order of sale in his presence, and does not pretend that he made the slightest objection to this action on the part of his counsel. It also appears that the plaintiff was present at the sale, and made no objection to its taking place, and either then or previously informed others that the purchaser at the sale would get a good title. If ever human conduct amounted to an estoppel, it seems indisputable that in the present case the plaintiff absolutely forfeited any right he may have had to complain of the levy as illegal, or to deny the validity of the sale. It does not appear that he expressly assented thereto, but the course he pursued throughout the entire transaction amounted practically to the same thing. If, in cases of this character, express ratification on the part of the complaining party were the exclusive test, without regard to conduct on his part from which the law would imply a tacit assent, the doctrine of estoppel would have an exceedingly limited operation. Judgment affirmed.

(97 Ga. 736)

#### LEE v. LEE.

(Supreme Court of Georgia. Feb. 7, 1896.)

#### CONTEMPT—JURY TRIAL—REFUSAL TO PAY ALIMONY.

1. The act of December 22, 1892, amending section 4711 of the Code so as to confer a

right of trial by jury in certain cases of contempt, has no application to a proceeding pending before a judge of the superior court to enforce the payment of alimony by a husband to his wife; nor is the defendant in such a proceeding entitled to demand a jury to pass upon the question of his ability to comply with an order of the judge directing the payment by him of certain sums as alimony.

2. In the present case there was no abuse of discretion nor error requiring a reversal.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action by Mary W. Lee against Lewis A. Lee for divorce. From a decree granting alimony, defendant brings error. Affirmed.

Glenn & Irwin and A. C. McCalla, for plaintiff in error. G. W. Gleaton, for defendant in error.

SIMMONS, C. J. Pending her suit for divorce, Mrs. Lee applied to the court for temporary alimony and counsel fees; and the court ordered the husband to pay her \$20 per month alimony, and \$25 for counsel fees. The counsel fees were paid, but the husband declined to pay the \$20 per month, and paid to the clerk of the court \$10 per month, which the wife refused to receive, and she moved for an attachment requiring him to pay the amount awarded to her. Upon the hearing of this motion the court reduced the alimony to \$10 per month until the next term of the court. At that term the matter was again taken up, and evidence was heard as to the ability of the husband to pay alimony, after which the court ordered him to pay \$15 per month for alimony, and \$15 for additional counsel fees, on account of the extra service performed by counsel since the former order was passed. At this hearing the defendant asked that the question of his ability to pay additional alimony and counsel fees be submitted to a jury, as the issue involved was one of fact, and the decree of the court might affect his personal liberty. To the refusal of this request the defendant excepted.

The court did not err in refusing to submit this question to a jury. The act of December 22, 1892, amendatory of section 4711 of the Code (Acts 1892, p. 65), which was relied upon by the defendant as entitling him to have the matter passed by a jury, does not, in our opinion, apply to cases of contempt, arising out of the refusal of a husband to pay alimony. The act was passed to meet that class of cases where an insolvent debtor or other person is alleged to have in his custody, power, or control a certain sum of money, which he has been directed by the court to turn over to a receiver, or to the plaintiff or some other person, and fails or refuses to surrender. The question which the act provides shall be submitted to the jury makes it clear that the act was intended to apply to that class of cases only. Here

the question is not, as in those cases, whether a person alleged to have a certain fund in his power, custody, or control refuses to surrender it, but whether a person who has been ordered to pay so much from time to time for the support of his wife is able to earn, or to provide from such means as he has, a sufficient sum to pay the allowance ordered by the court. Under the evidence in the record, there was no abuse of discretion by the court in the amount allowed by the order. Judgment affirmed.

(97 Ga. 800)

#### AUGUSTA & S. R. CO. v. LARK.

(Supreme Court of Georgia. Feb. 29, 1896.)

APPEAL.—REVIEW.—OVERRULING DEMURRER.

In determining whether or not the trial court erred in overruling a general demurrer to a declaration, this court cannot look beyond the declaration itself, nor consider a "written agreement of facts entered into between the parties for the purposes of said demurrer." Such agreement is no part of the pleadings, and cannot be treated as an amendment to the declaration, unless made so by a proper order.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Ewe, Judge.

Action by David Lark against the Augusta & Savannah Railroad Company. From an order overruling a demurrer, defendant brings error. Affirmed.

Black & Verdery, for plaintiff in error. Boykin Wright and H. C. Roney, for defendant in error.

LUMPKIN, J. The question presented in this case was decided in that of Publishing Co. v. Stegall during the present term. 24 S. E. 33. It is really too plain for argument. Nothing outside of the declaration itself can properly be looked to or considered in testing its legal sufficiency. Of course, exhibits to a declaration are to be treated as parts of it; but an agreed statement of facts, though the same might be all that was needed in disposing of a motion for a nonsuit, cannot possibly throw any light upon the question as to whether or not the allegations of the declaration set forth a cause of action. If, in any given case, counsel mutually desire the question as to the plaintiff's right to recover to be adjudicated upon a demurrer, they ought to see to it that the facts relied upon by the plaintiff are stated in the declaration. This can be accomplished by an appropriate amendment to the declaration, and the preparation of such an amendment would require no more difficulty or labor than would be requisite in making out an agreed statement of facts. This court has gone quite far enough in tolerating looseness in pleadings, and cannot give its sanction to such a demoralizing practice as would necessarily result from an approval of what was attempted in the present instance. Judgment affirmed.

(97 Ga. 801)

**BROWN v. COMER et al.**

(Supreme Court of Georgia. Feb. 29, 1896.)

**RECEIVER OF RAILROAD — INJURY TO EMPLOYE — LIABILITY.**

Although the property of a railroad company was put into the hands of a receiver upon its own petition, the question of his liability to his own servants engaged in operating the railroad is, nevertheless, controlled by the decision of this court in the case of *Henderson v. Walker*, 55 Ga. 481, recently affirmed in the case of *Youngblood v. Comer*, 23 S. E. 509; and, consequently, such a receiver is not liable to one of its employes for personal injuries occasioned by the negligence of a co-employé.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Mack Brown against H. M. Comer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Fleming & Alexander, for plaintiff in error. Black & Verdery, for defendants in error.

**LUMPKIN, J.** It was sought to differentiate this case from that of *Henderson v. Walker*, 55 Ga. 481, solely for the reason that it appears in the present case that the railroad company was put into the hands of the receivers upon its own petition. It is true that, in his reasoning in support of the decision in the case above cited, Judge Bleckley did say (see page 483): "Unless the contrary appeared, the receivership is to be deemed a compulsory one. There is no presumption that the receivers went in on the application of the company, or by its consent." But it by no means follows that, if it had appeared that the railroad company had actually itself applied for the appointment of receivers, the decision in that case would have been different. The truth is, *Henderson's Case* is based upon the proposition that the receiver of a railroad company is in no sense a railroad company. He represents, not the company, but the court; and it follows that statutes enacted solely for the purpose of regulating the liability of railroad companies, and dealing with them exclusively, cannot properly, by implication, be held applicable also to a receiver in charge of a railroad, and operating it under the orders of a court. Judgment affirmed.

(99 Ga. 134)

**KIMBROUGH v. KIMBROUGH.**

(Supreme Court of Georgia. June 1, 1896.)

**GIFT TO WIFE — SEPARATE ESTATE — TENANCY BY SUFFERANCE.**

1. Where a husband, with his own money, purchased and paid for a home, and deliberately and intentionally had the same conveyed to his wife, with no understanding or agreement that he was in any event to have an interest in the title, the transaction amounted to a gift from the husband to the wife, and, as between them, the property became absolutely her separate estate.

2. Where the husband and wife took joint possession of the property thus conveyed, and, after they had lived together thereon for a time,

she was forced, by mistreatment and cruelty on his part, to leave the premises, and he remained in possession, he was, in law, her tenant at sufferance; and, upon his refusing to surrender possession to her when so demanded, it was her right to sue out a dispossessionary warrant for the purpose of ejecting him.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

The following is the official report:

Mrs. Kimbrough sued out a dispossessionary warrant against J. W. Kimbrough for a house and lot in the suburbs of Columbus, described, which she alleged he had been allowed by her to occupy at sufferance, and is now occupying at sufferance, and of which he refused to deliver possession when she demanded the same. Kimbrough made counter affidavit that Mrs. Kimbrough was not the owner of the property, as he had paid for the same with his own money, and was in fact the owner; that on July 6, 1893 (the date of the affidavit and warrant), he was in the peaceable possession of the property in his own right, and was not the tenant of his wife (the plaintiff); and that on July 6, 1893, he and plaintiff were man and wife, and no separation had ever been had between them. There was a verdict for plaintiff for the premises, with \$210 rent. Defendant's motion for a new trial was overruled, and he excepted, and brings error. Affirmed.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in refusing defendant's motion for a continuance, based upon the following grounds: That Ab. Wooldridge, a material witness for this defendant, was absent without his consent or procurement; that he had been subpoenaed, and this motion was not made for delay only; that he expected to prove by Wooldridge that he bought the Rutherford place, and paid for it with his own money, as a home for himself and family; and that he had the deed to said place made in his wife's name; and that immediately thereafter he went into possession, and has since so remained. Error in charging: "The relation of landlord and tenant may be shown by contract. Where there is an agreement between two parties to lease land, and the lands are leased or rented for a certain specified time, and for an agreed price, that is a tenancy under and by virtue of a contract. Another contract, which may be an implied contract, is where a man permits another to use and occupy his premises for a certain stipulated price, without any time being fixed; then that is a tenancy at will." Error in charging: "Whenever a party who is in legal possession of property holds over beyond the time agreed upon, and whenever any notice is served upon him to give up the possession of the premises, and he holds over beyond that time, then he is a tenant at sufferance for the time he holds over

beyond the time for which the premises were leased or rented to him. Where there is no contract of this sort, then he becomes a tenant at sufferance, by operation of law." Error in charging: "She insists, further, that she has been deprived of the possession of that property by him; in other words, by the ill treatment upon his part, she was forced to leave the premises. If that be true, and she afterwards gave Mr. Kimbrough notice to surrender this property to her, and he failed to do so, then he would be a tenant at sufferance; and she would be entitled to recover these premises from him. If she gave him notice, then from the time he received that notice, or whatever time he may have held over from that time, then he was a tenant at sufferance; and she would be entitled to recover the premises, and whatever rents that the proof has shown to you the premises were worth up to a certain time agreed upon." Error in charging: "In order to constitute him a tenant at sufferance under this proceeding, it must be shown that he went into possession legally; that he went along with his wife as a home, which was legal possession; and that he held over beyond the time after she gave him notice to quit, and to deliver up possession to her." Error in charging: "If you believe she did demand possession of it, and he held over adversely to her,—refused to surrender the possession,—then, if the testimony satisfies you of that, you should find for the plaintiff the premises in dispute, together with whatever amount of rent, double the amount of rent, she has shown to you the premises were worth." Error in permitting plaintiff to prove, over the objection of defendant, that she and her husband were living in a state of separation in July, 1893. It was not stated in this ground what objection was made to the evidence. Error in not permitting defendant to prove by certain witnesses named that a portion of defendant's money was used by him in paying for the land conveyed by deed, and that they knew that this money was so used.

H. V. Hargett and J. H. Worrill, for plaintiff in error. C. J. Thornton, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 206)

#### JACKSON v. STATE.

(Supreme Court of Georgia. June 8, 1896.)  
CRIMINAL LAW—PLEA UNDER FALSE REPRESENTATIONS—APPEAL.

Where one indicted for a crime entered a plea of guilty, was duly sentenced, and afterwards moved to set the judgment aside on the ground that he had been induced to enter the plea by the false and fraudulent representations

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of two other persons "that they would see that he got off with a light fine or sentence," supporting the motion by his own affidavit only, and all of its material allegations were denied under oath by the other two persons, this court will not reverse a refusal to set the judgment aside. (Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

The following is the official report:

Will Jackson pleaded guilty to an indictment charging him with the offense of larceny from the house. He was sentenced to the penitentiary for five years. He moved to set aside the judgment, and, his motion being overruled, he excepted, and brings error. Affirmed.

The motion was upon the following ground: Because the judgment was obtained by fraud, in this: that the two detectives, W. S. McHaffey and T. G. Conn, came into the prison room where defendant was confined, and asked defendant what he intended to do, and told him that he had better plead guilty, and, if he would, they would see that he got off with a light fine or sentence, the sentence, in no event, to exceed 12 months in the chain gang; and under these promises defendant entered the plea of guilty. In support of the motion, defendant made affidavit. He had been brought up from the county jail to the superior court for trial. He was confined in the prison room, and Detectives McHaffey and Conn both came into said room, and asked him what he intended to do in his case. He stated to them that he had employed a lawyer to represent him; that he was not guilty, and intended to fight the case. Said detectives told him that he had better plead guilty, and, if he would, that they would see that he got off with a light fine or sentence, the sentence in no event to exceed 12 months, and perhaps not more than 6 months. Deponent had the utmost confidence in the promises of said detectives, and, had it not been for such promises, would not have entered the plea of guilty, for he was not guilty of the crime charged. By way of counter showing, the state produced the affidavit of Conn and McHaffey, positively denying every material allegation in the affidavit of the defendant, and stating that defendant sent for them, and voluntarily told them that he wanted to plead guilty, and intended to do so as soon as his case was called, and they replied that he could do as he pleased about it, that they had no interest in the case, except to see the law enforced, and whether he pleaded guilty or not was a matter of indifference to them, because they had the evidence at hand to convict defendant of the crime charged.

A. C. Perry, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 209)

**THOMAS v. STATE.**

(Supreme Court of Georgia. June 8, 1896.)  
**CRIMINAL LAW—APPEAL—REFUSAL TO GRANT  
 NEW TRIAL.**

The only grounds of the motion for a new trial being that the verdict was contrary to law and the evidence, and there being sufficient evidence to support the conviction, this court cannot overrule the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

The following is the official report:

James Thomas was indicted for the offense of robbery, and was found guilty of larceny from the person. His motion for a new trial, made upon the general grounds alone, was overruled, and to this ruling he excepted, and brings error. Affirmed.

The evidence for the state tended to show the following: On Christmas eve night Joseph Schochter bought two half-gallon jugs of whisky on Decatur street, and gave them to a boy named Will Clayton, just after dark, to carry to Schochter's house. Will Clayton was going down Decatur street, and was between Piedmont and Butler streets, and had stopped to give another boy some change, and had one of the jugs in his arm and the other in his hand, and two or three men ran up, one of whom struck Clayton, and another took the jugs, and ran down Decatur street, and turned into Butler street, and then into Tolbert's alley, where Clayton and the boy who was with Clayton lost sight of him. Clayton and the boy went back on Decatur street, and found defendant standing on the corner of Butler and Decatur streets, and pointed him out to the police as the man who took the jugs from Clayton. It was about 7 o'clock when the jugs were taken, according to the testimony of Clayton, and about 8 o'clock when defendant was arrested. There was a large crowd on Decatur street when the jugs were taken. Clayton and the boy who was with him both testified that they never saw defendant before that night, but that defendant was the man who got the whisky. Schochter testified that Clayton was not reliable, and that it was about 6 o'clock when he started Clayton home with the whisky. The boy Clayton stopped to give the change to testified that Clayton was giving him the money, when some one ran up, and struck Clayton, and another man snatched the jugs, and that he did not know defendant, could not say he was one of them. It was at night, and done so quickly, witness could not tell. There was evidence for the defense tending to show that the man who got the jugs was Charlie Wallace, and that the other man was not defendant, and that Charlie Wallace has left Atlanta, where the crime was committed. Defendant stated that he did not commit the crime, and never saw either of the boys who pointed him out to the officer until he was arrested.

A. C. Perry, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 212)

**SELLERS v. STATE.**

(Supreme Court of Georgia. June 8, 1896.)  
**CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR  
 —NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.**

1. Even if, under the special facts of this case, it was the duty of the court to charge upon the law of confessions without a request so to do, the omission to do this is not cause for a new trial; it appearing that there was, outside of the testimony of the witness who swore to the confession, other and sufficient evidence to warrant the conviction.

2. Evidence which, in the nature of things, must have been known to the accused before his trial was ended, cannot, after verdict, be treated as newly discovered. If at any stage of the trial it became important or material to his defense to obtain the evidence in question, he should have taken immediate steps to procure the presence of the witness whose evidence was desired; invoking for this purpose, if necessary, a suspension of the trial until the attendance of the witness could be had.

(Syllabus by the Court.)

Error from superior court, Dodge county; O. O. Smith, Judge.

The following is the official report:

Sellers was indicted for selling liquor in Dodge county, unlawfully and without license, on October 19, 1895. He was found guilty, and, his motion for a new trial being overruled, he excepted, and brings error. Affirmed.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Error in permitting the state's witness, W. R. Lawson, to testify to an alleged confession made by defendant, to wit, that defendant told witness about a week ago that he was the man who sold witness the liquor, without requiring any foundation for such confession to be laid. Defendant's counsel, however, did not object to this testimony when offered, nor move to rule it out. Error in not charging the law of confessions, and in not charging at all on the subject of confessions, though an alleged confession was relied upon by the state, to wit, the testimony of Lawson that defendant told him about a week before the trial, on the street in Eastman, in the presence of John J. Harrell, that he (defendant) was the man who sold witness the liquor testified about. Defendant's counsel did not request the court to charge on the subject of confessions, but contends that under the evidence it was the duty of the court to charge the law of confessions without request. Because of newly-discovered evidence. In support of this ground, movant produced the affidavit of John J. Harrell: "Defendant did not, about a week ago, in

Eastman, or at any other time and place, tell Lawson, in deponent's presence and hearing, that he (defendant) was the man who sold Lawson the liquor; and deponent never heard defendant tell Lawson, or any other person, that he had sold any liquor." No affidavit of defendant or his counsel appears in the record. In the ground of the motion as to newly-discovered evidence, the following statement appears: "Defendant shows that he could not, by the exercise of reasonable diligence, have discovered this evidence before the trial, nor before the conclusion thereof, for the following reasons, to wit: Defendant could not have foreseen or anticipated that W. R. Lawson would testify to the state of things denied by the affidavit of Harrell until he did actually swear it on the trial, late in the afternoon; and immediately after said Lawson so testified, by request of defendant's counsel, the court sent a bailiff to the room of the grand jury, on which said Harrell was serving as a grand juror, and had him called, but said bailiff reported to the court that said Harrell had gone to his home, in the country, and the trial was concluded that afternoon, and the verdict rendered, but said Harrell did not return to the court until the following day; so that it was impossible for defendant to discover or procure his testimony until after said trial was over, but defendant obtained an affidavit from him as soon thereafter as he could be seen, to wit, the next day, March 21, 1896."

De Lacy & Bishop, for plaintiff in error. Tom Eason, Sol. Gen., and Anderson, Felder & Davis, for the State.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 174)

#### GLOVER v. LUMPKIN.

(Supreme Court of Georgia. June 12, 1896.)

APPEAL—WHEN LIES—MONEY RULE AGAINST BAILIFF.

This being a money rule against a bailiff of a county court, upon the trial of which no evidence was introduced, and nothing was adjudicated except that his answer was insufficient to discharge him, he could not, by an appeal to the superior court, review a judgment of the county court making the rule absolute. The only question being whether or not the officer was in contempt of the court for a failure to perform his duty, and this being, under the facts set forth in his answer, entirely a question of law, there was no issue for a jury to try, and consequently the proper remedy was by certiorari.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

The following is the official report:

In the county court of Sumter county, Lumpkin, surviving partner, for the use of

Snow, Church & Co., filed his petition for rule against W. H. Glover, the county court bailiff, for not making the money on an execution placed in his hands, alleged to have been levied on the property of defendant in execution, of sufficient value to satisfy the execution; it being alleged that the bailiff had levied on the property, but refused to bring it to sale, and make the money. The bailiff answered, admitting that he levied on the property, and that it was of sufficient value to pay the *fi. fa.*, but denying that he failed or refused to sell the property. He alleged that, when the property was levied on, defendant claimed it, and gave bond for the same; that, when the case was called for hearing, it appeared that the attorney for defendant signed the claim affidavit, and, for some inadvertence, the affidavit was not properly attested, and the same was either withdrawn or dismissed; that then the defendant filed a claim, and gave good and sufficient bond for the forthcoming of the property; and that the claim is now pending in the county court. The rule was made absolute against the constable for \$57.01, principal, besides interest and costs. He entered an appeal to the superior court. In that court plaintiff moved to dismiss the appeal, because it was a case that was not appealable to the superior court, and the superior court had no jurisdiction of the case by appeal. The motion was sustained, and the bailiff excepted, and brings error. Affirmed.

Fort & Watson and L. J. Blalock, for plaintiff in error. J. H. Lumpkin, in pro. per.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

#### BLAIR v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

CRIMINAL LAW—REVIEW ON APPEAL.

There being no complaint of any error of law, and the only question presented by the motion for a new trial being whether or not there was sufficient evidence to support the verdict, this court will not reverse the judgment refusing to set it aside, there being in the record enough testimony to warrant the conviction.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

The following is the official report:

Bragg Myhand, George Blair, La Fayette Dunn, and Ed Mott were indicted for the offense of burglary, in having on November 11, 1895, broken and entered the storehouse of J. C. Molder, and stolen therefrom three hams, seven shoulders of meat, eight gross of snuff, three boxes of cigars, two boxes of tobacco,—one marked "Early Bird," and one "New Stamp." Blair was tried and found guilty, and his motion for new trial, based upon the general grounds alone, being over-

(99 Ga. 211)

ruled, he excepted and brings error. Affirmed.

Upon the trial, J. O. Molder testified: "My store in Columbus was broken into in November, 1895, on a Thursday night, after midnight. I left the store, at midnight, closed up. The next morning I found an entrance had been effected at the back door, which I left fastened with a bar across it the night before. I found that some 12 or 16 gross of snuff, some hams, shoulders, coffee, soap, tobacco, cigars, meat, some whiskey and some wine, had been taken from the store. I found some of the property, but can't say that I ever found any of it in the possession of Blair. I found some at Bragg Myhand's and at La Fayette Dunn's house, who lived at the same place, such as hams and some meat, some shoulders and tobacco, some soap and snuff. The snuff was in tin boxes, which were packed in wooden boxes. My name was on the wooden box containing the snuff. My figures—marks we sell by—were on the hams and shoulders. I don't know what kind of tobacco I found. I missed two boxes of tobacco, and I found one there. Don't know whether it was the Early Bird, or the New Stamp. I identified the New Stamp by tags on the tobacco. I found some of these goods in Bragg Myhand's house. He occupied the back room of the house where I found some of the goods. Fayette Dunn and Ida Spellars occupied the front room, and Bragg Myhand and Ida Brannon occupied the back room. Ida has been staying at my house since the goods were found. The bailiff brought her there, and said he would have to put her in jail if somebody didn't feed her, and I told him to take her to my house,—we didn't have any cook there,—and she could stay until the trial was over. I found the stolen property upstairs in the loft of this two-room house on Monday following the burglary. The only entrance to the loft was in Myhand's room." W. H. Gibson testified for the state as to the search of the house where Myhand and Dunn lived, and the finding of the goods in the loft of the house. He further testified: "I don't know where George Blair lived at that time, nor whether any of the property was found in his possession. I never went to search his house, and never searched the place where he was supposed to reside. I knew where his father lived, but did not search that house. Didn't search the house of any of the Blairs, because I was after George and he left here, and I went to Macon and got him there. I don't know where George was on the night of the burglary. Saw him around Molder's store on the day before, I think. I went to Macon for Blair the same week I found the goods, and I brought him and Myhand back with me." Ida Brannon testified: "Fayette Dunn and Ida Spellars stayed in the front room, and I stayed in the back room. I remember there was a ham and meat brought there,

and some soap. Ida Spellars claimed it was her washing soap and some snuff. That's all I saw. I saw some whiskey in a beer bottle up at the head of her bed. These things were brought there at night, I reckon, because in the daytime I was not there. I never saw anybody bring them there. George Blair came there one Thursday. I think it was Thursday night,—the night before I heard about Molder's store being broken open. When Blair came in, Ida Spellars and Fayette Dunn were there. Blair had a box of snuff, and it was between seven and eight o'clock at night. He stayed about half an hour, and went off. I never saw anybody go with him. If he came back to the house that night, I didn't see him. Somebody called Myhand to come into the room that night. I didn't know who called. Shack Lane came into the room, and I suspected that he was the one that called Myhand. I saw Shack Lane and Julius Blair, but did not see George Blair. Shack and Julius came into the room after Fayette woke up Bragg. I went home that night at half after six o'clock. Bragg was in my room, and Fayette and Ida Spellars and their little girl were in Ida's room, when I got home. About half an hour afterwards I saw George Blair, and he had a box of snuff. I asked him what he was going to do with it, and he said it was not snuff, it was a box; but when he set it down I heard the snuff rattle. It had never been opened. He said it was his chair. There was a door between the room Ida Spellars rented and the room Bragg rented. There was a door to the room Bragg rented, which locked inside. Ingress to Bragg's room could be had through this back door." Paul Dunn testified for the state: "On a Friday morning in November, 1895, George Blair came to Ed Hunter's store with Shack Lane, between eight and nine o'clock. George did not have anything. Four boxes of snuff and three boxes of cigars were brought there. Shack brought the snuff. He had it under his arm, and I suppose George had the rest of it. I didn't see George with any of it. George had two or three of them. I don't know where the other one came from. Shack had two boxes of snuff under one arm, and a box of cigars in the other. Ed Hunter bought four boxes from Shack,—wooden boxes. Don't know whether they had any names on them or not. They were not open, but closed up. Late that evening I heard of Molder's store being burglarized." Molder, being recalled, testified: "I saw some of the box tops at Hunter's store. They were split about as wide as your finger. I afterwards put the splits together, and found my name. I found some snuff at Hunter's, and the tops were off." Hunter testified: "I saw George Blair and Shack Lane on a Friday in November, 1895. They brought snuff and cigars out there. Shack had three boxes of snuff, and George Blair had one. I bought it from

them. It was the snuff from which the tops were torn off and split up into kindling wood. Gibson and Molder came out there afterwards, and I showed it to them. The snuff I took out of the boxes was in boxes. The tops were on the boxes. I also bought three boxes of cigars from them, one being Sweet Puff and Mexicana and Grand Republic. [It was cigars of these brands which Molder lost.] I think it was on Friday morning, November 11th, about nine o'clock. The evening of that day I heard of Molder's store being robbed. The goods were sold to me by Shack, and I paid him for them. George Blair had nothing to do with selling me the things. He just came there with Shack, and helped him to bring the boxes. I don't know whether there was any agreement between them about the money. I never saw anything more of them, and don't know whether they divided the money or not. I don't know where they got the snuff. They said it came from the railroad commissary." Defendant introduced no testimony.

Blandford & Grimes, for plaintiff in error.  
J. H. Worrill, S. P. Gilbert, Sol. Gen., for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 180)

GODWIN v. ALBANY FERTILIZER CO.  
(Supreme Court of Georgia. June 12, 1896.)

APPEAL—REVIEW OF EVIDENCE.

As a finding for the plaintiff to the full amount sued for would have been warranted if the jury had accepted the version of the evidence most favorable to that side of the case, and as the verdict was for a less amount, this court will not disturb it after its approval by the trial judge, there being no complaint that any error of law was committed. Even if it was a compromise verdict, this alone is not cause for setting it aside.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by the Albany Fertilizer Company against William Godwin. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Upon the levy of a mortgage *fi. fa.* on crops, for \$242 principal, besides interest and costs, the defendant filed his affidavit of illegality, on the following grounds: (1) Not indebted. (2) The consideration for the debt sued on was 100 sacks of guano, for which he was to pay at the rate of \$20 per ton, if said fertilizers proved good and came up to the standard which plaintiff warranted; and this would have amounted to \$200, instead of \$242. (3) The fertilizer was not branded and tagged in accordance with the requirements of

the law, and plaintiff is not entitled to recover therefor at all. (4) The fertilizer was utterly worthless, and did not come up to the representations made by plaintiff to defendant, which were that the same was a good and valuable fertilizer, and would prove beneficial to his crops. The same was worthless and of no account whatever, and failed to do his crops any good; but, on the contrary, said fertilizers injured and damaged his crops, so that they were not so good as other crops raised on land of like quality, and with the same seasons and cultivation. And the failure of said guano was in no wise owing to want of season or cultivation, but it was due to the utter worthlessness of said guano, which was a fraud, and in no wise came up to the requirements of law, or to the representations of plaintiff when said guano was sold to defendant. The jury found in favor of the plaintiff for 90 sacks of guano, \$198, besides interest and costs. Defendant's motion for a new trial was overruled, and he excepted. The motion is upon the grounds that the verdict is contrary to law and evidence, and to the charge of the court; and that the verdict shows that the jury credited the defense, and intended to sustain defendant's theory as to the absence of tags; yet the verdict was not such as was required by that theory. Plaintiff contends that all the sacks were tagged. Defendant contends that 45 of them were not tagged. The jury adopted defendant's contention, limiting the untagged sacks to 10; but, while there is abundant evidence to sustain defendant's contention, there is no evidence to sustain or uphold the limitation to 10 sacks; and the jury should have found in defendant's favor to the extent which the evidence supporting his theory required.

Wooten & Wooten, for plaintiff in error. D. H. Pope, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 179)

DISMUKES et ux. v. BAINBRIDGE STATE BANK.

(Supreme Court of Georgia. June 12, 1896.)

APPEAL—REVIEW—ASSIGNMENTS OF ERROR.

The bill of exceptions containing no assignment of error upon any ruling or decision of the court below, it presents nothing for adjudication by this court, and the writ of error must be dismissed.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Action by the Bainbridge State Bank against T. Q. Dismukes and wife. Judgment for plaintiff, and defendants bring error. Dismissed.

The following is the official report:

It appears from the bill of exceptions that the case in the superior court was called for trial, and defendants were not present; that plaintiffs made out their case, and obtained a verdict and judgment against defendants; that later, on the same day, defendants came into court, and moved to reinstate the case for trial, which motion was heard and overruled by the court,—"wherefore the defendants in the case now tender this, their bill of exceptions, within thirty days from said trial, and pray that the same may be certified," etc. The bill of exceptions then designates the declaration, the plea, and the motion to reinstate "as necessary record to a clear understanding of the errors complained of," and prays that the court certify, and "that the errors complained of may be considered and corrected." It does not assign error upon any ruling or decision of the court below.

D. A. Russell, for plaintiffs in error. Donaldson & Hawes, for defendant in error.

PER CURIAM. Writ of error dismissed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 183)

#### HUDSON v. WILLIAMS.

(Supreme Court of Georgia. June 12, 1896.)

INJUNCTION—RESTRAINING TRESPASS—REVIEW ON APPEAL.

An examination of the pleadings and of the evidence submitted at the hearing does not disclose that there was any abuse of discretion in refusing to grant the injunction prayed for.

(Syllabus by the Court.)

Error from superior court, Baker county; B. B. Bower, Judge.

Action by E. L. Hudson against George Williams. From an order denying an injunction, plaintiff brings error. Affirmed.

The following is the official report:

Hudson brought his petition against Williams, alleging that he has entered upon land lot 115 in the Seventh district of Baker county, the title to which is alleged to be in Hudson, and that Williams, who is insolvent, threatens to cut and carry away the timber from the lot, which gives it its chief value. Hudson attaches copies of his title deeds, and prays that Williams be enjoined from further trespassing on the land, and be required to deliver immediate possession to Hudson. There is no waiver of discovery. The only verification of the petition is an affidavit of R. Hobbs, that he is the attorney at law of Hudson, and that the facts set forth in the petition, so far as they are within his own knowledge, are true, and, so far as they are derived from others, he believes them to be true. The petition was sanctioned, and an order passed to show cause why the injunction should not be granted. Williams answered, claiming title in himself, denying that

plaintiff has any title to the lot, or has ever been in possession as alleged, and denying that he (Williams) intends to cut and remove the timber off the place, but insisting that he has the right so to do if he should see fit. The answer was sworn to positively. At the hearing, plaintiff made affidavit that defendant told him, a few days before the petition was brought, that he had a clearing on the land in question, and that he intended to cut the timber, and sell it, if he had to do it himself. The case was heard upon the petition, with the deeds thereto attached, the answer, another deed introduced by plaintiff, the affidavit last mentioned, and a plat claimed to show the situation of the lot in question and contiguous lots in the same district. The injunction was denied, and plaintiff excepted.

R. Hobbs and Wooten & Wooten, for plaintiff in error. Donaldson & Hawes, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 180)

#### DUNCAN v. STATE.

(Supreme Court of Georgia. Oct. 5, 1895.)

CRIMINAL LAW—WEIGHT OF EVIDENCE—IMPEACHMENT OF WITNESS—CRIMINAL LAW—REVIEW OF EVIDENCE.

1. The testimony of a witness attacked by proof of general bad character, though not specifically corroborated, should not be wholly disregarded by the jury, if, from the deportment on the witness stand, or the probability of the truth of what he states, when considered in connection with all the evidence in the case, they feel justified in believing him without such corroboration.

2. A jury is not constrained to discard all of the testimony of even a corrupt witness when he is satisfactorily corroborated on material points by circumstances, or by other unimpeached evidence. This is so although the corroboration may not extend to the main or vitally controlling issue in the case.

3. The charge, as a whole, correctly instructed the jury as to the methods and effect of impeaching witnesses, and was not erroneous, objectionable, or misleading for the reasons or upon the grounds set forth in the motion for a new trial.

4. If the rulings of the court in rejecting evidence, or in any other respect, were not entirely accurate and correct, there was in them no material error, nor ought which, in any probability, affected the result of the trial. There was sufficient evidence, if credible, to warrant a finding that the crime of rape was committed, and some evidence which, if also credible, authorized the conclusion that the accused was the guilty party.

5. The grounds of the motion for a new trial, whether taken separately or collectively, afford no legal reason which would justify the supreme court, though by no means satisfied with the verdict, in setting it aside after its approval by the trial judge; especially as this is the second conviction of the accused in this case.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. W. Beck, Judge.

Adolphus Duncan was convicted of crime, and brings error. Affirmed.

Glenn & Rountree, for plaintiff in error. O. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, J. This case was before this court at the October term, 1894, when a new trial was granted, for reasons then stated in the synopsis of the points decided. 95 Ga. 477, 22 S. E. 324. Upon a second trial the accused was again convicted, and sentenced to be executed, and the case comes here once more for review.

1. Error was assigned upon the following charge of the court: "If the witness has been so impeached, still the testimony of that witness ought not to be wholly disregarded by you, if you feel justified from his or her deportment on the stand, or the probability of his or her testimony, in believing it, even if it receives no other corroboration." By the use of the terms "so impeached" the court evidently referred to an attack which had been made upon the credibility of a witness by proof of general bad character. It is not unusual to use the expression that a witness has been impeached when testimony has been introduced to the effect that the general character of such witness is bad, and that he is unworthy of belief; but, strictly speaking, testimony of this kind is not necessarily an impeachment of the witness, for, after all, it is a question for the jury to determine what weight should be given to the impeaching testimony. If a dozen or more witnesses should swear with reference to another witness, who, in point of fact, was a person of great probity and truthfulness, that his character was bad, and that they would not believe him on his oath, the jury might well believe that the testimony of the many witnesses was itself false and unworthy of credit; and, if they so believed, they would be warranted in crediting the one witness, notwithstanding the attack made upon him. It is therefore more accurate, where one or more witnesses testify that another witness is of bad character, and therefore not to be believed, to say that the credibility of the latter has been attacked, or that an effort to impeach him has been made, rather than to say flatly that he has been impeached. The court would not be authorized to tell the jury in plain terms that any witness had been impeached, in the sense that he had been successfully discredited. We think the charge complained of was intended merely to instruct the jury, in effect, that, where an effort has been made to impeach a witness by proof of general bad character, they were not absolutely bound to wholly disregard the testimony of that witness; and we are satisfied the jury must have understood this to be the meaning of the judge, and, accordingly, must have received the idea that they were left free to pass upon the question whether or not the effort at impeachment had been successful. Indeed, in other portions of the charge, the

court gave to the jury the following explicit instructions: "Whether any witness in this case has been impeached; and, if so, how far impeached; if impeached, how far that witness has been sustained (if sustained at all) by corroborating circumstances or credible evidence,—are all questions for you, and you alone, to determine." "Whether any witness has been impeached or not is for you to decide." And, again: "After all, gentlemen, it comes back to the broad proposition that the jury are the sole judges of the facts and the degree of credence to be given each witness."

2. Another charge complained of was in the following words: "But the maxim, 'False in one thing, false in all,' is not to be understood as constraining a jury to disregard all of the testimony, even of a corrupt witness, when he is satisfactorily corroborated, on material points, by circumstances or by other evidence unimpeached." It is certainly possible for even a corrupt witness to tell the truth. Indeed, one may be convicted of a felony involving moral turpitude upon the testimony of an accomplice, if that testimony is corroborated by other evidence connecting the accused with the perpetration of the offense; that is to say, the testimony of the accomplice, though confessedly of a corrupt person, may, in the opinion of the jury, count for something in arriving at the truth of the issue. We therefore think the court was not in error in giving the above-quoted instruction. Nor was it necessary that the corroboration referred to should extend to the main or vitally controlling question, if it was on material points involved in the solution of that question.

3. There were several exceptions to instructions given to the jury in reference to the methods and effect of impeaching witnesses. We have already quoted portions of the charge bearing upon this subject, and there are others upon the same line. In the main, the instructions given upon this branch of the case were accurate and correct; and, no new or specially important question of law being raised in this connection, we deem a further discussion of the subject unnecessary.

4. The motion for a new trial presents a number of questions of minor importance, predicated upon rulings of the court in rejecting evidence, etc. It would be tedious and unprofitable to set forth and discuss these questions in detail. They involve nothing of serious consequence, or which, in any probability, affected the result of the trial; and, moreover, after a careful examination and consideration of them, we do not find that any material error was committed. The truth is, the case turned almost entirely upon the credibility of the woman who swore that the accused had committed the crime of rape upon her. If she was worthy of belief, the conviction was right; if otherwise, it was wrong. The fate of the accused, therefore, depended mainly, if not entirely, upon the view entertained by the jury as to the credit which should be given to this witness. The small

points to which we have above alluded could have had little or nothing to do with the solution by the jury of the great and controlling issue they were called upon to decide; and, in dealing with them, we have reached the conclusion that they were of little consequence in enabling us to determine whether the judgment below should be affirmed or reversed.

5. Indeed, upon a full, anxious, and careful consideration of all the grounds of the motion for a new trial, whether taken separately or collectively, we find nothing which affords us a legal reason for setting the verdict aside. As is well known, under our system of administering justice, jurors are the triors of all questions purely of fact, and the exclusive judges of the credibility of witnesses. We have no right or authority, after a verdict has been approved by the trial judge, to set it aside because the jury believed a witness whose testimony would not have carried conviction to our minds had we been sitting in their places. In view of the rule just stated, we do not feel justified in saying that the jury ought not to have accepted as true the testimony of the woman that she was raped by the accused. But the verdict is by no means satisfactory to us. This woman's testimony was self-contradictory, inconsistent with some of the recognized principles of human nature, in many respects improbable, and was met by much testimony of an impeaching character. On the whole, we feel that, upon the merits of the case, there ought to have been an acquittal. So much impressed were we with this view, that we came very near ordering a new trial upon the sole ground that the verdict was not sufficiently supported by the evidence. At last, however, we reluctantly concluded that this would be going beyond all precedent, and usurping to ourselves a function not conferred upon us by law. It is also true that the fact that this was the second conviction of the accused had some weight in the painful deliberations which characterized our dealings with this case. We therefore affirm the judgment, but, in so doing, ourselves entertain the most serious misgivings as to the correctness of the jury's finding. Judgment affirmed.

NOTE. After the final decision of the above-stated case by the supreme court, the governor of the state, in view of the doubts expressed in the foregoing opinion, and of other facts brought to his attention, the tendency of which was to throw still greater doubt upon the character and credibility of the prosecutrix, granted to the accused a full pardon, and ordered his discharge from custody.

(39 Ga. 167)

NEWHOFF et al. v. CLEGG et al.  
(Supreme Court of Georgia. June 12, 1896.)

FRAUDULENT CONVEYANCE—EVIDENCE.

The evidence introduced and relied upon by the plaintiffs to impeach as fraudulent a mortgage attacked by their petition was insufficient to authorize a finding that it was not

a bona fide and valid lien for the amount expressed upon its face, and consequently there was no error in dismissing the petition, as to the defendant who held this mortgage.

(Syllabus by the Court.)

Error from superior court, Sumter county; Fish, Judge.

Action by Newhoff & Sons and others against C. B. Coates, P. C. Clegg & Co., and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

The following is the official report:

The petition of Newhoff & Sons against C. B. Coates alleged: Coates is a trader engaged in buying and selling gentlemen's furnishing goods in Americus. He owes plaintiffs \$744.50, past due, payment of which has been demanded and refused. He has recently created large liens upon his stock, and on December 13, 1889, one of the liens (a mortgage held by P. C. Clegg & Co.) was foreclosed, and the mortgage *fi. fa.* levied on the stock. The stock is worth between eight and ten thousand dollars, besides the notes and accounts held by Coates, and the liens thereon do not amount to over \$6,600. Coates is insolvent, and his only property is his stock of goods, and the evidences of indebtedness held by him. Injunction and receiver were prayed. By amendment a number of other creditors of Coates were made parties plaintiff, the indebtedness to them being set out. P. C. Clegg & Co. were made parties defendant. The amendment further alleged: On December 7, 1889, Coates executed to Clegg & Co. a note for \$4,346.72, due five days after date, without grace, secured by mortgage on his stock of goods,—his entire visible property liable for the payment of his debts. On the same day Coates made to J. C. Roney a note for \$1,500, due ten days after date, and secured by mortgage of the same date on the same stock. Before the mortgage to Clegg & Co. became due, to wit, on December 12, 1889, they had prepared for foreclosing the same, and requested the clerk of the superior court to be at his office by 7 o'clock the next morning; and, at that unreasonable hour for transacting business, Clegg, well knowing that he held the first mortgage, made affidavit of foreclosure, and the clerk issued a mortgage *fi. fa.*, which was levied on the stock. From the beginning of the business of Coates in Americus, he has been carrying on the same by false and fraudulent representations as to his assets and liabilities. The amendment then set forth various alleged false statements of Coates, upon which it was alleged that credit was extended. The nature of these will sufficiently appear from the report hereinafter to be made. During 1889 Coates has been, as rapidly as possible, selling the goods so purchased, and either pocketing the proceeds, or applying them to other purposes than the payment of his just debts. About the time the mortgage to Clegg & Co. was executed, and about the time it was foreclosed, Coates represented himself as owing

\$15,000, and of being possessed of assets to about that amount; and, when the creditors from whom he had purchased goods under such fraudulent representations became clamorous for payment, he confederated with P. C. Clegg & Co., and gave to the latter said note and mortgage, which were without consideration and void, and if there was any consideration it was so inconsiderable as to indicate that Coates has reserved to himself great benefits thereunder, or that he was utterly forgetful of the rights of his bona fide creditors. Clegg & Co. well knew the pecuniary standing of Coates in 1888, before he moved to Americus; Clegg and Whitley, two members of the firm, having resided with him in Hawkinsville, knowing him as a clerk at that place, without means, utterly unable to purchase and pay for such a stock of goods, and to carry on such an extensive business as he represented himself to have been doing. Clegg & Co. well knew of the large indebtedness of Coates, and that at the time of making the mortgage he was insolvent. The transaction in the giving of the mortgage was not bona fide and on a valuable consideration and without notice, but was begun and carried on by Coates and Clegg & Co. to defeat the creditors of Coates. Petitioners prayed for cancellation of the note and mortgage to Clegg & Co., and of the mortgage *si. fa.* By further amendment it was alleged: The demands of petitioners are all on open accounts, and the debts were unsecured. By reason of the false and fraudulent representations made by Coates, no title passed to Coates to the goods so purchased from these petitioners. At the time of the mortgage given to Clegg & Co., no title to the goods being in Coates, the lien of the mortgage did not attach to the goods so bought by Coates from petitioners, and petitioners, as creditors of Coates, are entitled in law to follow the proceeds of their goods into the hands of the receivers [receivers having been appointed prior to the making of this amendment], and a large portion of the proceeds realized from said receivers' sale was from the goods of petitioners,—at least \$5,000,—which should be paid to them. The mortgage to Clegg & Co. was to secure an indebtedness existing prior to the sale of the goods by these petitioners.

Clegg & Co. answered: They know nothing of the amounts and correctness of the claims alleged to be due to petitioners by Coates, nor of the statements alleged to have been made by Coates touching his financial condition. The mortgage made to defendants by Coates was to secure payment of a bona fide debt due by Coates to these defendants, and was taken by defendants in the utmost good faith, and without any intention to delay or defraud any creditor of Coates, and if Coates had any such intention it was wholly unknown to defendants. The transaction, so far as these defendants are concerned, occurred as follows: Coates came to Clegg, and stated that he owed Schumpert & Co. between four and five

thousand dollars, that they held his note, and that the debt was a valid, bona fide debt against him. He further stated that said note could be bought for \$2,500, if the money was paid at once, and that if he could get the money for a few days he was satisfied his brothers would lend him that amount, so as he could repay it. Respondents knew that his brothers were able to advance him the \$2,500, but respondents were not willing to lend him the amount to take up the Schumpert note, and declined to do so; but after much persuasion they agreed to purchase the note, and to pay \$2,500 therefor, provided Coates would give them a mortgage to become due on the Schumpert note. Respondents bought the Schumpert note, and paid therefor \$2,500 cash, took a new note and mortgage, from Coates covering the amount due on the Schumpert note, and agreed with Coates that if, within five days from the date of the maturity of the mortgage, his brother would repay the \$2,500, respondents would give up the note and mortgage, but, if his brother failed to repay the \$2,500 within said five days, then respondents would hold the note and mortgage for the full face thereof, being the amount which was due by Coates to Schumpert & Co. Respondents then believed, and now believe, that the Schumpert note represented actual, bona fide indebtedness for the amount therein stated, and they bought it in good faith, without any intention to hinder, delay, or defraud any person. After they had so taken the mortgage, and before it matured, one of the brothers of Coates came to Americus, and refused to pay the \$2,500. After this refusal, respondents determined to proceed to foreclose their mortgage as soon as it became due. With no other purpose than to collect the amount due them, they turned the mortgage over to their attorneys, and instructed them to foreclose it as soon as it became due. They know nothing about the charge as to Coates selling his goods rapidly, and pocketing or misapplying the proceeds. They know nothing of his sales, or what he did with the money. While they knew him before he came to Americus, they did not know how much money he had, or how much, if any, had been advanced by his relations, nor how much he had made in his business since moving to Americus. When the mortgage was given, they did know he was embarrassed, because he told them he owed the Schumpert note, which they understood was given for the purchase of the original stock of goods, and that he could not pay it. They knew nothing of his mercantile transactions, but supposed it was his purpose to induce his brother to advance the \$2,500, and then to go on with his business. From his great anxiety to have the note held by Schumpert & Co. purchased by some one else, they supposed this was the debt that was about to be pressed against him. Respondents deny that there was any collusion or confederacy between them and Coates in the

taking of the mortgage. By way of cross petition, they submit that under the facts aforesaid they are entitled to be first paid the full amount due them from the funds now in the hands of the receiver, and which arise from the sale of the mortgaged property, and they pray for decree that the receiver pay over to them the amount due on their mortgage *fi. fa.* Coates filed no answer, but acknowledged service, and made appearance through his attorney.

Upon the trial before the jury, after the introduction of the evidence for plaintiffs, Clegg & Co. moved to dismiss the case, as to them, upon the ground that no sufficient case was shown against them to require them to make proof, or to entitle plaintiffs to carry the case to the jury, so far as Clegg & Co. were concerned. Upon the consideration of this motion the sworn answer of Clegg & Co. was used, plaintiffs relying upon certain statements therein as admissions. The court sustained the motion, to which ruling plaintiffs excepted. A verdict was directed in favor of the various plaintiffs, against Coates, for the amounts of their several claims. Upon the call of the case for trial, in response to a notice served upon Clegg & Co. to produce certain checks, etc., Clegg testified that he had had certain checks given by Clegg & Co. during December, 1889, which had been returned to them by the bank upon which they were drawn, but that, according to his custom, said checks had been destroyed after being kept about a month.

For plaintiffs, the clerk of the superior court testified: "Mr. Dodson, attorney of Clegg & Co. came to me on December 12, 1889, and the next morning. It was seven o'clock, or a little later, when I arrived at the office, but neither of the firm of Dodson & Son had then arrived. They came in about eight o'clock. Mr. Dodson asked me to come early in the morning. I suppose he asked me to be there at that time to foreclose the mortgage. It turned out that it was to foreclose the mortgage. I do not remember whether he asked me to come earlier than usual or not. It might have been a little earlier than usual. The days are short at that time. The superior court was then in session. It was nothing unusual to foreclose a mortgage at that time of day. I have issued many after supper. I do not think the court hardly ever met before 8:30 o'clock at that time,—hardly before 9, I reckon, in December,—but I would be up here, arranging my papers, and getting ready for court. It is not very customary to issue mortgage *fi. fas.* before the mortgage is due, but sometimes it is done. There might have been legal grounds for it."

C. C. Minter testified: "The latter part of 1888, I began working for Coates as salesman. He was selling clothing, shoes, and furnishing goods. He had bought the stock the latter part of November, and I began working for him the 1st of December. Soon afterwards we made a pretty accurate in-

ventory of the shoes, and a rough inventory of the other goods. The inventory of the shoes, at cost price, amounted to \$900 or \$1,100. Second-hand stock were then worth fifty or sixty cents on the dollar. The shoes were pretty clean stock, but the clothing was just odds and ends. The whole stock would have invoiced \$1,500 or \$1,800, and, at a fair market price, would have been worth from \$800 to \$1,000. I don't know where Coates got those goods. The boot and shoe company had been in business there before he bought the stock, and they bought the bankrupt stock of Buchanan at public sale. I do not know who composed the boot and shoe company, but, while they were in business there, Hugh Brown was working there; and I think Coley Pickett was around there some, and also A. K. Schumpert; Pickett's brother-in-law. I remained there until April 1, 1889. The A. W. Mann bill of goods was bought by Coates from White, a traveling salesman, in January, 1889. Up to the time that I left there, all the replenishing of the stock was one bill of clothing and a bill of shoes, which shoes were about sold out before I left. It was not a very big order. In January, 1889, the money value of the stock of goods did not exceed \$1,000. The statement dated January 5, 1889, I think, is signed in Coates' handwriting. That statement, as to the stock of goods, is false. A liberal estimate on the stock would have been from \$1,500 to \$1,800. I do not know whether the item in the statement as to the amount of cash on hand is true or not, and know of nothing to show that it is not true, except that Coates would frequently put off little bills until he could take in some cash. When I left him, the amount of stock was less than when I went there. The shoes we had sold at good prices, but the clothing we found very unsalable. It would hardly fit anybody, and a great deal of it was old. We took a rough inventory of the shoes, but I do not think we took an inventory of the clothing. I just speak from my observation, and what I knew of the mercantile business, which I have been in five or six years. Coates did not get a lot of shoes from Thomasville after I went there. The shoes had H. C. Pickett's name in them, but I do not know that they came from Thomasville. It is my recollection that Buchanan did not carry any shoes in his stock. After the boot and shoe company bought out Buchanan, they had a sort of rush sale, with cut prices, and sold from that stock from the time the Buchanan stock was sold, about September or October 1st, until the last of November. Fifty cents in the dollar was the value of the goods, judging a bankrupt stock. Coates did not sell them at that price. He rated them at cost prices. This is the way we invoiced them. The goods I invoiced amounted to \$900, \$1,100; cost that from the manufacturers, and were worth that at retail. I do not know what was the value of

the other stock—clothing and hats—that had come over from the Buchanan stock. I only estimate it at \$500. We made a pretty accurate inventory of the shoes. I do not know that we did of the other goods. I did it myself. I do not know that Coates did. It was about the time that he was making a statement to somebody, and I reckon that was why it was done. He asked that it should be done. There was not over \$500, or possibly \$800, worth of anything besides the shoes. Some of the hats were very old."

Thornton Wheatley testified: "A very short time before the selling out of his stock, Coates came to me to borrow about \$1,000 or \$1,500; saying he would have to have it, or would have to close out his business or stock. I think he made a rough statement of the condition of the business, and informed me that there was a mortgage on the stock, the amount of which I could not state, but my impression is, it was some four or five thousand dollars. I told him that if I had the money I would not advance it on stock already mortgaged as fully as that was. He said that it need not be in the way; that he could arrange that mortgage, or had arranged it,—could arrange it so that it would be out of the way, and not be in the way of a good security for the loan. My recollection is that he said the mortgage was in favor of Clegg, or Clegg & Co. After refreshing my memory from an affidavit, it is my recollection he said the mortgage was in favor of Clegg & Co. This interview was a very few days—within five days—before Coates was closed up; within five days of the date of the mortgage."

J. R. Shaw testified: "Before Coates was closed up,—I think, in the fall of 1889,—he asked me to lend him \$2,500, and said he was a little pressed, and if I would do it he would be all right. He had on a piece of paper a sort of statement of his affairs, and as soon as I glanced at it I would not have let him have the money, because I would have felt like I would have never got it back. In the statement there were two mortgages on the stock,—one for \$4,200 or \$4,300, which I think was in favor of Clegg, or Clegg & Co., and \$1,500 in favor of Roney. I told him the stock would not bring more than that, and what little was owing him he need not count, if he wanted to raise money quick on it. He said that trade would probably be better, and that he must have \$2,500. I told him it was out of the question. He said that Clegg's mortgage was the first mortgage, that Roney's would have to be settled in full, and that the Clegg mortgage could be cut considerably, or arranged somehow,—I just do not know how now,—could be cut down, or scaled, or arrangements made to extend it along, and arrange it so as for me to come in ahead of that mortgage. I do not remember his saying that the Clegg mortgage could be got out of the way, nor that if he could get \$2,500 he could

take up the Clegg mortgage. I bought that stock of Coates' at the receiver's sale, and paid \$4,100. It invoiced about \$12,000, and twenty-five per cent. had been added to it. I bought the stock expecting to make some money on it, and did make some. I know that Coates sold nearly all the Buchanan stock out. In May or June, 1889, I would suppose, Coates' stock would amount to about \$5,000 or \$6,000, after the spring business is over, preparatory to going into fall business. I looked over the stock before I bought it. The clothing was nearly all new, but the balance was not, but being furnishing goods, and things of that kind, only filled in the gaps usual in stock. I have been in the mercantile business about 36 years, and have bought a good many bankrupt stocks. Shoes of good quality are staple stock, and ought to bring cost at retail. The Buchanan stock was a good, fair stock, and, I suppose, was about a \$10,000 stock. Coates was attentive to his business, and energetic and active, so far as I know."

F. A. Hooper testified: "On the day the mortgage from Coates to Clegg & Co. was given, I was in the Bank of Americus, and Clegg was there, and the cashier was counting out to him a good, large amount of money. My attention was called to his check, and it was a check from Clegg & Co. to Coates or bearer. There were eight piles of bills, of \$500 each, and some smaller change. The cashier asked Clegg if he wanted to deposit the money, or wanted the cash, and Clegg got the money and went off with it. At that time Clegg & Co. were doing a large wholesale business, and that amount was no astonishing amount to Clegg." The cashier of the Bank of Americus, who also served as teller in December, 1889, testified that \$4,346.72 was paid on a check of Clegg & Co. by the bank on December 7, 1889, and another check for \$165.60; that about the time Coates was reported to have sold out, or something of that kind, witness remembered having paid a check of some three or four thousand dollars to Clegg; that witness attested the mortgage, was present at its execution, and did not remember to have seen any money passed between the parties to the paper, and, if as large an amount as was mentioned in the mortgage had passed between the parties at the time, he thought he would have remembered it; that the amount mentioned in the paper was \$4,346.72,—just the same amount as that in the check,—and he paid the same sum to Mr. Clegg; that he did not remember that Clegg was present when he witnessed the mortgage; that at that time Clegg & Co. were solvent, doing a large wholesale business,—he thought, worth \$40,000 or \$50,000 or more,—and it was nothing unusual for them to make large deposits and draw large checks; that it was not usual to give checks in payment of their debts, payable to a certain party or bearer, and collect the money on it themselves, using the check as a

memorandum, though that was sometimes done. Plaintiffs introduced evidence proving the various accounts in their favor against Coates, which were not disputed. These accounts amounted to between five and six thousand dollars, and were created at various dates from May 29 to December, 1889, except one of A. W. Mann for \$593.07 from January 16 to September 19, 1889. Plaintiffs introduced also a written statement made by Coates, January 5, 1889, in which he stated: Amount stock on hand, \$7,500; cash on hand, \$600; owed for merchandise not due, \$600; total amount of capital employed \$8,700,—and no mortgages or notes. Also, statement made by Coates, October 7, 1889, that he succeeded Buchanan; that stock on hand when he began November 1, 1888, invoiced \$5,700; that he paid for it \$4,700 cash, all his own money; that he owed nothing for borrowed money; that he had, October 7, 1889, stock, \$3,000, on which he owed \$3,000, and his net worth was \$5,000.

J. W. Beasley testified: "Am traveling reporter for the American Boot & Shoe Company, a commercial agency publishing annually detailed reports of the credit and standing of boot and shoe buyers throughout the United States, which reports are furnished to manufacturers and jobbers of boots and shoes, subscribers to the reporting company. I called on Coates in May, 1889, told him my business, and asked him for a statement of his affairs for publication. In response he said: 'Stock, \$7,000; boots and shoes, \$2,000; insurance, \$6,000; trade, cash; merchandise indebtedness, \$1,500; rent, \$600; no borrowed money.' This report was printed by the American Boot & Shoe Reporting Company in their report for 1889. Wright & Richards [of petitioners] have for several years been subscribers to said commercial reports. This report was sent to them on June 26, 1889, and to other subscribers." E. T. Wright testified that Wright & Richards received this report, and in accepting the order of Coates, and shipping to him the goods sold by them to Coates, they relied wholly upon his statement as contained in said report. Plaintiffs introduced also the statement made by Coates "for the benefit of Banner Bros. [of petitioners], and in order to obtain merchandise of them on credit," of date September 15, 1889. In this statement it was set forth: That Coates bought out the shoe and clothing company November 1, 1888, for \$4,700 cash, which he had saved from salary, etc. That he had stock, \$3,000; cash in bank, \$200; notes and accounts, \$250. That his liabilities were: Merchandise due, \$200; merchandise not due, new purchases, \$3,300; and borrowed money, none. And that his safe net surplus was \$4,500. Banner testified that the credit extended by Banner Bros. was on the faith of said statement. There was evidence that the credit extended by Cochran, Baird & Levi (of petitioners) was on the faith of the statement to Banner Bros., to which statement they had been referred by Coates.

Further, that the credit extended by Auerbach to Coates was on a verbal statement made to him by Coates, that Coates had a capital of \$5,000, all his own money, carried a stock of \$8,500, and had no liabilities except what he was buying then. It was shown that the credit extended by Newhoff & Son to Coates was on the faith of statements of mercantile agencies, and that the credit extended by Mack (of petitioners) was on the faith of written statements made by Coates to Mann. J. L. Anderson testified: In December, 1889, representing Rountree & Bro., he visited Americans to settle the claim they had against Coates, and had a conversation with Coates, in which Coates stated, in regard to about \$4,000 claimed to be due by Coates to Clegg & Co., that he (Coates) received this money in cash from Clegg & Co. as borrowed money, and, on being further questioned as to what became of said money, stated that his books would show. Witness could get from Coates no more satisfactory answer. Plaintiffs put in evidence also the note and mortgage to Clegg & Co.

Clarke & Hooper, Cutts & Hixon, Lumpkin & Nisbet, and Ansley & Ansley, for plaintiffs in error. Jas. Dodson & Son, Fort & Watson, and E. A. Hawkins, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 32)

### BLACK v. FRITZ.

(Supreme Court of Georgia. Jan. 13, 1896.)

CITY COURT—JURISDICTION—TITLE TO LAND—ACTION ON NOTE—PLEADING.

1. That the defense to an action upon promissory notes for the price of land held by the defendant under a bond for titles from the plaintiff was failure of consideration, on the alleged ground that the plaintiff did not have, and consequently could not make, a good title to the land in question, did not render the case one "respecting titles to land," and thus deprive the city court (in which the action was brought) of jurisdiction to entertain and render a judgment therein. In such a case the title to the land was only incidentally or collaterally involved.

2. This case, upon its merits, is controlled by the decision in *Black v. Walker* (this term) 26 S. E. —.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by J. A. Fritz against D. C. Black. From an order overruling a demurrer to the plea, defendant brings error. Affirmed.

W. W. Haden and John C. Reed, for plaintiff in error. Thos. W. Latham, for defendant in error.

SIMMONS, C. J. Fritz sued Black in the city court of Atlanta upon certain promiss-

sory notes given for part of the purchase money of land. Black filed a plea in which he alleged that he had contracted for the purchase of the land on the faith of the plaintiff having a good title to the same, taking from the plaintiff a bond conditioned for the making to him by plaintiff of a good and sufficient title on payment of the notes, but that he had since had the title investigated, and had discovered that the plaintiff did not have a good title. He offered to deliver up the bond for title, and to surrender possession of the land, and prayed that the contract of sale be rescinded, and for judgment against the plaintiff for the sums already paid him. The plea did not allege insolvency of the plaintiff, nor any ouster by the defendant from the land, and upon this ground it was demurred to. The court sustained the demurrer, and to this ruling the defendant excepted. Subsequently, the defendant demurred orally to the declaration, on the ground that the court had no jurisdiction of the case, it being a case respecting titles to land, and the constitution declaring that "the superior court shall have exclusive jurisdiction in cases respecting titles to land." Code, § 5139. The court overruled this demurrer, and to this ruling, also, the defendant excepted.

1. The court was right in overruling the demurrer to the declaration. The mere fact that the notes sued upon were for the purchase price of land did not render the case one "respecting titles to land," within the meaning of the constitution. This question has been settled by various adjudications of this court. See *Smith v. Bryan*, 34 Ga. 53; *Bivins v. Bivins*, 37 Ga. 346; *Beckwith v. McBride*, 70 Ga. 644. In such a suit the title to land is only incidentally or collaterally involved. In *Smith v. Bryan*, supra, it is said that "cases respecting titles to land," in the intentment of the constitution, are "cases in which the plaintiff asserts his title to the land in question, and depends for a recovery upon his maintenance of it, or to supply a link in the chain, wanting by reason of accident or other cause." The jurisdiction of the court over the subject-matter of the plaintiff's petition, of course, could not be affected by the matter set up in the defendant's plea.

2. The case, upon its merits, is controlled by the decision in *Black v. Walker* (this term) 28 S. E. —. According to that decision, the court did not err in sustaining the demurrer to the plea above mentioned. Judgment affirmed.

(97 Ga. 722)

MELSON v. PHOENIX INS. CO. OF  
BROOKLYN.

MARIL v. HOME INS. CO. OF NEW  
ORLEANS.

(Supreme Court of Georgia. Feb. 7, 1896.)

INSURANCE POLICY—LIMITATION OF ACTION.

It being stipulated in a policy of insurance that no action thereon should be sustain-

able against the insurance company unless commenced within 12 months next after a loss should occur, an action brought after the lapse of that period was barred, although it purported on its face to have been a renewal of a previous action which was instituted within the time limited, and to have been brought within 6 months after the granting of a nonsuit in the first action.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

Actions by D. P. Melson against the Phoenix Insurance Company of Brooklyn, N. Y., and by one Maril against the Home Insurance Company of New Orleans. Judgments for defendants, and plaintiffs bring error. Affirmed.

C. W. Hodnett, J. B. Hutcheson, and J. S. Boynton, for plaintiffs in error. Glenn, Slaton & Phillips, for defendants in error.

LUMPKIN, J. These were actions against fire insurance companies. In the first case the policy contained a stipulation that no suit or action thereon should be sustainable against the company "unless such suit or action shall be commenced within twelve months next after the loss shall occur." The policy sued on in the second case stipulated that no suit or action thereon should be sustainable "unless commenced within twelve months next after the fire." In each case an action was in fact begun within the time limited by the policy, a nonsuit granted, and a new action brought within 6 months from the rendition of the judgment of nonsuit, but after the expiration of the specified 12 months. The two cases stand upon substantially the same footing, and involve the same question, viz.: Is a second action upon such a policy, commenced after the lapse of the period therein mentioned, in renewal of a previous action duly brought, barred, when the second action is begun within 6 months of the granting of a nonsuit in the first? This court has decided that a contract limitation upon the right to sue, fixing a shorter period than that allowed by statute, is lawful, "provided the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage, in some way." *Brown v. Insurance Co.*, 24 Ga. 97, in which a 6-months limitation was sustained; *Underwriters' Agency v. Sutherlin*, 55 Ga. 266, where the limitation was 12 months. See, also, *Insurance Co. v. Wells*, 83 Va. 736, 3 S. E. 349. Section 2032 of the Code, which gives a plaintiff who is nonsuited the right to renew his action within 6 months, has no application. It is only a part of the law of limitations, and where the parties, by agreement, make a fixed and unqualified limitation for themselves, they abandon all the legal regulations on the subject, and consequently must stand upon their contract as written. Where a party binds himself absolutely to sue within 12 months, or not at

all, it would be a radical and material departure from the contract to allow such a variance from its plain terms as would have resulted from a proviso declaring that a suit brought within that time might be renewed within 6 months, in case of nonsuit. To subject the rule of the contract—which has taken the place of the rule of the law—to an exception like this would, in our judgment, be totally unwarranted. When the plaintiffs in these cases waived the right to rely upon the law of limitations, they waived everything which any part of the law on the subject provided for their benefit.

It was earnestly argued that these policies contained other stipulations requiring many things at the hands of the insured as prerequisites to the right to sue, which, in effect, rendered the 12-months limitation unreasonable, for the reason that in certain contingencies this period would actually expire before the insured could do all that was incumbent upon him before, under the terms of his policy, he could bring an action. So far as the present cases are concerned, it is a sufficient answer to this contention to say that in each the action was begun within the 12 months, and it is therefore clear that neither policy contained anything creating an insurmountable obstacle to so doing. If, in a given case, there should be in a policy stipulations which, in their practical operation, rendered the limitations therein provided for so unreasonable as to cause imposition upon, or undue hardship to, the insured, the matter might present a different aspect, but no question of this kind is now before us.

The leading case of *Riddlesbarger v. Insurance Co.*, 7 Wall. 398, is exactly in point. It was there held that the stipulation in the policy as to limitation was not against the policy of the statute of limitations, and was valid, and also that "The action mentioned in the condition, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action, from any cause, cannot alter the case, although such previous action was commenced within the period prescribed." This case was decided with reference to a Missouri statute which allows one who "suffers a nonsuit" to renew the action within one year afterwards. In *McElroy v. Insurance Co. (Kan.)* 29 Pac. 478, the policy stipulated that no action upon it should be sustainable "unless commenced within twelve months next ensuing after the fire"; and it was held that neither the statutes of limitations of Kansas, nor their exceptions, had any application to the conventional limitation prescribed by the policy. The plaintiff brought his first action in time, and, though it was dismissed "without prejudice to a further action," the second suit, commenced more than one year after the fire, was held to be too late. The case of

*Arthur v. Insurance Co.*, 78 N. Y. 465, which is quite similar as to its facts, and which has been often cited, supports the rule for which we are contending. It is thus stated in *Wilson v. Insurance Co.*, 27 Vt. 99: "A stipulation in a policy of insurance that no action shall be sustainable, unless commenced within twelve months after the loss, is binding, and bars a suit commenced after that time, even though a prior suit was commenced within the twelve months and failed without fault on the part of the plaintiff." This opinion was delivered by the eminent Chief Justice Redfield. See, also, *Insurance Co. v. Hocking*, 18 Atl. 614, 180 Pa. St. 170; *McFarland v. Insurance Co.*, 6 W. Va. 437; *Fullam v. Insurance Co.*, 7 Gray, 61,—all of which are pertinent. It would not be difficult to extend this list.

The text writers below cited are upon the same line. Referring to actions like those now in hand, it is said in 2 May, Ins. § 483: "Nor can such suit, brought after the expiration of the time limited, although a prior suit brought within the limited period may have been nonsuited, or judgment thereon arrested, be maintained. The condition is without exception, and the exceptions of statutes of limitations cannot be imported into it by the court." The following is taken from Ostr. Ins. § 291: "Where suit is commenced within the time provided in the policy, and afterwards discontinued for any reason, and a second suit brought after the expiration of the time, the bringing of the first suit within the term will not save the second one from being barred." The decision in *Burton v. Insurance Co.*, 28 Ohio St. 467, does not support the contention of the plaintiffs in error. What was done in that case amounted to no more than allowing an amendment of the original summons, which was defective; the effect being to keep in court the case first brought, and not to allow the bringing of another suit. In 2 Wood, Ins. § 467, it is said that: "An action is deemed to be commenced when the summons or writ is issued. Consequently, if an action is commenced within the time limited, the assured's rights are preserved, even though, by reasonable diligence, the assured fails to obtain service thereof upon the insurer." This is not inconsistent with our ruling in the cases before us; and while the case of *Insurance Co. v. Hall*, 12 Mich. 202, which the author cites, supports the text, to the extent of the language above quoted, it is not authority for the proposition that an entirely new action could be brought against the insurance company after the expiration of the conventional limitation. In that case the summons or writ was issued before the 12 months had elapsed, but was not served within the 12 months, because the defendant could not be found. The court simply held that the action had been commenced by the filing of the original writ. To the same effect is the case of *Schroeder v. Insurance Co.*, 104 Ill. 71. Mr. Wood cites no decision, save that

rendered in *Insurance Co. v. Fellowes*, 1 Dism. 217, which seems to directly sustain his view announced in the same section, on pages 1026 and 1027, that the ruling in the Vermont case (*Wilson v. Insurance Co.*, supra) "is not believed to be sound doctrine, either upon the score of morality, justice, or fair construction; and the doctrine of the Michigan case commends itself most favorably, and expresses the best and soundest rule." We cannot assent to the correctness of the decision, or accept the author's conclusion. In *Rosenbaum v. Insurance Co.*, 37 Fed. 7, the effect of the court's action was merely to keep in force the original action; and practically the same thing was accomplished in *Jacobs v. Insurance Co.* (Iowa) 53 N. W. 101, though the latter case bears a little more strongly than the former in favor of the contention of the plaintiffs in error. There are doubtless other cases tending more or less in the same direction, but the soundness of the rule laid down in the *Riddlesbarger Case* is established by the decided weight of reason and authority. Some of the cases endeavor to make a distinction between the effect of stipulations requiring the action to be brought within the fixed period "after loss," and those in which the words "after the fire," or "after the claim shall accrue," are used. If any such distinction exists at all, it is immaterial, so far as relates to the two cases with which we are now dealing. Both of them are controlled by the well-settled rule stated by Mr. Justice Jackson in the case of *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 463, 14 Sup. Ct. 379, which (though not similar as to its facts) rests upon the principle that "contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." After thus arriving at the true meaning of an insurance contract, the duty of the courts to enforce it accordingly is not to be questioned. Judgment affirmed.

**PER CURIAM.** The case of *Maril* against the Home Insurance Company is controlled by the decision of this court in *Melson v. Insurance Co.*, which, upon a review thereof, is affirmed. Judgment affirmed.

(39 Ga. 112)

**RITCH v. MASONS' FRATERNAL ACC. ASS'N OF AMERICA.**

(Supreme Court of Georgia. May 19, 1896.)

**ACTION ON POLICY — LIMITATIONS — DEMAND FOR ARBITRATION.**

1. Where a policy of accident insurance contained a stipulation in these words: "No legal proceedings for recovery hereunder shall be brought until the expiration of three months after receipt by the association of acceptable proofs of loss, and the association shall not be required, in case of a disagreement between the certificate holder and the beneficiary and the

association as to liability, to arbitrate the question of liability, as by the rules of this association it is provided, and no suit shall be brought at all, and the said association shall not be bound to arbitrate at all, unless the said suit is brought, or such arbitration is in writing demanded, within one year from the date of the alleged accident, and no suit shall be brought in any case, except to enforce payment of the award of the said arbitrators, unless the association refuse to arbitrate." Held, that whether the requirement that "no suit shall be brought in any case except to enforce payment of the award of the said arbitrators, unless the association refuse to arbitrate," was or was not reasonable, an action brought by the insured after more than one year from the date of the alleged accident, he having made no demand for an arbitration, was too late.

2. If, in any event, "overtures for a settlement," or "promises to pay" on the part of the company, or "negotiations" between it and the insured for a settlement, can have the effect of extending the time within which the plaintiff may commence his action beyond the conventional limit prescribed by the policy, there was nothing in the facts of the present case to constitute an exception of this kind, and it does not appear that there was any conduct on the part of the company which should have deterred the plaintiff from bringing his action within a year. (Syllabus by the Court.)

Error from city court of Floyd; G. A. H. Harris, Judge.

The following is the official report:

Rich sued the Masons' Fraternal Accident Association of America upon an accident policy of insurance. The suit was brought November 24, 1893. The policy was dated October 13, 1892. It stipulated, among other things, that the association would pay \$1,000 "if the certificate holder shall lose a hand above the wrist or foot above the ankle as the result of accident, such accident as is above set forth, during the life of this certificate." The accident in question was alleged to have occurred on or about November 21, 1892, by which petitioner lost a foot above the ankle. It was alleged, among other things, that defendant had paid petitioner on account of the accident \$500 and refused to pay the remaining \$500. After the introduction of the evidence for plaintiff, the presiding judge directed a verdict for defendant, on the following grounds and in the following words: "Under the 12-months limitation clause in the eighth paragraph of the certificate of insurance, I do not see how you can travel in this case. I think it is sufficiently clear that you have to sue in 12 months from date of accident; and, more than 12 months having expired, there is but one possible legal result." Plaintiff moved for a new trial, and, his motion being overruled, excepted, and brings error. Affirmed.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in directing a verdict for defendant, and in holding as above stated; plaintiff contending that it was shown by the evidence that negotiations had never been finally concluded between defendant and the plaintiff or his attorney with regard to a settlement of the amount claimed, nor had defendant ever

reached final decision, or made positive refusal to settle the claim of loss. Plaintiff contended, further, that such holding was error because defendant had paid one-half of the claim in March, 1893, and hence that the 12-months limitation could not commence to run until that date. Further, that it could not commence to run until negotiations of settlement had been terminated between the parties, and a final decision or refusal had been made by defendant to plaintiff's demand for payment, and that such final refusal never was made by defendant. Error in said holding, because plaintiff contends that said eighth paragraph has no reference to bringing of suits upon the certificate, but simply specifically and in terms refers only to the bringing of a suit to enforce "payment of an award of arbitrators"; said eighth paragraph being in the following words: "Eighth. No legal proceedings for recovery hereunder shall be brought until the expiration of three months after receipt by the association of acceptable proofs of loss; and the association shall not be required, in case of a disagreement between certificate holders and the beneficiary and the association as to liability, to arbitrate the question of liability, as by the rules of this association it is provided, and no suit shall be brought at all, and the said association shall not be bound to arbitrate at all, unless the said suit is brought, or such arbitration is in writing demanded, within one year from the date of the alleged accident; and no suit shall be brought in any case except to enforce payment of the award of the said arbitrators unless the association refuse to arbitrate." Plaintiff insists that the evidence fails to disclose that the association had ever refused to arbitrate, and hence, as this eighth paragraph specifically stated that no suit should be brought in any case except to enforce payment of the award of the arbitrators, and this suit was not brought to enforce payment of an award of arbitrators, this clause did not set up such a statute of limitations as to one year's time as could in any particular affect or control the bringing of this suit, as against the general statute of limitations in force by the laws of Georgia. Further, because it is not the policy of our law to permit or allow insurance companies to establish special clauses of limitation that will contravene or change the general limitation laws of Georgia. Error in directing a verdict for defendant for any reason whatever, as plaintiff had fully made out his case.

As bearing upon the holding of the court upon the subject of limitation, the following appears from the evidence: Plaintiff's wife had some chickens, and a hawk had been catching them. Plaintiff borrowed a breech-loading gun from a neighbor, two days before the accident, and loaded the gun to kill the hawk. After loading the gun, he took it up, and "drew a bead" on a knot in the front door of his house, when his two-year old child shoved a chair, so that probably the back of

the chair struck plaintiff's right arm, when plaintiff started to throw the gun down from his face, his finger being on the trigger, and the gun was discharged, the load going down through his ankle and necessitating amputation of the foot above the ankle. Plaintiff owned no gun himself and had no firearms in the house. The accident occurred November 21, 1892. The agent of defendant, through whom plaintiff had obtained the policy, came out and investigated the accident. Within 10 days after the accident plaintiff in writing gave notice of the accident to defendant. Defendant answered at once, sending blank proofs of loss, which were filled out by plaintiff and sent to defendant. There was considerable correspondence between plaintiff, and on his behalf, and defendant. On March 1, 1893, defendant wrote to plaintiff saying: "One of the reasons we have been waiting was to have you state that your foot has been amputated above the ankle, as your claim blank did not state that fact. We presume, however, from your letter, that it was, and in accordance with that belief we inclose check for \$500." The check or draft was dated March 1, 1893, and was drawn on a bank in Massachusetts. Accompanying it was a receipt of the same date, which purported to be in full payment for the claim. Plaintiff refused to receive the draft in full payment, but the word "full," as printed in the original receipt, was erased, and the word "part" interlined, and the words, "Balance still unpaid, \$500," and "The above receipt is for one-half of the whole claim," were written in the receipt by plaintiff's attorney before cashing the draft. Plaintiff received the draft by mail, but did not draw the money when he received it. He notified defendant in writing that he would hold the draft and not collect it in full settlement. There was considerable correspondence. On March 16, 1893, defendant acknowledged the receipt of a letter written on behalf of plaintiff, notifying it that the \$500 was not accepted by plaintiff in full settlement, and that plaintiff was advised to hold up the draft and receipt until defendant was heard from. In said reply of March 16, 1893, defendant claimed that plaintiff came under a clause in the certificate as to "hunting for pleasure or profit." On March 23, 1893, a letter was written for plaintiff to defendant, acknowledging the receipt of the above letter, and claiming that at the time of the injury plaintiff was not a hunter for pleasure or profit, nor engaged in hunting either for pleasure or profit, and that he was entitled to full payment of the indemnity. The last letter appearing in the record was a letter from defendant to plaintiff's attorney, in reply to the letter last above mentioned, insisting that plaintiff was hunting for both pleasure and profit. This letter was dated April 4, 1893, and concluded: "Trusting I have made this matter plain and satisfactory to you, and awaiting your further favors, I remain," etc. The draft and receipt as altered were at-

tached together. On April 11, 1893, it was placed to the credit of Mr. Hoskinson (who had accounted to plaintiff for the \$500, and taken therefor the draft) in a bank in Rome, and the draft was collected through this bank. It would not take more than from five to seven days to collect a draft on the bank in Massachusetts.

Reece & Denny, for plaintiff in error. McHenry, Nunnally & Neel, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(47 S. C. 263)

COVINGTON v. COVINGTON et al.

(Supreme Court of South Carolina. July 21, 1896.)

PARTITION—DECREE OF CONFIRMATION—NEWLY-DISCOVERED EVIDENCE—NEW TRIAL.

1. Under Const. 1868, art. 5, § 3, which abolished the distinction between law and equity so far as pleadings are concerned, a circuit judge presiding on the equity side of the court of common pleas may grant a new trial in such a cause on motion and cause shown, without adopting the old process of a petition for rehearing on a bill of review.

2. After the confirmation of a return of commissioners in partition, evidence that, at the time of the first trial there was an unrecorded deed in the possession of others than parties to the suit; that this deed, executed by defendants' intestate in his lifetime, cut off 42 acres of land that entered into the estimate of the commissioners; and that this estimate was acted on by the court, and the deed was unknown to defendants till a sale of the property after the decree,—will justify the granting of a new trial.

3. Where there is no appeal from an order granting a new trial in such case on terms that it shall be "without prejudice to the titles of those who purchased lands at such sale," defendants can only show that the 42 acres did not belong to the estate of the intestate, and that the commissioners estimated its value as they did the rest of the tract; and the decree will be modified to allow this amount to be set off against a sum allowed to plaintiff to be paid by defendants for the purposes of equalization.

Appeal from common pleas circuit court of Marlboro county; Ernest Gary, Judge.

Bill by Lou B. Covington, administratrix, etc., against Joel Covington and others, for partition. From an order granting defendants a new trial after decree in favor of plaintiff, plaintiff appeals. Modified, and affirmed on condition of remittitur.

The decree of Judge Watts granting a new trial, and plaintiff's exceptions, are as follows:

Decree.

"In the month of May, 1895, this action was commenced by Lou B. Covington, as administratrix of the personal estate of Preston Covington, deceased, and in her own right as widow of said intestate, offering to account and praying for a partition of his real estate, the one half to her, and the other half

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to his collateral heirs, he having left no lineal descendants, but having left two brothers and children of one deceased brother and two deceased sisters, in all six nephews and two nieces. The complaint alleges that Preston Covington left a small personal estate and three tracts of land, viz.: (1) One tract of 69 acres, more or less, called the 'Home Place'; (2) a tract of 67 acres, more or less; (3) a tract of 212 acres, more or less,—all in Marlboro. The joint answer of the defendants, ten in number, raises no issue, and joins in the prayer for partition and accounting. Accordingly, on the 8th day of June, 1895, the order for a writ in partition was granted by the circuit judge in term time; and on the 7th day of August, 1895, the writ was issued by the clerk, directing five commissioners, named therein, to execute the same, the tracts being stated therein to contain 69, 65, and 212 acres, respectively. On the 16th day of August, 1895, the commissioners made their return, allotting to the widow the 69 acres, valued at \$3,450, which is at the rate of \$50 per acre. To all the other heirs (10 in number) they allotted the tract of 65 acres, valued at \$2,600, which is \$40 per acre, and the tract of woodland they returned as 230 acres, valued at \$1,380, at the rate of \$6 per acre. The two tracts thus allotted to the 10 heirs they recommended to be sold for partition; and, for the purpose of equalization, they recommended that the other heirs pay to the widow \$265. The partition thus made by them was:

To the widow, 69 acres.....	\$3,450
To the other heirs,	
65 acres .....	\$2,600
230 acres .....	1,380

Total to other heirs..... 3,980

Total real estate..... \$7,430

Widow's share, one-half.....	\$3,715
Value of her tract.....	3,450

Balance due by heirs..... \$ 265

"Exceptions were duly filed to this return by the ten defendants, upon the grounds that the widow's tract was undervalued, and the allotments to the defendants overvalued, and because the attempt at equalization should not be made until after the sale, by which alone the true value of the lands allotted to the defendants could be ascertained. On hearing the return, the exceptions, and argument thereon, his honor, Judge Ernest Gary, on 26th September, 1895, confirmed the return, and decreed the equality as recommended by the commissioners, and ordered the land to be sold in November, 1895, and that the 230 acres be sold in two or more separate tracts, if so desired by counsel or their clients. On the 5th day of October following, the defendants' counsel served on the counsel for the widow exceptions to the decree of confirmation, and intention to appeal therefrom upon three grounds, the substance of which is that the widow is entitled to one

half of the real estate, and the defendants to the other, and a sale of the undivided half was necessary to enable equality to be fairly decreed. In order, however, to enhance the price of the sale of the 230 acres of woodland, the attorneys for the defendants had it surveyed and divided into four parts, and a plat of the same made for the use of the clerk of the court on day of sale, showing the tract to contain 237 acres. Accordingly, on the first Monday in November, the tract was, by this plat, sold in four parcels. The first offered for sale was a parcel of 49 acres, called 'Tract No. 1.' The attorneys for the plaintiff and defendants, and some of the defendants, were present at the sale. When the first tract of 49 acres was offered, Mr. Knox Livingston, as attorney for the estate of Peter T. Smith, announced from the block that he had learned that this part of the land probably belonged to the heirs of Peter T. Smith. This was a surprise, as it is alleged, to counsel for the plaintiff and for the defendants, and to the defendants themselves. Nevertheless, the 49 acres were sold, and bid off by Joel Covington, a brother of the deceased, and a defendant, for the sum of \$125. He has not complied, and will not be asked to comply, with the terms of sale. That tract is lost to defendants. Mr. Livingston then announced that no claim was made to the balance, and the sale proceeded. Tract No. 2, 59½ acres, brought \$128. Tract No. 3, 60 acres, brought \$123. Tract No. 4, 68 acres, brought \$145. This was on the 4th day of November, and on November 6th the attorneys for the defendants served notice of a motion for a new trial of the issues raised upon the return of the commissioners in partition, upon the ground of newly-discovered evidence, to wit, in that the sale disclosed the fact that the commissioners had greatly overvalued the so-called 230 acres, and because 49 acres of it was claimed by the estate of Peter T. Smith. Inquiry was made, and the information given by Mr. Livingston led to the discovery of the fact that, in 1882, Preston Covington sold and conveyed to Charles Welch 71 acres of land, which embraces this 49 acres, according to a survey made after the discovery of this deed, which has never been recorded. The surveyor had this deed before him on this survey, made November 18, 1895, and had with him Charles Welch and Frank Stanton, who know the lines and boundaries of the deed of 1882 to Charles Welch. The surveyor, James Kirkpatrick, made this survey, and also made the survey before the sale by which the land was sold. He certifies that the tract returned by the commissioners as containing 230 acres, and found by him to contain 237 acres, embraced this 49 acres, which is the property of the estate of Peter T. Smith's heirs by purchase from Charles Welch, and that the woodland belonging to the estate of Preston Covington is by accurate calculation only 188 acres. Accepting this as correct, and

leaving undisturbed the partition as made in the return and confirmed, we have this result:

Tract of 69 acres to widow.....	\$3,450 00
To other heirs, 65 acres.....	1,806 00
Tract No. 1 (of the 237), 49 acres (lost).....	
Tract No. 2 (of the 237), 59½ acres	128 00
Tract No. 3 (of the 237), 60 acres..	123 00
Tract No. 4 (of the 237), 68 acres..	145 00
Total real estate.....	\$5,652 00

"Of this, the widow ought in fairness to receive one-half, \$2,826. But her share decreed to her is \$3,715, leaving to the other heirs but \$1,937; that is, nearly three-fourths to the widow, and a fraction over one-fourth to the other heirs. This, in equality, should not be, and will not be, sanctioned by a court of equity, unless bound to do so by some rigid rule of practice, or unless the parties seeking relief are estopped by their own conduct. The motion in this case by the defendants is for a new trial of the question of confirmation of the return of the commissioners, upon the ground of newly-discovered evidence, going to show a mistake of the commissioners as to the number of acres in the alleged 230 acres of woodland, and gross error as to the value of the same. A motion of this kind in an equity cause is made, heard, and determined in the same manner as an application for a new trial in a case at law, and that is by motion, supported by affidavits, by documentary or written evidence. It must appear that the evidence is pertinent and material, was at the previous hearing unknown to the moving parties, and could not have been discovered by the exercise of reasonable diligence. The affidavits submitted by the defendants, the survey and certificate of the surveyor, and the newly-discovered unrecorded deed of 71 acres of land made by Preston Covington to Charles Welch, in 1882, satisfy me that the evidence proposed is pertinent and material, was unknown to all the parties and their counsel and the commissioners at the time of partition, and at the hearing of the question of confirmation, and that carelessness in not discovering it until after the sale cannot be reasonably charged against the defendants. I am satisfied, also, that the evidence is probably true. In fact, it is not denied at the hearing that the deed to Welch covers the 49 acres bid off by Joel Covington, but, on the contrary, it was stated, and was not denied, that one of the heirs of Peter T. Smith had recently sold this land to a purchaser, and that the plaintiff's counsel drew the title deed, having before him the Welch deed as a guide; this, too, pending the controversy. The price of the 188 acres of land at the sale was less than three dollars per acre, but this can scarcely be called 'newly-discovered evidence.' It only demonstrates the hazard of accepting and confirming a partition such as this, and the chances of doing injustice thereby.

"I am urged to refuse this motion, upon the ground that the 49 acres were known to Mr. W. H. Manning and others to have belonged to P. T. Smith, who is said to have once had a steam mill on it, or to have gotten saw timber from it. In a large body of pine timber land, such as this, such a thing might have occurred without bringing home to the collateral heirs of Preston Covington the knowledge of a conveyance, and without informing them of the true dividing line, or that only 188 acres remained. Certain it is that the commissioners in partition seem not to have known of this, and they were, most of them, from the neighborhood, it is to be presumed; and they went upon and examined the land, and returned it as 230 acres. The counsel in the case knew nothing of this conveyance; the surveyor knew nothing of it; nor did the heirs of Covington know of it. I must conclude from the affidavits, therefore, that it was unknown to the parties to this cause and their counsel, without blame or carelessness on their part.

"As to the materiality of the evidence, there can be no question. The counsel for the plaintiff rely, in opposing the motion, upon the case of *Goulding v. Goulding*, in 8 Rich. Eq. 82, and upon the case of *Buckler v. Farrow*, Rich. Eq. Cas. 178. It is sufficient to say that neither of these cases involves the question of after-discovered evidence. In *Goulding v. Goulding* the widow accepted the return of the commissioners without objection, and acquiesced in the confirmation for a year, and not until the sale of the land allotted to the heirs, at an enhanced price, did she interpose an objection, and ask to share the benefit of this increase, after a year's acquiescence in the judgment of confirmation. As might have been expected, the court refused the request. In the case of *Buckler v. Farrow*, after the commissioners had divided and equalized the land, a motion was made to have the officer of the court (the commissioner) review their work, and fix an equalization; but the court refused, because it could not be done under the statute and the practice of the court. Neither case is applicable to the one before me, because this is a motion, upon after-discovered evidence, to reopen the question of confirmation; and, besides, the defendants have been most prompt, diligent, and constant in resisting the confirmation, and, since the judgment, in seeking relief against it. I am not called upon to reverse Judge Gary for supposed error committed by him with the light before him, but only to say whether or not that confirmation should be set aside, and the defendants be permitted to submit to the court, at another trial, the after-discovered evidence laid before me; and this privilege, I feel, should be granted them. It will be for the court, on this new trial, to decide the controversy according to the law and the

evidence. It is therefore ordered, adjudged, and decreed that the judgment of confirmation of the return of the commissioners in this case, rendered and filed on the 28th day of September, 1895, be set aside, and a new trial of the matters therein involved and adjudged be granted, but without prejudice to the titles of those who purchased land at said sale, complied with the terms thereof, and received conveyances therefor."

#### Exceptions.

"(1) Because the motion for a new trial was not the proper remedy in this case. (2) Because his honor, the presiding judge, was without authority or jurisdiction to grant a new trial. (3) Because the matters involved in the motion for a new trial were res adjudicata, under the decree of Judge Gary, overruling exceptions to and confirming the return of the commissioners in partition. (4) Because his honor, the presiding judge, erred in holding that the return of the commissioners in partition could be set aside and annulled, after it had been confirmed by Judge Gary. (5) Because his honor erred in not holding that the return of the commissioners was conclusive between the parties, especially where the same had been confirmed, and no appeal taken. (6) Because his honor erred in not holding that, when the return was made and confirmed, it became a decree of the court, and could only be questioned as any other decree, to wit, by appeal. (7) Because his honor erred in not holding that, until the decree confirming the return of the commissioners was reversed or set aside, it was binding on all the parties. (8) Because his honor erred in not holding that, even admitting the allegations contained in the affidavits submitted by the defendants on this motion, they had had their day in court, and could not now be heard to establish the rights of the parties. (9) Because his honor erred in not holding that the court had no authority to grant a new trial, the only object and effect of which would be to attempt to re-equalize and adjust the shares or interests of the different parties, which, it is respectfully submitted, the court had no authority to do. (10) Because his honor erred in not holding that, even if the matter contained in said affidavits be true, the alleged newly-discovered testimony is not material, in that it cannot affect the issues in this cause. (11) Because his honor erred in not holding that by not appealing from the order confirming the return of the commissioners, and by assenting to the sale, and the order confirming the same, the defendants were estopped from asking relief in the premises. (12) Because his honor, the presiding judge, erred in holding that the 49-acre tract was lost to the defendants, when, as matter of fact, it appears that no effort has been made to force the purchaser to comply with his bid, or to test the validity of the claim

of a third party thereto. (13) Because his honor erred in holding that the facts stated in the affidavits could not, with due diligence, have been ascertained, whereas it is respectfully submitted that the record of the deed from O. A. Welch to P. T. Smith, reciting the conveyance from Preston Covington to O. A. Welch, and the open and notorious possession of P. T. Smith, were sufficient, at least, to put the parties upon the inquiry. (14) Because his honor erred in holding, as matter of fact, that a part of the land had been conveyed by one of the heirs of Peter T. Smith pending the controversy, whereas it is respectfully submitted that there is not a scintilla of evidence to sustain such finding. (15) Because his honor erred in holding that the commissioners in partition were ignorant of the conveyance from Preston Covington to P. T. Smith, whereas, it is respectfully submitted, there is not the slightest proof that the commissioners were themselves ignorant of the fact, and, on the contrary, it appears that one of the boundaries called for in the writ in partition was the land of P. T. Smith, and one of the commissioners owned land adjoining thereto. (16) Because, even admitting that the parties to the action were not aware of the facts set forth in the affidavits submitted, his honor erred in imputing like ignorance to the commissioners, when there is not an iota of testimony tending to establish such alleged ignorance on their part. (17) Because his honor erred in holding that the commissioners had made a mistake, whereas it is respectfully submitted that no such conclusion can be drawn from the alleged newly-discovered evidence submitted on the motion for a new trial, and there is no testimony tending to show such mistake on the part of the commissioners, but the same develops, if anything, only a mistake and disappointment on the part of the defendants. (18) Because his honor erred in holding that the mistake was made by the commissioners; whereas, it is respectfully submitted, the mistake, if any, was the mistake of the defendants and their attorneys, and was produced by the incompetency of the surveyor employed by them to divide the land for the purposes of sale, in accordance with the power granted in Judge Gary's order. (19) Because there is no testimony showing, or tending to show, that the commissioners made a mistake, or that they were guilty of fraud or corruption, and his honor erred in granting a new trial, when such proof was not submitted to him. (20) Because his honor erred in admitting in testimony the ex parte survey and the ex parte statements of the surveyor employed by the defendants."

T. W. Bouchier and Knox Livingston, for appellant. J. H. Hudson and H. H. Covington, for respondents.

POPE, J. This action for partition of land came on for trial before his honor, Judge

Ernest Gary, who rendered his decree on the 26th September, 1895. Defendant gave notice of appeal therefrom, but, pending said appeal, he made a motion before his honor, Judge Watts, for a new trial upon after-discovered evidence. This motion was granted by Judge Watts on 31st March, 1896, and from this order the plaintiff now appeals to this court, in 20 grounds. It will be proper that this decretal order of Judge Watts and plaintiff's exceptions thereto shall be included in the report of this case. The decree of Judge Watts fully states the history of this case, and the same need not be repeated in detail by us. The respondents, in their argument at the bar of this court, very properly group these 20 exceptions into 4 propositions: (1) That Judge Watts was without jurisdiction to grant the motion for a new trial; (2) that the alleged evidence for a new trial is immaterial; (3) that due diligence might have led the respondents to have discovered it at or before the first trial; (4) that the circuit judge erred in receiving in evidence an ex parte survey and the remarks of the surveyor indorsed on the plat.

Since the case of *Durant v. Philpot*, 16 S. C. 116, which was decided in the year 1881, and which has since been recognized, it seems to us a waste of time for counsel to inveigh against the practice of granting new trials in equity causes on after-discovered evidence, on motion therefor. The legislature has clothed circuit judges with the power to have and grant such matters. Section 195 of our Code, among other matters, provides: "The court may likewise, in its discretion, and upon such terms as may be just, allow an answer, \* \* \* and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from judgment, order, or other proceedings taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding." The language of Mr. Justice (now Chief Justice) McIver in *Durant v. Philpot*, supra, seems to have been very direct when he was discussing in that case (which was on the equity side of the court of common pleas) the question of the procedure to be employed in making to the court an application to be relieved against "a mistake, inadvertence, surprise, or excusable neglect in not producing at the first trial some highly-important, but newly-discovered, evidence, by way of motion, rather than by a petition for a rehearing, or by a bill of review." He thus stated the conclusion of this court: "It seems to us, however, that since the abolition of the court of equity and the requirement of the constitution, in section 3, art. 5, that justice shall be administered in a uniform mode of pleading, without distinction between law and equity, these modes of proceeding, by a petition for rehearing and by bill of review, have become inapplicable, and that now the same results can be obtained by motion under the

provisions of section 2, c. 105, p. 497, Rev. St." It does not affect the soundness of these views, so expressed, that the legislature has repealed section 2, c. 105, p. 497, Rev. St. for it will be observed that there was no provision in the repealed law relative to the form under which the desired relief was to be obtained, which was made the basis of this alternative of this court, but, on the contrary, it was bottomed on the charge wrought in the mode of pleading in our courts by section 3, art. 5, of the constitution of 1808. So, we find that in the case of *Hubbard v. Camperdown Mills*, 28 S. C. 581, 2 S. E. 576, this mode of procedure was adhered to. It seems to us that, independent and distinct from section 195 of the Code, a court of equity in this state, or rather a circuit judge presiding on the equity side of the court of common pleas, is invested with the power of granting new trials in such a cause without adopting the old process of a petition for rehearing on a bill of review. On the law side, such relief is granted on motion. Since the constitution has abolished the distinction between law and equity so far as pleadings are concerned, this result is almost necessary. What principle guides the court in granting the relief sought? In the language of Mr. Justice McIver, in *Durant v. Philpot*, supra, in answering the objection that one circuit judge has no authority to reverse and nullify the decision or decree of another circuit judge, as was done by the order granting a new trial in this instance, he thus states the principle: "It is quite manifest that Judge Mackey, in granting the motion for a new trial, does not undertake to reverse or nullify the decision or decree of Judge Thomson. The latter rested his decision solely upon the ground that the evidence, as presented to him, satisfied his mind that there was no agreement to assign the mortgage until after the debt secured by it had been paid by the mortgagor, and, therefore, that the assignment was a nullity, there being nothing to assign. Judge Mackey, without pretending to controvert or question the correctness of this conclusion of fact on the testimony before Judge Thomson, and without questioning the conclusion of law deduced therefrom,—indeed, admitting the correctness of the law laid down,—simply holds that the newly-discovered evidence would have a very important bearing upon the question of fact which was made the basis of the former decision, and would, probably, tend to induce a different conclusion, and grants the motion for a new trial in order that the parties may have the opportunity of introducing this newly-discovered evidence. He does not grant the motion because of any error committed by Judge Thomson, but solely because of the discovery, since the former trial, of certain evidence, which, in his judgment, was well calculated to influence the result, and show that the former decision was erroneous; not because of any fault or error in the judge who rendered the former decision, but because

of the absence of that full light which subsequent discoveries have enabled the parties to shed upon the questions of fact involved."

Now, in the case at bar, assuming for the present the existence of valid newly-discovered evidence, Judge Watts in no wise intends to infringe, nor does he infringe, upon the decree of Judge Ernest Gary so far as his conclusions of fact issuing from the testimony adduced before the latter, or his conclusions of law deduced therefrom, are concerned, but he virtually says: "Here is some newly-discovered evidence since that trial that, in my judgment, has a direct bearing upon the rights of the parties, and in my judgment, if this testimony had been before Judge Gary, it would have had a tendency to induce him to reach a different conclusion. If this testimony had been in hand in the first hearing, there would have been no excuse for the failure to have introduced it; but it has been discovered, after reasonable diligence used at the first hearing, since such hearing, and therefore I hold it must be given an opportunity for consideration; it having been brought to my attention by motion after due notice, accompanied by affidavits in support thereof." Let us go a step further, and see what this after-discovered testimony is, and what relation it bears to the issues in the case at bar. The complaint set out that the real property to be partitioned was to be divided amongst the parties so as to give the plaintiff one half thereof, and the remaining half to the defendants, and consisted of three tracts of land; one tract containing 60 acres, "more or less," known as the "Home Place"; one tract containing 60 acres, "more or less," cultivated in 1893 by Lewis Covington; and one other tract containing 212 acres, "more or less," bounded by lands of James McRae and others. The last tract is called the "Woodland Tract." The answer admitted this statement as to the tracts and acreage of each. When the writ of partition is found, these tracts, respectively, are said to contain "69 acres," "65 acres," and "212 acres." In the return of the commissioners to the writ of partition, these tracts, respectively, are stated to contain "69 acres," "65 acres," and "230 acres"; and they recommend that the widow receive the 69 acres, at a valuation of \$3,450, and that the 65 acres and 230 acres, which, in the aggregate, they value at \$3,980, be allowed to the defendants, to be sold for a partition among them. When Judge Gary was considering this return, these tracts were considered as 69 acres, 65 acres, and 230 acres. The objections urged against the confirmation of the return were: (1) That the homestead assigned to the plaintiff at \$3,450 should be assigned at \$4,140; (2) that the whole three tracts should have been sold, and the proceeds divided; (3) that it was error to attempt partition before sale. All these exceptions the circuit judge overruled, and confirmed the return. It should have been stated that the defendants were required by the return to pay

plaintiff \$265, to equalize the partition. Now, the evidence after discovered is that the tract of land which was returned by the commissioners as containing 230 acres in fact only contained 188 acres; that the fact that the intestate had in his lifetime sold the 42 acres off of the 230-acre tract was not discovered by the defendants until on the day of sale, a month after the decree; and that deed of the intestate by which he conveyed the 42 acres off of the 230 acres was not recorded in the office of the register of mesne conveyance for Marlboro county. When we recall that the commissioners in partition returned said tract as containing 230 acres, and placed value thereon equal to \$6 per acre if they valued this tract at \$1,380, and that it was in this way that defendants were made to appear to receive \$265 in value of lands more than the plaintiff received, and that this knowledge would have been made manifest by the intestate's deed for the 42 acres, of the existence of which the defendants were excusably ignorant until after the decree of Judge Gary, it does seem that Judge Watts was justified in rendering the decision that a new trial ought to be ordered, and he accordingly did so. We cannot sustain these exceptions up to this point, certainly.

We will now examine the second group of exceptions. The newly-discovered evidence is required to be subjected to the closest scrutiny by the circuit judge, for it is no light and commonplace matter to grant a new trial. On the contrary, it is a solemn and responsible act, and must only be done in those instances where such newly-discovered evidence was unknown to the party offering it at the first trial. This ignorance of its existence must not be the result of a want of reasonable diligence. The evidence in question must be material to the issues, and must be of such character as would, in all likelihood, change the result if established. Did the newly-discovered evidence comply with all these requisites? We think it did, for these reasons: We think this evidence was unknown to these defendants at the time of the first trial. The deed was unrecorded, and in the possession of others than parties to the suit. This deed took off 42 acres of land that entered into the estimate of the commissioners in partition, for they returned that tract, not as 188 acres, more or less, but absolutely, as 230 acres. It is true that this was an enlargement of the acreage, upon the estimate thereof in the pleadings and in the writ itself, and might have stimulated inquiry; but neither plaintiff nor defendant seems to have made the inquiry at that time. They and the court acted upon it as 230 acres. Now, 42 acres is merely the one-fifth part of the 230 acres, and it is idle to say that such a deficit is immaterial. By the estimate of the commissioners at \$6 per acre, it amounted to \$252, which amount was nearly sufficient to wipe out the \$265 which defendants were required to pay to the plaintiff for purposes

of equalization. It is at this point our doubts arise under the order of Judge Watts for a new trial. By its terms, such order requires that such new trial shall be "without prejudice to the titles of those who purchased lands at such sale, complied with the terms thereof, and received conveyances therefor." By the report of the clerk on sales, it seems that every purchaser has complied by paying his entire bid in cash by consent of the defendants, and each purchaser has received title, except that the purchaser of the 42 acres (that did not belong to the estate of the intestate) has been excused from paying and taking title. What practical advantage can accrue to the defendants under this order of the judge with its instructions? It seems clear to us that, by these acts of the defendants, they have taken it out of their power and that of the court (for the defendants did not appeal from the order of Judge Watts) to deal with the two tracts of land that had been assigned to them in this partition suit. Can they therefore interfere with the land assigned, in partition, to the plaintiff? We think not. So, therefore, it seems to us that, in equity,—and this is a suit in equity,—they should only be allowed on this new trial to show this 42 acres did not belong to the estate of the intestate, and that the commissioners estimated its value as they did the other four-fifths of the woodland tract of 230 acres, as they found its acreage to be; and that, when this is done, if these facts be established, a credit of \$252 be allowed on the \$265 allowed to the plaintiff to be paid by the defendants for the purposes of equalization. The decretal order of Judge Watts should be amended as modified to this extent.

The third and fourth divisions, under which we proposed to consider the appellant's exceptions, do not present any question that we have not already disposed of under what we have hereinbefore stated.

It is the judgment of this court that the order of Judge Watts granting a new trial be modified as herein required, but that if the appellant will remit the sum of \$252, so that the same shall be entered as a credit upon the sum of \$265 the defendants were ordered to pay her for equalization in partition, within 10 days after this judgment is remitted to the circuit court, then, and in that event, Judge Watts' order for a new trial is reversed.

(47 S. C. 279)

JENNINGS v. HARE et al.

(Supreme Court of South Carolina. July 22, 1896.)

INFANT—RESCISSON OF PURCHASE—PAYMENTS TO AND BY THIRD PERSONS.

1. On rescission by an infant of a purchase of land, she cannot, by reason of payments made by her to third persons for improvements thereon, claim any deduction from the rents for which she is liable.

2. Payments made by the husband of an infant from his own means on a purchase by the

infant do not give the infant, on rescinding the purchase, a claim for the money with which the payments were made.

Appeal from common pleas circuit court of Greenville county; Benet, Judge.

Action by L. I. Jennings against Florence S. Hare and W. C. Black. From a decree for plaintiff, defendant Hare appeals. Affirmed.

The following is the master's report:

"The master to whom it was referred to hear and determine the issues of law and fact raised by the pleadings in the above-stated case respectfully begs leave to report that he has held references, and taken the testimony herewith submitted. From the testimony the master finds that a short time prior to the 29th day of September, 1892, the defendant W. C. Black contracted with one John L. Hare, the husband of the defendant Florence S. Hare, for the sale to him of the lot of land described in the pleadings. Under the terms of this contract, Black was to convey to John L. Hare this lot of land for the sum of \$500, and to furnish to him the further sum of \$500, for the purpose of building a house thereon. This contract was made with the husband, who went into possession thereunder, and the wife's name was not mentioned in connection therewith till the deed was about to be executed. When it came to the execution of the deed, Hare requested Dr. Black to make the deed to his wife, which he did, on the 29th of September, 1892. On the same day, Mrs. Hare executed her mortgage to Dr. Black for the sum of \$1,000. \$500 of that sum was for the purchase money of the lot, and the remaining \$500 for advances that Dr. Black was to make for building a house thereon. Hare made the contract for the building, and attended to all the details in selecting and purchasing materials, procuring labor, etc. The bills for these various items were presented to Dr. Black from time to time, and paid by him till he had expended the sum of \$671.70, being \$171.70 in excess of the amount he had agreed to furnish under the contract. Dr. Black called the attention of Mr. Hare to this fact, and demanded an additional mortgage to cover this excess. Hare consented to this, and accordingly the mortgage of date December 22, 1892, was executed by Mrs. Hare. John L. Hare paid November 8, 1892, \$150; January 2, 1894, \$146; and December 1, 1894, \$100,—on the \$1,000 mortgage. These several sums, amounting in the whole to \$396, were paid by John L. Hare out of his own means. On the — day of May, 1895, the defendant assigned these notes and mortgages to the plaintiff, without recourse on him, but guaranteed that there was due on the \$1,000 note and mortgage at the time of the assignment the sum of \$776.98, and on the \$171 note and mortgage the sum of \$204.82. The defendant Florence S. Hare has been in possession of the premises described in the pleadings ever since the completion of the house, to wit, since about the

15th of November, 1892, and occupied the same as a residence. The rental value of this house and lot is \$9 per month. This will make the sum of \$307.80 the rental value of said premises from the day the defendant Florence S. Hare took possession till this date. John L. Hare paid Bramlett & Barnett, on account of material that went into the building in question, \$119.13, and one Thomas Butler, for work done on the same, \$18. The defendant Florence S. Hare is under the age of 21 years, and pleads infancy as a bar to the recovery of the plaintiff in this action. There is due on the two notes described in the pleadings, according to the guaranty of the defendant Black, to the plaintiff, the sum of \$1,005.63.

"The master concludes, as findings of law, that the defendant Florence S. Hare is entitled to have the contract entered into by her for the purchase of the property in question rescinded, and the deed and notes and mortgages executed for the purpose of carrying out that contract canceled, and to recover from the defendant W. C. Black the money paid to him on said purchase, subject to an accounting by her for the rent of said premises during the time she has occupied the same as hereinbefore stated. This being done, the account between the parties defendant stands as follows:

Paid by defendant Hare, November 8, 1892 .....	\$150 00
Interest to September 20, 1895.....	30 05
Paid by defendant Hare, January 2, 1894 .....	146 00
Interest to September 20, 1895.....	17 53
Paid by defendant Hare, December 1, 1894 .....	100 00
Interest to September 20, 1895.....	6 41
<b>Total .....</b>	<b>\$449 99</b>
Rent due by defendant Hare, November 15, 1893.....	\$108 00
Interest September 20, 1895.....	14 00
Rent due by defendant Hare, November 15, 1894.....	108 00
Interest September 20, 1895.....	6 44
Rent due by defendant Hare, September 20, 1895.....	91 50
<b>Balance .....</b>	<b>\$122 05</b>

"Thus it appears that there is due by the defendant Black to his co-defendant, upon a proper adjustment of the accounts between them, the sum of \$122.05, for which she is entitled to recover judgment against him with interest from this date, subject, however, to a discount for the rent of said premises at \$9 per month for such time as she may occupy the same after the date of this report. The master respectfully recommends that the defendant W. C. Black be required to pay his co-defendant, by a day certain, subject to the discount for rent above mentioned, the sum of \$122.05, with interest from date of this report, and that he be further required to pay the costs of this action; that, in the event he shall fail to pay the said sum of money as above required, then the premises in question be sold by the order of the court, and the

proceeds applied to the payment of said sum of money and costs as above recommended, and that the balance of the proceeds of said sale be applied to the debt due the plaintiff as hereinbefore reported; that, in the event the said balance shall not be sufficient to pay the plaintiff's debt, then the plaintiff do recover judgment against the defendant Black for the deficiency, provided such deficiency does not exceed the sum of \$122.05, with interest from this date."

Appellant's exceptions:

"(1) Because his honor, the presiding judge, erred in not holding that the defendant Florence S. Hare should be held to account for only such rents as were due to the amount furnished and contributed by the defendant W. C. Black to the property producing said rents, including the lot on which the house and improvements were put; and it appearing from the evidence that the house and lot and improvements altogether cost \$1,311.70, and that said W. C. Black contributed and furnished only \$1,174.57 of said amount, including the value and price of the lot, the said Florence S. Hare should have been held to account to him for only \$1,174.57—\$1,311.70, of \$9 per month, the rental value of said premises, the remaining costs of said building and improvements, to wit, \$137.13, having been paid by John L. Hare; and his honor erred in not holding that she should account for only \$1,174.57—\$1,311.70, of said rental value; and his honor erred in not holding that the amount of rent found by the master should have been reduced by \$137.13—\$1,311.70 thereof; and he erred in not deducting from the amount of rent found by the master, to wit, \$327.94, \$137.13—\$1,311.70 thereof, to wit, \$34.28, and thereby making balance due said Florence S. Hare on accounts of said payments made by her on the notes and mortgages mentioned in the complaint herein at the date of the master's report \$156.33; and he also erred in not holding that the amount of subsequently accruing rents for which said Florence S. Hare should account should be \$1,174.57—\$1,311.70, of \$9 per month. (2) Because his honor, the presiding judge, erred in sustaining the first exception of the plaintiff (respondent herein) to the master's report, and ordering that the proceeds of the sale of the premises ordered to be sold herein be first applied to the payment of the debt and costs of the plaintiff (respondent), and before the payment of the amount due the defendant Florence S. Hare on account of payments made by her on the notes and mortgages set forth in the complaint in this action, after deducting rents accrued and accruing during her occupancy of said premises. (3) Because his honor, the presiding judge, erred in not ordering that the proceeds of the sale of the premises ordered to be sold herein be first applied, after paying the master's fees and expenses of sale and any lien for taxes or assessments, to the payment of the amount due the de-

fendant Florence S. Hare on the payments made by her to the defendant W. C. Black on the notes and mortgages set forth in the complaint in this action, after deducting the rents of said premises therefrom accrued and subsequently accruing during the occupancy of said premises by said Florence S. Hare. (4) Because his honor, the presiding judge, erred in not ordering the defendant W. C. Black to pay the amount due the defendant Florence S. Hare on account of the payments she made on the notes and mortgages, after deducting rents accrued and accruing during her occupancy of said premises, by a day certain, and, if he did not pay the same by such specified day, that said premises be sold, and the proceeds of sale applied, first, to the payment of said amount and the costs of said Florence S. Hare, after paying the amount of the master's fees and expenses on such sale and any lien for taxes or assessments. (5) Because his honor, the presiding judge, erred in not holding that the said Florence S. Hare, having the title to said premises, and being in possession thereof, had the highest equity, as a mortgagee in possession, and was entitled to have the amount due her on account of the payments which she had made on said notes and mortgages, after deducting rents accrued and accruing during her occupancy of said premises, paid to her out of the proceeds of the sale of said premises, before paying the debt and costs of the plaintiff. (6) Because, even if his honor, the presiding judge, did not err in ordering the proceeds of said premises applied to the payment of the debt and costs of plaintiff before the payment of the amount due defendant Florence S. Hare, as aforesaid, it is respectfully submitted that he erred in not ordering that she have a personal judgment against the defendant W. C. Black for any deficiency remaining unpaid of said amount due her on account of payments made by her on said notes and mortgages, after deducting rents accrued and accruing during her occupancy of said premises, after exhausting the proceeds of the sale of said premises. (7) Because his honor, the presiding judge, erred in holding that as the plaintiff was a purchaser of the notes and mortgages set forth in the complaint in this action, without notice of any equitable lien of the defendant Florence S. Hare, that the proceeds of the sale of said premises should be first applied to the payment of the plaintiff's debt, in preference to said claim of the said defendant Hare; it being respectfully submitted that the plea of a purchase for valuable consideration without notice cannot prevail against the plea of infancy and the rights arising out of such plea when it is established."

Grounds on which respondent Black asks that the decree be sustained:

"(1) That the defendant Florence S. Hare has no right to recover of the defendant W. C. Black any of the payments made upon

the notes and mortgages referred to in the complaint, and has no interest in the money paid thereon; it appearing that the deed to her was executed by W. C. Black at the request of John L. Hare, with whom the said Black had previously made a verbal agreement for the sale of the said property, under which agreement the said John L. Hare had taken possession of the said premises; it appearing, further, that the payments made upon the said notes and mortgages were made by the said John L. Hare out of his own funds, and not out of any estate of the said Florence S. Hare. (2) That the said Florence S. Hare was entitled to recover no payment from the defendant W. C. Black, because, under the agreement of the said John L. Hare with said W. C. Black, the said Black had advanced a considerable amount of money to the said John L. Hare, and subsequently to the said Florence S. Hare, and any payments made by either of them to the said W. C. Black would be regarded simply as a return of the said money for these advances."

Shuman & Dean, for appellant. A. Blythe, for respondent Jennings. Haynsworth & Parker, for respondent W. C. Black.

GARY, J. This action was commenced on the 12th day of June, 1895, to foreclose two mortgages on the house and lot described in the complaint. The facts are fully stated in the report of the master, which will be set out in the report of the case, and it is only necessary to refer to it for a proper understanding of the questions raised by the exceptions. When the case was heard by his honor, Judge Benet, he overruled all the exceptions to the master's report, except the plaintiff's first exception, which was as follows: "Because the master, in said report, recommended that in case the premises in question are sold, as therein provided, that the sum of \$122.05 be paid to the defendant Florence S. Hare out of the proceeds of such sale, and balance applied to plaintiff's debt; whereas he should have recommended that as the plaintiff was a purchaser of said notes and mortgages, without notice of any equitable lien of the defendant Hare, that the proceeds of such sale should have been applied, first, to plaintiff's debt, in preference to the claim of the defendant Hare." After sustaining this exception, his honor, Judge Benet, ordered a sale of the premises, and concluded his order as follows: "That, out of the proceeds of said sale, the said master deduct the amount of his fees and expenses on said sale, and any lien for taxes or assessments, and that he then pay the plaintiff the amount found due him and the costs of this action; said sum to bear interest from the date of said report, and, if any balance should remain in his hands after such payments, that he do then pay the same to the defendant Florence S. Hare, or her attorney, or her legally appointed guardian. In the event the proceeds

of sale be insufficient to pay the debt of plaintiff, the plaintiff shall be entitled to no judgment against W. C. Black for such deficiency, and so much of the master's report as gives judgment for such deficiency be overruled." The defendant Florence S. Hare appealed from said decree, upon exceptions, which, together with the additional grounds upon which the respondent W. C. Black gave notice he would ask this court to sustain said decree, will be set out in the report of the case.

The exceptions raise substantially but three questions, to wit: (1) Was the circuit judge in error when he adopted the mode by which he ascertained the rental value of the premises? (2) Was the circuit judge in error when he decreed that the plaintiff's debt should be paid out of the proceeds of sale prior to the claim of the defendant Florence S. Hare? (3) Was the circuit judge in error in not decreeing that Florence S. Hare should have a personal judgment against W. C. Black for any deficiency remaining unpaid of her claim, after exhausting the proceeds of sale of said premises?

We will consider the questions raised by the exceptions in the order above stated, and proceed to a consideration of the first question. John L. Hare paid Bramlett & Barnett, on account of material that went into the building in question, \$119.13, and Thomas Butler for work done on the same, \$18; aggregating \$137.13. The appellant contends that as the house and lot and improvements altogether cost \$1,311.70, and W. C. Black only contributed \$1,174.57 of said amount, she should not be held to account for the full rental value of the premises, but only in the proportion which \$1,174.57 bears to \$1,311.70, and that the rental value should be reduced in the proportion which \$137.13 bears to \$1,311.70. When the defendant Florence S. Hare arrived at the age of maturity, she had the right either to confirm or rescind the agreement which she entered into with the defendant Black. She made her election to rescind, the effect of which was to relieve her of her obligations, and to vest the title to the house and lot in Black. Black did not receive any benefit from the payment to Bramlett & Barnett of the \$137.13 by John L. Hare, until Florence S. Hare, by making her election to rescind her agreement with Black, vested the title to the house and lot in Black. This was a voluntary act on her part, and she will not be allowed now to say that, when the agreement was rescinded, it did not have the effect of vesting title in Black, freed from all claims and equities touching the rental value of said property. The exceptions raising the first question are overruled.

We come next to a consideration of the second question. The master finds that the amounts received by the defendant Black, aggregating \$396, were paid by John L. Hare out of his own means. There is no exception before us raising a question as to this find-

ing, and it must therefore be accepted as true. If the money paid to Black had been property of Florence S. Hare, then this case would be governed by the principle established in *Scott v. Scott*, 29 S. C. 414, 7 S. E. 811, and her claim would have priority over that of the plaintiff in the distribution of the proceeds arising from the sale of said property. The payments made to Black by John L. Hare did not have the effect of vesting Florence S. Hare with the ownership of the money. The effect of the payments was to extinguish her indebtedness; but when she made her election by which the agreement was rescinded, and the parties, as far as possible, restored to the status quo, we do not see how she can set up a claim to the money with which the payments were made when it never belonged to her. Florence S. Hare, by her voluntary act, in rescinding the agreement, prevented herself from getting the benefit of payments made in her behalf by a third person with his own money. The exceptions raising the second question are also overruled.

The third question is disposed of by what has been said touching the second question, and the exceptions upon which it was predicated are likewise overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(47 S. C. 229)

**KIRVEN v. PINCKNEY et al.**

(Supreme Court of South Carolina. July 20, 1896.)

**EXECUTORY CONTRACT — TITLE — CLAIM AND DELIVERY.**

Though plaintiff, pursuant to contract, delivered a mare and a sum of money in exchange for another mare which he was to receive, but which was never delivered, he had not title under which to maintain claim and delivery for the recovery of the latter mare, as against one to whom it was subsequently sold.

Appeal from common pleas circuit court of Sumter county; Buchanan, Judge.

Action by James N. Kirven against Henry L. Pinckney and another to recover a certain mare. There was a judgment for plaintiff, and defendants appeal. Reversed.

Purdy & Reynolds, for appellants. Frasers & Cooper and Townsend & Floyd, for respondent.

**POPE, J.** This action was commenced in the court of common pleas for Sumter county, in this state, on the 21st day of December, 1895, and its object was to recover a mare and colt alleged to have been wrongfully detained from the plaintiff by the defendants, and for damages. It came on for trial before his honor, Judge Buchanan, and a jury. The verdict was for the plaintiff, and, after entry of judgment thereon, an appeal was taken therefrom. Quite a number of interesting questions were presented and argued before us; but we have concluded

that there is one all-controlling question here which we have concluded will render unnecessary the consideration of all the other matters embraced in the appeal. Indeed, when we settle this question, no other can be said to fairly arise in the record.

It seems that the plaintiff made an agreement with one Mr. Henry Tupper, of Charleston, in this state, which was formally embodied in this written agreement, to wit: "October 2d, 1894. This is to certify that J. N. Kirven and Henry Tupper have traded the following mares, Brown Girl and Daisy. J. N. Kirven to give H. Tupper Brown Girl and \$25.00 for Daisy. J. N. Kirven to pay freight on both mares. H. Tupper to raise the colt that Brown Girl is with, to the age of six months, and then give said colt to J. N. Kirven; and, if the colt is not sound at that time, H. Tupper is to pay J. N. Kirven \$100.00. Brown Girl is by Highland Red out of Worth by Black Chief. Brown Girl is in foal by Melville Chief (2353), due to foal on or about 7th March, 1895. In witness whereof, I have hereunto set my hand and seal, this 4th day of Sept., 1894. Henry Tupper [L. S.]" On the 8th day of October, 1894, this plaintiff shipped, by rail, Brown Girl to the order of Henry Tupper, and advised Tupper to send to him Daisy on the night of the same day. A letter from Tupper to Kirven, dated 8th October, 1894, admits the receipt from Kirven of a telegram to this effect on that same day, and expresses his regret at not being able to ship Daisy on that night, explaining his inability by reason of the mare being up town, but stating she should be shipped the next day. On the 9th day of October, 1894, when Tupper sent to the railroad authorities for the mare Brown Girl, his messenger returned with the information that she was sick. Thereupon he employed a veterinary surgeon (one McInness) to do what he could for her, but she died while in the car at Charleston. Mr. Tupper promptly notified Mr. Kirven of his loss, and advised Kirven to bring suit against the railroad for damages. Mr. Kirven, however, sent him a check for the \$25, dated 8th October, 1894, and insisted that Brown Girl was Mr. Tupper's loss. Mr. Tupper, however, denied this, and returned the check to Mr. Kirven.

This describes the attitude of the parties to each other. Mr. Tupper sold the mare Daisy to the defendant Henry L. Pinckney, Jr.; and Mr. Pinckney placed her in the keeping of the defendant Manly Boykin. The two last reside in Sumter county, where the mare Daisy is kept, who, by the way, has dropped a colt; so that now Mr. Kirven brings his suit for claim and delivery against Mr. Pinckney and Mr. Boykin for both the mare Daisy and her colt, but Mr. Tupper is not made a party to this suit.

One of the defenses set up by the defendant is that Daisy never became the

property of Mr. Kirven; that the agreement between Mr. Kirven and Mr. Tupper was only for an exchange of mares, but was never executed; and that the only remedy Mr. Kirven had was to sue Tupper for a breach of his contract; and that Kirven never owned or had a lien on the mare Daisy, and therefore the defendant Pinckney had a perfect right to buy her as he did. We cannot regard this as a sale of the mare Daisy to Mr. Kirven. The contract shows that it was to be an exchange of one mare for the other, with \$25 as "boot." This exchange was never consummated. If the contract was breached by Tupper, Kirven had his remedy by bringing his action against Tupper for such breach of his contract. We cannot view this contract as executed by its terms, so that Brown Girl was Tupper's property, and Daisy was the property of Kirven. Each had to deliver his mare to the other, respectively, before the rights of third parties could be affected. Whatever remedy Mr. Kirven has is against Mr. Tupper. The defendant, by his second request to charge, made this point; and the circuit judge refused to so charge. This was error. The defendant, on the same ground, sought a nonsuit. This was refused by the circuit judge, and thereby the circuit judge was again in error. We must therefore reverse the judgment, and direct that the complaint be dismissed. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remitted to the circuit court, with directions to that court to dismiss the complaint.

(99 Ga. 165)

## CLARK et al. v. HORN, Sheriff.

(Supreme Court of Georgia. June 12, 1896.)  
EXEMPTIONS—LEVY—REDELIVERY BOND—LIABILITIES.

Where exempted personality was levied on under the provisions of section 2023 of the Code, and the defendant, upon filing the counter affidavit therein provided for, gave to the levying officer a bond conditioned for the delivery of the property at the time and place of sale; if, upon the trial of the issue formed by the filing of such affidavit, the property should be found subject, *held*:

1. An order of court dismissing the counter affidavit and directing that the levy proceed was so far an adjudication that the property was subject as to render it obligatory upon the defendant and his surety to deliver the property to the officer, as stipulated in the bond, upon his readvertising the property for sale. *Williams v. Printing Co.* (decided at the last term) 25 S. E. 172.

2. Upon their failure so to do, the sheriff could maintain in his own name against the principal and surety an action upon the bond for the breach of the same.

(Syllabus by the Court.)

Error from superior court, Webster county; W. H. Fish, Judge.

J. L. Horn, sheriff of Webster county, brought suit against L. P. Clark, principal, and E. A. Clark, surety, upon a forthcoming

bond. Defendants demurred to the declaration, the demurrer was overruled, and they excepted. Affirmed.

The following is the official report:

The declaration alleged: "L. P. Clark, as principal, and E. A. Clark, as security, are indebted to petitioner \$450, principal, on a forthcoming bond, copy of which is attached. On November 20, 1893, petitioner, as sheriff of Webster county, by virtue of a fl. fa. from the superior court of said county in favor of the Bank of Richland v. G. D. Jones, J. D. Irwin, and L. P. Clark, levied on 100 bushels of corn, more or less; 100 bushels of cotton seed, more or less; 300 pounds seed cotton, more or less, ungathered; 800 bundles of fodder; a black mare mule, about nine years old, named 'Lizzie'; and a bay horse mule, about eight years old, named 'Fox,'—as the property of Louis P. Clark. On November 14, 1893, the president of the Bank of Richland made and delivered to petitioner an affidavit that the debt, the foundation of the fl. fa., was one from which the homestead is not exempt, being founded upon a contract in which defendants waived all right to homestead and exemption. On November 20, 1893, Louis P. Clark made and tendered to petitioner his counter affidavit, that the debt is one from which the homestead is exempt, and that the contract upon which the debt and fl. fa. is founded contained a waiver of homestead and exemption, but said waiver is void under the constitution and laws of this state. When Clark filed this affidavit, making the issue as above stated, the personality above mentioned was in the possession of petitioner, as sheriff, by virtue of said levy, and Clark entered into a bond with petitioner, as sheriff, in the sum of \$450, with E. A. Clark, as security thereon, the condition of the bond being: 'Should the said L. P. Clark deliver or cause to be delivered said property to said sheriff at the time and place of sale, provided that said property, upon the trial of said issue, be found subject to said fl. fa.,' then the bond to be void. Louis P. Clark thereupon took possession of the property under said bond. Petitioner, as sheriff, returned to the superior court of the county the issue as raised by said affidavit and levy, and at the April term, 1894, of said court, said issue came on to be heard, and on motion of plaintiff's counsel it was ordered by the court that the issue as interposed by L. P. Clark to the levy as made be dismissed at defendant's cost, and that the fl. fa. proceed. This judgment was rendered April 2, 1894. L. P. Clark, as principal, and E. A. Clark, as surety, on said bond, are liable thereon to petitioner, in that there has been a breach of the bond by L. P. Clark. Immediately after entering into the bond, L. P. Clark consumed and appropriated to his own use the cotton; the corn, the cotton seed, and the fodder levied on, and thus placed it out of his power to deliver or cause to be delivered said property, as by the conditions of the bond required, to

the sheriff, to be sold to satisfy the *fi. fa.* There has been a further breach of the bond in this: On May 7, 1894, petitioner, as sheriff, advertised all the property levied on in the newspaper where the official advertising of the county is done, offering said property for sale by virtue of the *fi. fa.* on the first Tuesday in June, 1894. Notwithstanding such advertisement, L. P. Clark failed, refused, and neglected to deliver or cause to be delivered said property, at the time and place of sale, to the sheriff of the county, to be sold in satisfaction of the *fi. fa.*, in accordance with the condition of the bond, though petitioner, on the day of sale, demanded the delivery of the property as per the conditions of the bond. Wherefore defendants became liable on the bond by reason of said several breaches, and thereby indebted to petitioner thereon \$450." The demurrer was general. Further, because the condition of the bond has never been broken by defendants, and they were not liable thereon; the contention of defendants being that, in contemplation of law, "there had been no trial of said issue"; that the judgment of the court, recited in the declaration, dismissing upon motion of plaintiff said issue, was not a trial of said issue; that the property mentioned in the bond has not been found subject, and, if so, had not been found subject upon the trial of said issue. Further, because plaintiff could not bring suit on the bond in his own name, and in his own right, and for his own use, but only for the use of another, he being only a nominal party.

S. R. Stevens and G. W. Stevens, for plaintiff in error. J. B. Hudson, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 143)

J. K. ORR SHOE CO. v. KIMBROUGH et al.  
(Supreme Court of Georgia. June 8, 1896.)

EQUITY—PLEADING—PARTIES—JURISDICTION.

1. Although an equitable petition may mention the name of a corporation, and contain a prayer for certain relief against it, such corporation is not a party to the petition when there is no prayer for process as to it.

2. Where an equitable petition did not pray for substantial relief against any party thereto who was a resident of the county in the superior court of which the petition was filed, and was not a petition for an injunction to stay pending proceedings of any kind in that county, that court was without jurisdiction of the case, and the petition should have been dismissed on demurrer.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Mrs. Kimbrough filed her petition for injunction, etc., against the Orr Shoe Company, the Fourth National Bank of Columbus, Kimbrough Bros., et al. The Orr Shoe Company,

for cause why temporary injunction should not be granted, and why the suit should not be maintained, demurred to the petition. The hearing was had at the appearance term of the court. The demurrer was overruled, and the injunction was granted. To both these rulings the Orr Shoe Company excepted. Reversed.

The following is the official report:

The petition alleged: The firm of Kimbrough Bros., composed of C. W., H. B., and W. K. Kimbrough, was engaged in merchandising in Talbotton in 1894, and had been for several years. While so engaged it became indebted to petitioner \$2,182 and to the Fourth National Bank \$2,000. To secure the payment of the indebtedness to the bank, the firm deposited as collateral security certain shares of stock, mentioned, of the value of \$4,000. In December, 1894, the firm sold and transferred said stock to petitioner, and she purchased it from the firm, in payment of their indebtedness to her, subject to the lien of the bank for its debt. The Orr Shoe Company, a creditor of the firm, sued them upon a debt to the March term, 1895, of Talbot superior court, and upon said suit obtained summons of garnishment, directed to the bank, returnable to the May term, 1895, of Muscogee superior court, and to the People's Bank of Talbotton, returnable to the March term, 1895, of Talbot superior court. At said May term the Fourth National Bank filed its answer, and the Orr Shoe Company filed a traverse thereto, copies of which are attached. See the report in the case of Kimbrough Brothers v. J. K. Orr Shoe Co. et al. at this term. At said May term the court, upon the motion of the Orr Shoe Company, made an order directing the sale of the stock and payment of the bank's debt and expenses of sale, and that the balance be retained in the hands of Blanchard, who was by the order appointed commissioner, to be held subject to further order. Copy of said order is attached. Blanchard is the president of the Fourth National Bank. Petitioner is ready and willing, and hereby offers, to pay the indebtedness of Kimbrough Bros. to said bank which the stock was deposited as collateral to secure. Kimbrough Bros. are insolvent. Acting under said order, Blanchard has advertised the stock for sale, and, unless restrained, will proceed to sell it, and petitioner will thereby lose her said property. She prayed that she be decreed to pay to the Fourth National Bank the indebtedness to it, that upon such payment it be decreed to surrender to her the stock, that the shoe company be enjoined from proceeding to have the stock sold, that Blanchard be enjoined from selling the stock, that the People's Bank be decreed to transfer to her said stock upon its books, for process, and general relief. The demurrer was upon the following grounds: (1) It appears from the petition that the superior court of Talbot county,

wherein the petition was filed, has no jurisdiction to afford the relief sought, inasmuch as defendants Blanchard, the Fourth National Bank, and the shoe company, the principal defendants against whom relief is prayed, reside in Muscogee county. (2) Petitioner seeks in the superior court of Talbot county to enjoin proceedings in the superior court of Muscogee county. (3) It appears from the petition that the garnishment proceeding is pending in the superior court of Muscogee county, and, if plaintiff is the owner of the property in the hands of the garnishee, her remedy is by claim or other proceedings in Muscogee superior court. (4) Because process is prayed only as to Kimbrough Bros., of Talbot county, against whom no relief is sought or can be sought, and the other defendants, against whom process is prayed and relief sought, to wit, the shoe company, Blanchard, and the Fourth National Bank, all reside in Muscogee county, and are parties to the garnishment proceeding now pending there. (5) Because there is no equity in the petition. The hearing for injunction was upon the petition and demurrer alone.

Brannon, Hatcher & Martin, for plaintiff in error. C. E. Battle, Persons & Son, C. J. Thornton, and J. H. Worrill, for defendants in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 242)

# HAWKINSVILLE BANK & TRUST CO. v. WALKER.

(Supreme Court of Georgia. July 13, 1896.)

REVIEW—RULING ON EVIDENCE—CONVEYANCE TO WIFE—FRAUD—CONSIDERATION.

1. This court will not reverse a trial judge for refusing to allow certain questions to a witness to be answered, when it does not appear what testimony was thereby sought to be elicited.

2. Mere inadequacy of consideration in a deed from a husband to his wife, even if he were insolvent at the time of its execution, will not of itself alone avoid the deed at the instance of creditors, if there was no intention to hinder, delay, or defraud them. The inadequacy of consideration, if gross, would be a badge of fraud, and might be so gross, when combined with other circumstances, as to amount to proof of actual fraud.

3. Although the consideration expressed in a deed to realty from a husband to his wife may be so grossly inadequate as to suggest fraud, yet, if it appears that the property, when originally purchased by and conveyed to the husband, was paid for with the wife's money, the deed from him to her may be upheld as bona fide.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. O. Smith, Judge.

Action by the Hawkinsville Bank & Trust Company against S. D. Walker. On levy of execution, Susanna Walker, his wife, inter-

posed a claim. Verdict for claimant, and plaintiff brings error. Affirmed.

The following is the official report:

An execution against S. D. Walker, from a judgment of April 12, 1894, was levied on a house in which he lives, with the lot on which it is erected, in the town of Abbeville. A claim to the property was interposed by his wife. It appeared that at the date of the levy, June 4, 1894, both she and her husband were living in the house levied on. She relied upon a deed from her husband, dated April 27, 1892, and recorded March 25, 1895, conveying the property in question for the expressed consideration of \$340. Her husband testified: "The property levied on is a part of that described in the deed. I conveyed it to my wife of the day of the deed, and she paid me \$340 in money. I sold her the place because I needed the money. I did not try to sell it to any one else. Before I sold it to her, I bargained one-half acre in one corner to Stubbs for \$300. He was to pay by a certain day, and, he not doing so, I would not let him have the land. I offered him \$25 to cancel the trade we had agreed to. The land bargained to him did not have the dwelling house on it, and was about a quarter of the land I sold to my wife. I built the dwelling house, and it cost me over \$1,000, besides the fences and outhouses. I built before the sale to my wife. Do not know what the place is worth. Would like to get \$2,000 out of it. It was my wife's money that first paid for the land when I bought. I did not notify the parties from whom I bought, but bought in my own name. Did not notify plaintiffs of this fact when my indebtedness to them was created, nor afterwards." For plaintiffs, it appeared that the debt on which the judgment is founded was made in February, 1890, and that the property in question was worth about \$1,500 at the time it was conveyed to claimant, and is now worth about \$2,000. Verdict was rendered for the claimant, and plaintiff's motion for a new trial was overruled. The grounds of the motion are: That the verdict is contrary to law and evidence, and that the court erred in refusing to allow plaintiff's counsel to ask Walker, as a witness, the following questions: "When you conveyed the land described in the deed in evidence to your wife, did you own any other real estate?" "When you conveyed the land described in the deed in evidence to your wife, did you claim any other real estate?" "When you conveyed to your wife the land described in the deed in evidence, did you not at the same time sell her the hotel property across the street?" "When you made to your wife the deed in evidence, did you not at the same time, and for the same identical consideration, sell her the hotel property across the street?" "At the time you made the deed in evidence to your wife, did you claim any other property?" "At the time you made the deed

in evidence to your wife, did you own any other property?" Also, that the court erred in not charging the jury, though not so requested, that gross inadequacy of consideration in a deed from a husband to his wife is a badge of fraud in a contest between a creditor of the husband whose debt was created prior to the date of the deed to the wife. Also, that the court erred in charging: "I charge you that if you find that the consideration of the deed from the defendant in *fi. fa.* to the claimant was grossly inadequate, before you would be authorized to find a verdict in favor of the plaintiffs upon that ground, you must further find from the evidence that the intention of the defendant in *fi. fa.* was to hinder, delay, and defraud creditors, and that he (defendant) was insolvent at the time."

Hal Lawson, for plaintiff in error. Williams & Land, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 183)

BUCK et al. v. BEACH et al.

SAME v. NICHOLLS MANUFACT'G CO.

(Supreme Court of Georgia. June 18, 1896.)

PRELIMINARY INJUNCTION—CONFLICTING EVIDENCE.

The evidence being conflicting, and the effect of the order passed by the judge being to preserve the existing status, and protect all of the contending parties in their rights until the same could be finally passed upon and determined by a jury there was no abuse of discretion in denying the prayers for injunction respectively made by the parties on both sides in case bonds should be given as by such order required, nor in ordering the writ of injunction to issue against such of the parties as failed to give bond.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Actions by Buck & Downing against A. T. Beach & Co., and by the same plaintiffs against the Nicholls Manufacturing Company. From an order refusing to enjoin defendants, and conditionally enjoining plaintiffs, plaintiffs bring error. Affirmed.

The following is the official report:

Buck & Downing brought their petition to restrain A. T. & W. W. Beach from boxing and working the timber suitable for turpentine purposes on lot of land No. 424 in the Sixth district of Coffee county, and removing therefrom the gum, scrape, etc. Defendants set up that their firm was known as A. T. Beach & Co., and was composed of A. T. Beach, W. W. Beach, and the Georgia Pine Investment & Manufacturing Company; and that said last-named company was the true and lawful owner of all the timber on the land suitable for turpentine purposes, and authorized these defendants to use the same as they are doing; and prayed that plaintiffs be re-

strained from cutting, boxing, or interfering with the timber. Plaintiffs amended by alleging that the partnership made defendant to the petition was composed of those described in the original petition, and likewise the Georgia Pine Investment & Manufacturing Company. Upon the hearing, the judge below ordered that upon each of the parties plaintiff and defendant entering into a bond of \$500 each, conditioned to pay the successful party all damages and costs recovered on final trial, thereupon each of said parties be authorized to continue to work the boxes in the timber on the land, cut by each of them, respectively, for turpentine purposes, and, in default of making such bond, that the parties so defaulting be enjoined from working said boxes until the final trial and further order. To this decision, refusing to enjoin defendants, and conditionally enjoining plaintiffs, plaintiffs excepted. The facts of this case are the same as in that of the same plaintiffs against the Nicholls Manufacturing Company. Upon the hearing, plaintiffs put in evidence: Deed from E. H. to J. P. Moore to lots 423 and 424, Sixth district of Coffee county, dated June 7, 1881, consideration \$200, recorded November 24, 1895. Also, lease for turpentine purposes to the pine timber upon the same lots by E. H. and J. P. Moore to J. M. Ricketson and S. L. Tyson, April 27, 1889, consideration \$500, recorded April 13, 1892. Transfers of said lease, for a valuable consideration, from Ricketson and Tyson to Stokes & Co., July 15, 1889; from Stokes & Co. to R. V. Covington, May 18, 1893; and from R. V. Covington to Buck & Downing, January 8, 1896. Also, warranty deed from Stokes & Co. to D. K. Coleman, conveying the pine timber on the same land, consideration \$2,300, date not given. Also, transfer of said lease from D. K. Coleman to Buck & Downing for a valuable consideration, February 26, 1894. Also, evidence to the following effect: In 1881, J. P. Moore bought in good faith, and for a valuable consideration, lots 423 and 424 in the Sixth district of Coffee county, and took "a title" to the same; that under said title, and verily believing it to be the genuine title to the land, he went upon the land, and in 1881 cleared a field of several acres, part of which was on one lot and part on the other, and on lot 424, near the line of the two lots, erected a dwelling house; that said Moore has had the field so cleared cultivated under his direction every year since 1881, and has exercised the rights of such ownership over said two lots continuously, without in any manner being molested; that in 18— he leased the timber for turpentine on said lots to Stokes & Co.; that his (Moore's) possession is the only possession of the land; that the representative of Buck & Downing entered upon both lots on October 21, 1895, and was engaged in boxing the pine timber thereon at the date of the alleged trespass by claimants, and had been so engaged for five weeks before, and it was quiet and acquiesced in. Defendants put in evidence:

Plat and grant from the state to Levi Campbell; deed from Levi Campbell to W. M. Johnson; and deed from W. M. Johnson to F. M. Scott. Also, deed dated September 1, 1878, from F. M. Scott to John Dykes, consideration \$450, conveying said lots, recorded January 16, 1891. Also, deed dated December 4, 1889, from John Dykes to Waycross Lumber Company, to said lots, consideration \$500, recorded January 6, 1890. It is stated in the bill of exceptions that the foregoing deeds were attacked upon their appearance for forgery, but what was the nature of their appearance is not indicated. Defendants introduced, also: Lease from the Waycross Lumber Company to Ellis, Young & Co., January 4, 1889, leasing timber for turpentine purposes on said lots; and similar lease from Ellis, Young & Co. to the Georgia Pine Investment & Manufacturing Company, dated November 13, 1890. Also, evidence to the following effect: Some 10 or 12 years ago, Joseph Moore built a small log house on the land, and inclosed  $1\frac{1}{2}$  acres by a fence. Since that time there have been no additional inclosures. The premises thus located have been occupied for a few months, respectively, by four persons (named), up to about 1893, since which time they have been vacant and unused by any one. Said lots of land have never been occupied or continuously in the possession of any one for the full period of 7 years. In 1891 the Georgia Pine Investment & Manufacturing Company had built a house on lot 423, and the same was torn down, possibly by Joseph Moore. No person has been in possession of or occupied either of the lots for any length of time since 1893, until the present parties litigating commenced boxing the same for turpentine purposes. Said lots have never been regarded by any one in the community in which they are located as improved lots, but at all times as wild and unimproved. Up to January 10, 1896 (about the time of the hearing), 22,896 turpentine boxes had been cut by Beach & Co. on lot 424; and up to January 11, 1896, 19,964 had been cut on lot 423. While Buck & Downing have also cut boxes on said lots, there is no difficulty in distinguishing those cut by defendants from those cut by Buck & Downing.

Quincey & McDonald and Toomer & Reynolds, for plaintiffs in error. John C. McDonald, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 62)

GAMMAGE et al. v. ATLANTA & W. P. R. CO.

(Supreme Court of Georgia. March 11, 1896.)  
INJURY TO PERSON ON TRACK — PRESUMPTIONS —  
NONSUIT.

There being evidence to warrant the jury in finding that the homicide, for which the

plaintiffs were legally entitled to sue, was caused by the running of the defendant's train, this evidence, in connection with the legal presumption of negligence against the company imposed by section 3033 of the Code, was sufficient to carry the case to the jury, unless that presumption was fully rebutted by other evidence. The defendant having introduced no evidence at all, and it not appearing from the evidence for the plaintiffs that this presumption was in all respects completely rebutted, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Arthur M. Gammage and others against the Atlanta & West Point Railroad Company. Judgment of nonsuit, and plaintiffs bring error. Reversed.

Goodwin & Westmoreland, for plaintiffs in error. Dorsey, Brewster & Howell, for defendant in error.

LUMPKIN, J. While it was not shown with absolute certainty that the deceased was killed by the defendant's train, there was ample evidence to warrant the jury in finding that such was the fact. This being so, and the plaintiffs having a legal right to sue for the homicide of their father, they were, in view of the presumption of negligence arising against the company under section 3033 of the Code, entitled to have their case passed upon by the jury, unless there were other facts in evidence by which the legal presumption was fully rebutted. There is no law requiring a railroad company to introduce evidence of its own for the purpose of overcoming the presumption of negligence imposed upon it by law. It may rely solely upon the evidence introduced by the plaintiff, and, if that evidence does remove the presumption, it will not be necessary for the company to offer any further defense. In the present case the defendant introduced no evidence at all, but stood upon the proposition that the evidence for the plaintiffs affirmatively vindicated the company's diligence, and demonstrated its nonliability.

It appears from the testimony that the deceased came to his death "upon a dark, drizzling, rainy night," at a point on the railroad track which was a considerable distance from any public crossing; and that upon such a night a good headlight would not disclose an object on the track at a greater distance than from 50 to 75 yards. The train by which the deceased was presumably killed was running between 25 and 30 miles an hour. There are at least two particulars in which the jury would have been warranted in finding that the company was wanting in the proper diligence. It does not affirmatively appear that the locomotive was in fact supplied with a lighted headlight, and the evidence does not show that the train, when running at the rate of speed testified to, could not have been stopped or its speed so reduced within the above-mentioned distance as to have prevented the homicide. Whether there was or was not any duty of looking out for persons who might happen

to be on the track at the place where the homicide occurred, it was certainly incumbent on the company's servants in charge of the train to stop it, if possible, after discovering the deceased in his buggy in front of the locomotive. The evidence does not negative the inference that he was so discovered as soon as the locomotive approached within a distance of 75 yards of him. With a headlight, the evidence shows he might have been seen for that distance; and if in fact seen, and it was possible either to stop the train, or to so reduce its speed as to avoid the collision entirely or to render the consequences of the collision less disastrous, the company's servants were negligent in omitting so to do. If, as matter of fact, it was impossible, within the distance stated, either to stop the train or to so check its speed as to prevent a fatal collision, the presence or absence of the headlight would seem to be immaterial; but, on the theory that its light would disclose the presence of the deceased on the track in time to enable the company's servants to avoid injuring him, the failure to have a lighted headlight would be negligence.

From the foregoing, it will be seen that the plaintiffs' evidence did not make out a case of complete diligence on the part of the railroad company. Morally speaking, we might be at liberty to presume that the locomotive was supplied with a headlight, and also that within a distance of 75 yards the "cannon-ball" train could have been stopped or its speed appreciably reduced. In all probability, this was the real truth of the matter, but we cannot judicially so assume, and are constrained to send the case back, in order that these questions may be passed upon by the jury.

The above expresses the views entertained by all the members of the court. In our consideration upon this case, two other questions were discussed. They were (1) whether or not the company's servants were under any duty of looking out for human beings upon its track at the point where the homicide occurred; and (2) if not, whether, in the absence of actual knowledge of the presence of the deceased upon the track in a situation of peril, the company, relatively to him, was under any duty of checking or regulating the speed of its trains. As it was not absolutely necessary to definitely decide these questions, and we were not entirely agreed in our views concerning the same, they are left open, as it may transpire that a full development of all the facts will eliminate both questions from the case. Judgment reversed.

ATKINSON, J. (concurring). I think the court reached a correct conclusion in this case, but inasmuch as the opinion seems to place the judgment of reversal upon special grounds, leaving out of consideration other theories upon which, according to my understanding of the law, the plaintiffs might be entitled to recover, independently of the special grounds

referred to, I deem it my duty to state the considerations which influenced me to the conclusion reached, lest, perchance, my silence might be construed into an acquiescence in a judgment based upon reasoning which seems to negative the right of the plaintiffs to recover upon such theories.

The plaintiffs brought an action for the homicide of their father, and, upon the conclusion of the evidence, a nonsuit was awarded. To a correct understanding of the questions made in the case, it is necessary that an outline of the testimony be given. It appears from the evidence that the person for whose homicide this action was brought was killed under the following circumstances: He lived near the city of Atlanta. His route to his home from the city led across the track of the defendant company within and very near the corporate limits of the city, at a point where the track of the Central Railroad Company runs parallel to that of the defendant, both companies using in common the two tracks,—one for ingress to, and the other for egress from, the city. On the afternoon of the homicide, the deceased was in Atlanta, and was last seen alive at about 4 or half past 4 o'clock in the city. He was driving a horse attached to a buggy. He was next seen lying dead upon the front of an engine of the defendant, about 1,100 yards, in the direction of the city, from the point where the road to his home crosses the track of the defendant company. On the next morning, the horse he was driving was brought home with the harness and shafts of the buggy hung to him. Upon investigation on the morning following the night of the homicide, traces of blood were seen leading from the point where the body of the deceased was first found upon the engine of the defendant, to a point on the line of its road about 500 yards distant from and in the direction of the crossing above referred to. At this point, and for some distance between the point where the body was found and the point where traces of blood were first discovered, fragments of the buggy of the deceased were found scattered along the railroad track. From the point where the blood was first discovered, back to the public crossing (a distance of about 600 yards) were seen the tracks of the horse driven by the deceased, which indicated that the animal was running at a high rate of speed; the buggy, as shown by its tracks, being sometimes on and sometimes off the track of the defendant company. At the crossing above referred to, which was a public crossing, and much frequented by travelers, were seen the tracks of the horse and buggy, as they were driven on the crossing from the direction of Atlanta, leading towards the home of the deceased. As the horse was about to cross the track of one of the roads, its tracks indicated that it had suddenly become frightened, and started off down the line of the defendant's road in the direction where the body of the deceased was found; and, according to the testimony of

the witnesses who examined the scene, the horse was running at a high rate of speed, estimated to be as much as a mile in three minutes, ultimately leaving the track at about the point where traces of blood first showed on the ties. For a distance of about 500 yards before reaching the public crossing above mentioned, the track of the defendant company is straight. From the crossing in the direction of the city of Atlanta, there is a curve extending for about 1,600 feet. The deceased was taken off of the engine of the defendant about 8 o'clock at night. It was cloudy and drizzly. The train was running at a speed of about 25 or 30 miles an hour. It was shown that, with a good headlight on the engine, an object could be seen on such a night about 50 or 75 yards. No evidence was submitted showing that the servants of the defendant company did not see the deceased, or could not have seen him by the exercise of ordinary care, in time to prevent his homicide. There was no evidence showing that they made the slightest effort to avoid killing the deceased; no evidence that they complied with any of the statutory provisions in regard to blowing the whistle and checking the engine before reaching the public crossing at which the horse of the deceased began to run. There was evidence showing the value of the life of the deceased, and the right of the plaintiffs to recover.

The judgment for nonsuit appears from the record to have been based upon the proposition that, the homicide occurring under the circumstances above detailed, the defendant company was not liable. That judgment this court reverses. My brethren seem to place their judgment of reversal upon the ground that the evidence does not negative the inference that the deceased was discovered when the locomotive approached within 75 yards of him, and if within that distance the train could have been stopped, and was not, the plaintiffs could recover; intimating that with evidence showing that a headlight was burning, and that the train could not have been stopped within the distance stated, the judgment of nonsuit would have been proper. To this conclusion I cannot give my assent. According to the view I take of the law, the judgment of the court should be placed upon the broad ground that, with the omitted evidence before the jury, it would still be a question of fact as to whether the defendant's servants exercised, with respect to the deceased, in view of his position, such ordinary and reasonable care as the law enjoins upon it. That the deceased was killed by the engine of the defendant, no candid mind, under the evidence submitted, can seriously question. At all events, a verdict finding that such was the fact would be supported by the overwhelming weight of the evidence. This fact ascertained, the law raises the presumption of negligence, from the consequences of which the defendant can only escape by

showing that its servants were in the exercise of ordinary care, or, they being negligent, the deceased, by the exercise of ordinary care, could have avoided the consequences of their neglect. In either event the question was one of fact for a jury. There is no law which requires that locomotives of railroad companies should be equipped with headlights, and no law which declares that the omission to have them is negligence, or that having them relieves railroad companies from liability for injuries inflicted by its employes. Neither this court nor any other has power to judicially declare upon this question of fact that the absence of a headlight proves negligence, or its presence proves diligence in favor of the company. The maintenance of a headlight may or may not be a necessary precaution, as a jury, under all the circumstances of a given case, might consider its absence negligence or its presence diligence. The fact that the engine had no headlight could not be a circumstance even as showing negligence, unless the servants and agents of the company were under a duty to look ahead to prevent injury to persons or property which might be upon the track; and to insist upon the headlight as a necessary and indispensable precautionary measure involves the admission that such particular duty rests upon the company, for certainly the omission to have the facilities of seeing could not be construed to be negligence, when the omission to see would not be. In other words, if they are under no duty to look, they are under no duty to furnish the means of seeing. It therefore is only upon the theory that the defendant's servants are bound to look ahead that the omission to have a headlight could be regarded as negligence. Moreover, unless it be admitted that the exercise of ordinary care involved keeping a lookout,—and this latter proposition the majority of the court seem to doubt,—I cannot understand from whence my brethren draw the inference that the deceased would have been discovered when the headlight came within 75 yards of him. This inference, if one of fact, I submit, with the utmost deference, this court has no right to draw against the company. That should have been left to the jury. If an inference of law, it can only arise from the presumption that the defendant's servants were on the lookout; and this presumption does not arise except upon supposition that it was their duty to be on the further lookout, and upon the further presumption that, inasmuch as every one is presumed to do his duty, the contrary will not be presumed. The presumptions thus indulged are all in favor of, while the law says they shall be against, the company. In order to uphold the judgment on the line adopted by the majority, we must presume that the defendant's servants were diligent; that they were on the lookout to prevent inflicting injuries, and were only prevented from doing so because of the absence

of a headlight. The law, on the contrary, presumes that they were negligent; that they were not on the lookout; that they took no precaution to prevent the infliction of the injuries resulting in the death of the deceased. These considerations lead me to doubt the soundness of the reasons assigned by the majority for the conclusion reached by the court, and I prefer to place my own judgment upon the broader ground that even if, as opposed to the doctrine of the maxim, "*Sic utere tuo ut alienum non laedas*," it could be considered doubtful whether the defendant company owed the deceased the duty of ordinary care, in view of the nature of its business,—and such doubts I do not myself entertain,—inasmuch as the statute imputes negligence to the defendant whenever it is shown that a person has been injured by the running of its cars, it raises, by necessary implication in favor of such person, a duty of diligence upon the part of the defendant's servants, which can only be met by showing, in case of injury, that its servants were in the exercise of ordinary and reasonable care. Just what facts will amount to ordinary care, on the one hand, or negligence, upon the other, in the absence of a statute declaring what things shall constitute negligence and what acts shall constitute diligence, must always be a question of fact for a jury.

In the present case, upon this motion for nonsuit, the question as to whether the deceased was himself guilty of such negligence as would defeat a recovery cannot be considered, for there is ample evidence from which a jury could infer, as a matter of fact, that the deceased did not voluntarily expose himself to an open and unnecessary hazard. There is ample evidence from which a jury could find that he was carried against his will by a superior force (a runaway horse), into a situation of peril, from which he could not, even by the most extraordinary care, extricate himself; and it should have been left to a jury to say whether, being himself free from fault, the railroad company discharged to him the duty of ordinary care, imposed by statute, in his favor, upon the servants of the company. Of course, no fixed rule can be laid down by which to measure in each instance that amount of care which will meet the requirements of ordinary diligence as imposed by law. There may be localities where even slight attention to the matter of speed of engines or of keeping a lookout in advance would amount to ordinary care. In others the most constant vigilance may be required to vindicate the company against a charge of negligence. The question then is, was this a case in which due diligence required the company to keep a lookout? If so, was the locomotive equipped with a headlight, so as to enable the servants of the company to see ahead? If so, were they endeavoring to see? If not so endeavoring, could they have seen had they

been on the lookout? If they could see, ought to have seen, or did see, the deceased, what effort was made to prevent injury to him? The trial court, by its judgment of nonsuit, resolved all these questions of fact in favor of the defendant. Reviewing this judgment, I will not undertake to say, as a matter of law, that a lookout was necessary; that, in order to maintain a lookout, it was necessary to keep a headlight; that there was or was not a headlight upon the engine; that, with a headlight, the servants of the company ought to have seen, could have seen, or did see, the deceased in time to take precautionary measures to prevent injury to him. All such are questions of fact, and a jury should be allowed to say, as matter of fact, whether running a locomotive through a populous city, on a dark, drizzly night, at a rate of speed approximating 25 miles an hour, is negligence, and whether the company answers the statutory demand of diligence by simply proving that its servants did not in fact see the person involuntarily upon its track in time to prevent his homicide. If so, their railroad companies should, for their own protection, employ either blind engineers or men so indifferent to human life as that they will not try to see; otherwise, if they be under no duty to keep a lookout, and are only answerable for the homicide of a person so situated in the event its servants saw him in his perilous position in time to prevent his homicide, a humane engineer, with good eyesight, might chance to see such an unfortunate, but not in time to prevent his homicide, and thus expose the company to liability.

Aside from these considerations, there is yet another reason why this nonsuit should have been refused. There was evidence from which the jury could have inferred that the deceased, without warning of danger, drove upon this public crossing of the defendant's road; and that his horse, though ordinarily gentle, took fright at the approaching engine of the company; and that this occurred in consequence of a noncompliance by the company's servants with the statutory provision touching the blowing of whistle and checking the speed of its engine; and, the horse, becoming thus frightened, ran away, taking the track of the company, and continuing ahead of the approaching train, until the deceased was slain. There is no evidence of a compliance on this occasion with the statutory provisions above referred to, and there is evidence that the mad race of the frightened horse commenced, on the public crossing, where the deceased had a right to be, and where the company owed to him a special duty, with which it made no effort to comply. If, under these circumstances, the horse driven by the deceased became uncontrollable (and this can be inferred from the evidence, for it will not be presumed that the deceased voluntarily drove upon

the track of the defendant company, thus exposing himself to certain danger), and, being beyond the control of the deceased, ran away, taking the track of the approaching train, and under such circumstances the driver was overtaken and killed by the train, the primary negligence touching the special statutory duty to check should be treated as continuing, and as the proximate cause of the injury; and hence, whatever might have been the duty of the company's servants as to keeping a lookout at points other than public crossings, the injury inflicted under such circumstances would be referable to such primary negligence, and the company would be liable. To hold that the defendant company could excuse the homicide by bare proof that the killing actually occurred at a point other than a public crossing would allow the company to justify its conduct by proof of its own negligence. It would be equivalent to admitting as a good defense from the company this reply to a person injured: "You had a right to be on the public crossing. Had you been injured there, I would have been liable. Instead, however, of injuring you on the crossing, I have, by disregarding the statutory requirements established for your protection, caused your horse to run away, and have been thus enabled negligently to injure you at another point, where I am at liberty to treat you as a trespasser, and thus escape liability." Thus, under shelter of its own wrong, it would be permitted to seek protection; and this is contrary to one of the oldest and most universal and salutary principles of the law.

(47 S. C. 453)

**FARMERS' MUT. INS. ASS'N OF FLORENCE COUNTY v. BURCH.**

(Supreme Court of South Carolina. Aug. 10, 1896.)

**MUTUAL INSURANCE ASSOCIATION — MEMBERSHIP CONTRACT — LIEN — HOMESTEAD — MORTGAGE.**

1. A mutual insurance association, chartered with power to mutually insure the buildings of its members, "under such conditions as may be fixed" by its by-laws, under provisions that such buildings, with the assured's interest in the lands on which they stand, "shall be pledged to the said corporation, and the said corporation shall have a lien thereon against the insured, \* \* \* during the continuance of [the] insurance, as to all debts and liabilities contracted or incurred by said corporation subsequent to the passage of this act," has a lien on the property insured for a member's portion of its losses and expenses, which will prevent the assured from claiming a homestead against such claim.

2. The lien created by the statute and contract pursuant thereto is a voluntary pledge of specific property as a security for the satisfaction of an obligation, and is an equitable mortgage, within the proviso of Rev. St. § 2130, that no right of homestead shall be allowed in any property mortgaged either before or after the assignment, by any person whomsoever, as against the claim of the mortgagee.

Appeal from common pleas circuit court of Florence county; Buchanan, Judge.

Action by the Farmers' Mutual Insurance Association of Florence County against Thom-

as S. Burch to enforce an alleged lien for a pro rata portion of plaintiff's losses and expenses. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The complaint and answer, plaintiff's exhibit, decree and report of his honor, Judge Buchanan, and the exceptions follow:

**Amended Complaint.**

"The plaintiff, by its amended complaint, shows to the court:

"(1) That, at the times hereinafter mentioned, plaintiff was, and still is, a corporation duly organized and authorized under an act of the general assembly of this state, and the following provisions appear in said act of incorporation (Laws 1894, p. 1049):

"Sec. 2. That said corporation shall have the right to mutually insure the respective dwelling houses, barns and other buildings of its members, of Florence county, against loss by fire, wind or lightning, upon such terms and upon such conditions as may be fixed by the by-laws of the said corporation. It may sue and be sued in any court of this state, and may have a common seal."

"Sec. 4. That every member of said corporation shall be, and is hereby, bound and obliged to pay his, her or their portion of all losses and expenses accruing to said corporation, together with the right, title and interest of the assured to the lands on which such buildings or other property may stand, shall be pledged to the said corporation; and the said corporation shall have a lien thereon against the insured, his or her heirs, representatives and assigns, during the continuance of their insurance, as to all debts or liabilities contracted or incurred by said corporation subsequent to the passage of this act.

"Sec. 5. All property insured by said corporation shall be liable as herein provided until all outstanding losses shall have been paid, and until the owner thereof shall have withdrawn his insurance in the manner prescribed by the by-laws of said corporation."

"(2) That on 1st day of January, 1895, the plaintiff and the defendant duly entered into a contract, in writing, duly signed by the plaintiff and the insured [the defendant], whereby the defendant became a member of plaintiff association, and whereby the plaintiff insured the defendant against loss or damage by fire of the property hereafter described. A copy of the material portions of said contract of insurance is hereto attached as Exhibit A, and made a part of this amended complaint.

"(3) That it is provided in said contract of insurance and membership, and in consideration thereof, that the defendant 'does, on the 1st day of January, 1895, at 12 o'clock M., become a member of said company, assigning to the same the following described property: One frame, shingle-roof, one-story dwelling house, situated upon the following described real estate, to wit: All that tract of land, in county and state aforesaid, containing 77½ acres, bounded north by lands of estate of Sarah W.

Kennedy, east by lands of Mrs. M. D. Burch, south by lands of Mrs. M. D. Burch, and west by lands of Mrs. S. J. Harrell; also, 'three bedroom sets, and one set of parlor furniture, stove and kitchen furniture, being in and upon the house and premises, as above described;' also, 'one frame barn and contents, situated upon the above-described premises.' And the said plaintiff insured, as aforesaid, the above-described property to the amount of \$700, as will more fully appear by reference to said policy, hereto attached, and made part of this complaint.

"(4) That in said contract of insurance the defendant agreed to bear his pro rata portion of all expenses and losses sustained by the members of this association on account of loss or damage of property that has been assigned to this association by fire, \* \* \* and likewise the said association shall pay to the insured, within thirty days after the treasurer has given notice of assessment, all damages to the property described in said insurance contract.

"(5) That afterwards Mrs. M. A. Anderson, who was a member of said association, sustained loss by fire on her dwelling house, insured by plaintiff association, and which had been assigned to plaintiff, as aforesaid, to the extent of \$320; and D. H. Mixon, likewise a member of said association, sustained loss by fire on his dwelling house, insured by plaintiff, and which property had been assigned to plaintiff, as aforesaid, to the extent of \$35; and H. N. Mixson, likewise a member of said association, sustained loss by fire on her dwelling house, insured by plaintiff, and which property had been assigned to plaintiff, as aforesaid, to the extent of \$125; and John Chisholm, likewise a member of said association, sustained loss by fire on his dwelling house, insured by plaintiff, and which property had been assigned to plaintiff, as aforesaid, to the extent of \$500. And plaintiff further alleges that all of said losses were duly adjusted by plaintiff association at the respective sums as aforesaid.

"(6) That the defendant's pro rata portion of said losses and expenses, under the terms of the policy or contract, set out in this complaint, was duly fixed and assessed at the sum of \$3.50; and the defendant was duly notified of said assessment, but he has failed and refuses to pay the same, although long since due.

"Wherefore, the plaintiff prays judgment that the said lien be enforced by this court; that the personal property and the real property (if so much be necessary) be sold, and the proceeds applied to the payment of the costs of this action, then to the payment of the said sum claimed to be due; and for such other and further relief as to the court may seem just and equitable."

#### Exhibit A (Policy).

"Policy of the Farmers' Mutual Insurance Association of Florence County, South Carolina.

"This agreement, this day entered into between Thomas S. Burck, of Florence, S. C.

(who is called the insured), and the Farmers' Mutual Insurance Association of Florence County, whereby it is agreed: (1) That the insured shall bear his pro rata portion of all expenses and losses sustained by the members of this association on account of loss or damage of property that has been assigned to this association by fire, lightning, or wind storm of any description. Likewise, the said association shall pay to the insured, within thirty days after the treasurer has given notice of assessment, all damages to the property described below (provided the amount of insurance herein specified shall equal such loss), by fire, lightning, or wind storm of any description. \* \* \* (5) This policy shall remain in force until such a time as it may be canceled, either by the insured or the association, as provided in this policy, or the by-laws of this association. \* \* \* In consideration of the above, the insured does, on the 1st day of January, in the year 1895, at 12 o'clock, become a member of said company, assigning to the same the following described property: One frame, shingle-roof, one-story dwelling house, situated upon the following described real estate, to wit: All that tract of land, in county and state aforesaid, containing seventy-seven and one-half acres, bounded on the north by lands of estate of Sarah W. Kennedy, east by lands of Mrs. M. D. Burch, south by lands of Mrs. M. D. Burch, and west by lands of Mrs. S. J. Harrell, \$500; three bedroom sets and one set of parlor furniture, stove and kitchen furniture, being in and upon the house and premises as above described, \$100; one frame barn and contents, situated upon the above-described premises, \$100. Dated this 1st day of January, A. D. 1895. [Duly signed by insured and officers of company.]"

#### Amended Answer.

"The defendant above named, answering the amended complaint herein, admits the truth of the allegations set forth therein. The defendant, further answering the said amended complaint, alleges that he is the head of a family residing in the state; that the personal property described in the complaint is worth less than the sum of five hundred dollars; and that the real estate described therein is worth less than the sum of one thousand dollars; and that he owns no other property out of which his homestead exemption can be assigned. Wherefore the defendant prays that the said complaint be dismissed in so far as it prays for the sale of said property."

#### Decree.

"This cause came on before me at chambers, under an agreement of counsel filed in the cause, on the amended pleadings. All the facts alleged in the amended complaint and the answer are admitted to be true. The defendant raises the question that he is entitled to homestead exemptions, and resists

the sale of the property on that ground. I hold that the charter of the plaintiff and the agreement of insurance create a lien on the property insured and the real property upon which the same is situated. The claim of homestead cannot prevail against this lien or its enforcement. It is ordered and decreed that the property described in the complaint (if so much be necessary) be sold by the clerk of this court on sales-day in July, 1896," etc.

#### Report of the Circuit Judge.

"The matter herein presents a novel question in relation to the homestead exemption: Whether or not under the circumstances the benefit of the exemptions should be allowed the defendant. As in the previous judgment heretofore rendered, I hold that under such contract no such exemption should be allowed him. Upon the appeal, for the settlement of this question, certain facts contained in the record were admitted. No question was made as to the time at which the contract was made with reference to the incorporation of the plaintiff herein, but argument was made below upon the admitted facts of the complaint, answer, etc. In the decision on appeal, the case was decided upon the time of its contraction with reference to the incorporation of the plaintiff. It is proper for me to say that no such question was made before me, and the admitted facts for the settlement of this case contained no such issue before me. Certain facts were admitted, and judgment was rendered upon such admission. Let this report be made a part of the 'case' on appeal."

The defendant duly gave notice of intention to appeal to supreme court.

#### Exceptions.

"(1) That his honor erred in holding that the alleged contract of insurance is anything more than an attempted waiver of homestead. (2) That his honor erred in holding that the charter of the plaintiff creates such a lien on all the property described in the complaint as will defeat the claim of homestead. (3) That his honor erred in holding that the policy of insurance and charter of the plaintiff create such lien on said property, both real and personal, as will defeat the defendant's claim of homestead, when it is respectfully submitted that they create a lien, if any, on said personal property only. (4) That his honor erred in holding that the plaintiff had a lien on the land described in the complaint, when it appears that the policy or contract of insurance only purports to assign to plaintiff the dwelling house and the personal property insured. (5) That his honor erred in holding that the claim of homestead herein can be defeated in any other way than by aliening or mortgaging said property. (6) That his honor erred in ordering the sale of the property described in the complaint."

W. A. & H. A. Brunson, for appellant.  
Thompson & Kershaw, for respondent.

JONES, J. The sole question in this case is whether the plaintiff association, by its charter and the contract of insurance with the defendant, a member, has a lien on the property insured for the member's portion of the association's losses and expenses, which will prevent the defendant from claiming a homestead therein against such claim. This action was commenced January 1, 1896, to enforce an alleged lien for \$3.50 against certain real and personal property of the defendant, to pay his pro rata portion of the losses and expenses of the plaintiff corporation. On the former appeal in this case, the judgment of the circuit court was reversed (24 S. E. 503), on the ground solely that the alleged contract of insurance, according to the record before this court, antedated the act incorporating the plaintiff. This court, while reversing the judgment below on this point, surmising that there was some error in the pleadings below, gave leave to apply for amendment. In justice to Judge Buchanan, who heard the case, it should be said that the point upon which the case was reversed was not called to his attention or passed on by him. The pleadings having been amended, the case was again submitted to Judge Buchanan, who held that the charter of the plaintiff and the agreement of insurance create a lien on the property insured and the real property upon which the same is situated, and that the claim of homestead cannot prevail against this lien or its enforcement, and accordingly decreed for sale of the property, or so much as may be necessary to pay the claim, etc. The case was heard upon the facts stated in the complaint and answer, which, with the exhibit, the decree and report of his honor, and the exceptions, will be found in the report of this case. The exceptions raise practically the one question stated at the beginning of this opinion.

We hold with the circuit court on this question. The plaintiff is a mutual insurance association, chartered by the legislature of this state, December 18, 1894, with power to "mutually insure the respective dwelling houses, barns and other buildings of its members of Florence county against loss by fire, wind or lightning, upon such terms and under such conditions as may be fixed by the by-laws of said corporation." Section 4 of the act of incorporation, incorrectly set out in the complaint, is as follows: "That every member of said corporation shall be, and is hereby, bound to pay his, her or their portion of all losses and expenses accruing to said corporation; and all buildings and other property insured by and with this corporation, together with the right, title and interest of the assured to the lands on which such buildings or other property may stand, shall be pledged to the said corporation; and

the said corporation shall have a lien thereon against the insured, his or her heirs, representatives and assigns, during the continuance of their insurance, as to all debts or liabilities contracted or incurred by said corporation subsequent to the passage of this act." When, therefore, a person becomes a member of this association, and enters into the contract of insurance, he voluntarily gives to the corporation the lien upon the dwelling houses, barns, and outbuildings insured, together with the right, title, and interest of the insured to the lands on which such buildings stand. We are not to be understood as ruling that this association has power to insure, and, by its charter, acquire therefor a lien upon, personal property. This question is not before us. Indeed, in the third exception of appellant it is claimed that the charter and contract create a lien, if any, on the personal property only. While the first exception might be strained to cover this question, the question was not made before the circuit court, nor argued in this court; hence we assume it is not intended to be made.

The question is to be determined by the constitution of 1868, in force when the contract in question was made. Under that constitution, it has been often adjudged that the homestead is not an estate, but a mere exemption from attachment and sale under any mesne or final process issued from any court. The title and dominion over the property remaining with the owner, he could alienate or incumber it as he saw fit, consistently with the constitutional or statutory enactment creating the homestead. The constitution of 1868 placed no limitation on this power. But it is provided in section 2130, Rev. St., that "no waiver of the right of homestead, however solemn, made by the head of a family at any time prior to the assignment of the homestead, shall defeat the homestead provided for in this chapter: provided, however, that no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged, either before or after assignment, by any person or persons whomsoever, as against the title or claim of the alienee or mortgagee, or his, her or their heirs or assigns." It has been held that this act limits the modes of defeating a homestead to those named therein,—alienation or mortgage of the property. *Hendrix v. Seaborn*, 25 S. C. 485. The mortgage, however, need not be in form a legal mortgage; an equitable mortgage may defeat the homestead allowed by the constitution and act under consideration. Besides, the "pledge" of the property insured—the "lien" thereon, which is "a tie that binds property to a debt or claim for its satisfaction"—is, in this case given by the statute, upon the assent of the owner by his becoming a member of the association, and entering into the contract of insurance, designating the property insured and subject to the lien. The express purpose of the act of incorporation was to give a lien on the very

property usually included and claimed under homestead exemption,—"the dwelling house," etc. The lien created by the statute and contract pursuant thereto is a mortgage in the sense of section 2130, quoted above. It is a voluntary pledge or dedication of specific property, as a security for the satisfaction of an obligation.

We reach this result with all the more satisfaction because the legislation and contract in question are not hostile to the preservation of homesteads, but, on the contrary, are directly designed to afford owners of homesteads, at small expense, mutual protection against the destruction of their homes. The judgment of the circuit court is affirmed.

(47 S. C. 206)

## RATHBUN v. JONES.

(Supreme Court of South Carolina. July 16, 1896.)

## NEGOTIABLE INSTRUMENTS—ACTIONS—EVIDENCE—WHAT CONSTITUTES—CONSTRUCTION.

1. Where, in an action on a note secured by a pledge of stock in a corporation, both parties request a sale of the stock, the admission in evidence of the certificate of stock, though not referred to in the pleading, is not error.

2. The following instrument: "\$1,000. Six months after date, I promise to pay to the order of R. one thousand dollars, with interest from maturity; and, to further secure the payment of the same, the attached certificate \* \* \* is herewith deposited as collateral, without recourse,"—is a note.

3. Such note imposes a personal liability on the maker for its payment in full.

Appeal from common pleas circuit court of York county; Townsend, Judge.

Action by J. G. Rathbun against John F. Jones. There was a judgment for plaintiff, and defendant appeals. Affirmed.

N. W. Hardin and George W. S. Hart, for appellant. Thos. F. McDow and C. E. Spencer, for respondent.

POPE, J. This action came on to be heard before his honor, Judge Townsend, a jury trial having been waived. Judgment was rendered in favor of the plaintiff for the sum of \$1,026.24 and costs. From this judgment an appeal was taken on six grounds, as follows: (1) Error in permitting the certificate of stock in the Carolina Sulphuric Acid Manufacturing Company to be offered in evidence, over defendant's objection that the same was not admissible in evidence upon any issue made by the pleadings. (2) Error in permitting the plaintiff's witness Thomas F. McDow, over the defendant's objection, to state a conversation had with the defendant, there being no issue before the court except upon the construction of the paper sued upon, which must speak for itself; that is to say, error in permitting the introduction of all of said conversation over and above the statement that no money had been paid on the paper since its execution. (3) Error in finding that the paper sued upon was a

"note." (4) Error in finding that there was any personal liability on the defendant upon Exhibit A. Error in finding that there was due thereon, from the defendant to the plaintiff, the sum of \$1,028.24. And error in adjudging that the plaintiff was entitled to recover that sum from the defendant. (5) Error in ordering that "either the plaintiff or defendant may have the said stock sold by the clerk of this court at public auction," the auction not having been brought for any such purpose. (6) Error in not dismissing the complaint, the action having been brought upon the supposed personal liability of the defendant, against which he had fully protected himself in the paper executed by him, in providing that there should be no recourse upon him if the claim of the plaintiff should not be realized out of the certificate of stock. The complaint of the plaintiff set out, in the first paragraph, that on the 16th day of December, 1894, at Blacksburg, S. C., the defendant John F. Jones made and delivered to the plaintiff his promissory note, of which the following is a copy: "Blacksburg, S. C., Dec. 8th, 1894. \$1,000. Six months and twenty-four days after date, I promise to pay to the order of J. G. Rathbun one thousand dollars, with interest from maturity; and, to better secure the payment of the same, the attached certificate, No. 184, for 20 shares of the stock of the Car. Sulph. Acid Mfg. Co., is herewith deposited as collateral, without recourse. Jno. F. Jones." In its second paragraph: That the note, or any part thereof, has not been paid. In its third paragraph: That the defendant is a resident of York county, S. C. The prayer for judgment is: "(1) That the plaintiff be allowed to turn over to this court the aforesaid certificate of 20 shares in the Carolina Sulphuric Acid Manufacturing Company, to be held by this honorable court as security for whatever judgment may be recovered by the plaintiff against the defendant herein. (2) For judgment against the defendant for the sum of one thousand dollars, and interest thereon from the 30th day of June, 1895. (3) For such other and further relief as to the court may seem just and proper." The defendant, by his answer, set up: (1) "That he denies that he executed a promissory note to the plaintiff, but admits that he executed a paper, and delivered that same to the plaintiff, and he believes that the copy paper set out in the complaint is a true copy of the paper which he did so execute and deliver, upon which there is no personal liability on the part of the plaintiff;" and (2) "that he denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second section of the complaint. Wherefore the defendant prays that the court may order the sale of the stock held by the plaintiff, and the proceeds applied to the costs of this case, and enough of the balance paid to the plaintiff to satisfy the amount that he should receive;

and, if there should still be a balance, that the same be paid to the defendant."

Now let us examine the exceptions in their order.

The first exception relates to the admission in evidence of the certificate of stock, being the 20 shares in the Carolina Sulphuric Acid Manufacturing Company, assigned as collateral by the defendant to the plaintiff. We are at a loss to apprehend the validity of this objection. Both sides to the controversy here admit the stock was pledged as security for the debt. Both sides, in their pleadings, pray the court to take charge of it. Why, therefore, is there any valid objection to having it turned over to the court, to see, it may be, that its terms made it free from any obstacle to a sale of it? This exception is overruled.

As to the second exception, it, too, must be overruled, for in the second paragraph of the complaint it was distinctly alleged that the said note, that is, the obligation which was set out in full in the first paragraph of the complaint and in the second paragraph of the answer it is denied, on information and belief the truth of such allegation in the complaint. This witness, Mr. McDow, at plaintiff's request, had gone to him for the payment of the debt; and, in their interview, Mr. Jones, the defendant, had not denied the validity of this debt, or claimed that it was paid. Indeed, his every effort in that interview was to obtain a freedom from pressure for payment. It was very proper that the whole conversation on this subject should appear, and this was all that was testified to by this witness.

We will consider the third exception. We do find error in this finding of the judge. It seems to us that, in the execution of the paper by the defendant, he had two intentions,—one to give a note for a certain sum of money to be paid by the maker to the plaintiff on his order, at a certain time, and with a fixed period when interest should commence; another, to pledge in writing a certain chose in action to further secure the debt. That both the note and the hypothecation of the stock should appear in the same instrument will not change the legal effect of the instrument. It is a note, and more besides. It is usual with banks to first state the note, and then, on the same paper, provide for the collateral being pledged; each being signed by the maker and pledgor. But it will make no difference in law that only one signature is had to cover the promise to pay as maker and the pledge of stock as security to such promise to pay.

Nor, as to the fifth exception, can we discover any reasonable error. It is true, the plaintiff, in his complaint, calls for a judgment against the defendant for the amount due, both principal and interest. But he does more. He also asks the court to receive the stock pledged by the defendant to the plaintiff, to secure his debt, as a security

for whatever judgment he may obtain against the defendant; and he closes his complaint with a prayer for such other and further relief as to the court may seem just and proper. And what does the defendant set out in his answer on this subject? Why, he actually asks the court to order the sale of this very stock, and make application of the proceeds—First, to costs; second, to the debt of the plaintiff; and, third, to pay to the defendant any balance thereafter remaining. The circuit judge, with a nice regard to the rights of both parties, allows each one of them to require a sale of this stock.

Lastly, we will consider the sixth exception. We cannot adopt the view of the appellant in his construction of the words "without recourse," which occur at the close of the paper executed by the defendant on the 6th of December, 1894. It is true, the whole instrument should be construed. But it is also true that, when it is manifest that certain words used in the instrument have a limited effect,—that is, they only apply to a part of the instrument, and not the whole,—then it is a duty, in a construction of an instrument, to limit such words to that part of the instrument intended to be affected, and not to the whole. To us it seems plain that the circuit judge was guilty of no error when he applied the words "without recourse" to the stock pledged, so as not to interfere with the validity of the promise to pay \$1,000 and interest. It is the judgment of this court that the judgment of the circuit court be affirmed.

(47 S. C. 418)

**STATE ex rel. McWHIRTER v. EVANS,**  
Mayor, et al.

(Supreme Court of South Carolina. Aug. 1, 1896.)

**MUNICIPAL CORPORATIONS—ELECTION TO VOTE  
BONDS FOR WATERWORKS—STATUTE—  
CONSTITUTIONAL LAW.**

Const. art. 8, § 5, authorizes cities and towns to acquire and operate waterworks systems and electric light plants when authorized by a majority vote of the electors qualified to vote on bonded indebtedness. Article 2, § 13, requires the general assembly to prescribe, as a condition precedent to the holding of elections in incorporated cities or towns for the purpose of bonding the same, "a petition from a majority of the freeholders of said city or town, as shown by its tax books." Act March 2, 1896, authorizing cities and towns to construct waterworks and electric light plants, and to issue bonds to meet the cost of the same, provides that, before any election shall be held thereunder, "a majority of the freehold voters of said city or town" shall petition therefor. By Act March 9, 1896, it is provided that "it shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special election in any such city or town for the purpose of issuing bonds for any corporate purpose set forth in said petition." An election was asked for in a town to vote on the issuance of bonds for the construction of waterworks and an electric light plant by 2 petitions, one

signed by "freehold voters," asking that such election be ordered in accordance with the provisions of the act of March 2d, and the other signed by "freeholders," asking that the election be ordered "as required by law." The petitions contained the names of a majority of both freeholders and freehold voters. Held that, whether the act of March 2d is vitiated by the fact that the petition prescribed differs from that required by the constitution, or whether the word "voters" therein, only, should be rejected as unconstitutional and null, the bonds to be voted on were for "corporate purposes"; and the election, being petitioned for in accordance with the act of March 9th and the constitution, was legally authorized, and would not be enjoined.

Petition by the state, on relation of George McWhirter, against Herbert Henry Evans, as mayor, and J. B. Walton and others, as aldermen, constituting the town council of Newberry, to enjoin the respondents from ordering a special election to vote on the issuance of municipal bonds. Petition dismissed.

The amended petition, on which the case was heard, was as follows: "To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of South Carolina: Your relator would respectfully show unto your honors by this his amended petition: (1) That he is a taxpayer and a freeholder residing in the town of Newberry, in the county of Newberry, and state aforesaid, and that his name appears as such upon the tax books of said town. (2) That the respondents, as mayor and aldermen, compose the town council of the town of Newberry, a municipal corporation of this state, chartered by an act of the general assembly of the state, entitled 'An act to renew and amend the charter of the town of Newberry,' approved December 21, 1894. (3) That the general assembly of the state of South Carolina, at its last session, passed an act entitled 'An act to authorize all cities and towns to build, equip, and operate a system of waterworks and electric lights, and to issue bonds to meet the cost of same,' wherein, among other things, it is provided that the cities and towns of the state may issue bonds for the purpose of constructing and operating waterworks systems and electric light plants upon compliance with the conditions prescribed in said act. (4) That, for the purpose of complying with the conditions prescribed in said act, petitions addressed to the town council of the town of Newberry, and praying said town council of the town of Newberry to order an election upon the question of the issue of bonds to the amount of thirty-three thousand dollars of the character and description named in said act of the general assembly hereinbefore referred to, have been circulated in said town for the signatures of the freehold voters of said town; and, as your relator has been informed, the said petitions have received the signatures of a majority of the freehold voters of said town. (5) That said petitions have been presented to said town council for their action thereon, and that, under the provisions of said act of the general assembly, the only duty imposed

upon the said town council before ordering the election petitioned for is to ascertain whether a majority of the freehold voters of the town have signed said petition. (6) That, at the time of filing the original petition herein, your relator had been informed and believed that said town council had determined that a majority of the freehold voters of said town had signed said petition, and had, by resolution, directed their attorney to prepare and submit to them for passage an ordinance ordering an election in accordance with the prayer of said petitioners. (7) That your relator is also informed and believes that petitions have been circulated in said town for signatures of freehold voters and freeholders, and that the same have been numerous signed; that is to say, that a petition in the words and figures following has been signed by eighty-four freehold voters, viz.: 'To the Honorable the Mayor and Aldermen of the Town of Newberry, S. C.: The undersigned, freehold voters of the town of Newberry, in the county of Newberry, state of South Carolina, respectfully petition your honorable body to order an election in accordance with an act of the general assembly of South Carolina entitled "An act to authorize all cities and towns to build, equip and operate a system of waterworks and electric lights, and to issue bonds to meet the cost of same," and approved the second day of March, 1896, on the question of issuing coupon bonds to the extent of forty-two thousand (\$42,000) dollars, bearing interest at a rate not to exceed six per centum per annum, and payable in any legal tender money of the United States, forty years after date, to meet the cost of constructing a system of waterworks and a system of electric lights, for the use and benefit of said town, and for the purpose of electing three commissioners of public works.' And that another petition, in the words and figures following, has been signed by sixty-two freeholders, who are voters, viz.: 'To the Honorable Mayor and Aldermen of the Town of Newberry, S. C.: We, the undersigned, resident freeholders of the town of Newberry, owners of real property in said town, respectfully petition that you order an election, as required by law, for the purpose of allowing the citizens of said town to vote upon the question of whether the town of Newberry shall issue bonds not exceeding \$42,000 for the purpose of establishing a system of waterworks and electric light plant.' (8) That your relator is now informed and believes that said petitions set out in paragraph 7 of this petition have been presented to the said town council, and that said town council have by resolution recognized said petitions as sufficient authority for them to order the election prayed for, and have directed their attorney to prepare and submit to them for passage an ordinance ordering an election in accordance with the prayer of said petitioners. (9) That your relator alleges on information and belief that the freeholders of

the town of Newberry, as shown by the tax books of said town, largely exceed in number the freehold voters of said town; there being two hundred and seventy-two freeholders, of which number one hundred and sixty are voters. (10) That your relator alleges that the said act of the general assembly set out by its title in the third paragraph of this petition is in conflict with the constitution of the state, ratified on the 4th day of December, A. D. 1895, in this: that said act prescribes, as a condition precedent to the holding of the election therein provided for upon the question of the issue of bonds for constructing and operating a waterworks system, that the petition of a majority of the freehold voters of said town for said election to be held shall be sufficient, whereas the said constitution, in article 2, § 13, distinctly provides that, 'in authorizing a special election in any incorporated city or town in said state for the purpose of bonding the same, the general assembly shall prescribe, as a condition precedent to the holding of said election, a petition from a majority of the freeholders of said city or town as shown by its tax books'; and also in this: that said act confers upon the cities and towns of the state full power and authority to construct and operate waterworks and electric light works, whereas the constitution, in the fifth section of article 8, provides 'that no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities or towns.' Wherefore your relator prays that said act may be adjudged to be in conflict with the constitution of the state, and that the respondents may be perpetually enjoined and restrained from ordering said election, or any other, under the power attempted to be conferred upon them by the said act of the general assembly."

The following is the amended return: "To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of South Carolina: The respondents, upon whom has been served the order of this court, requiring them to show cause, if any they can, before this court, at Columbia, in this state, on Monday, the 1st day of June, A. D. 1896, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue in accordance with the prayer of the petition, for cause respectfully show: (1) That the allegations contained in paragraphs from 1 to 9, inclusive, of the amended petition, are true. (2) That your respondents admit that the petition of the freehold voters mentioned in the relator's petition herein have been presented to them, as alleged in the 6th paragraph of the petition; but these respondents state that they have not acted upon them, nor made any order in relation thereto. (3) That the petitions filed with them, praying that an election be ordered on the question of issuing said bonds, and

referred to in the 7th paragraph of the relator's amended petition, were circulated at the same time, were presented to them at the same time, were acted upon together, by the council, and were considered as a part of the same general plan. (4) That the petitions acted upon by them meet the requirements of both the act of the general assembly and the provision of the constitution referred to in the relator's petition. (5) That these respondents also submit that under an act of the general assembly entitled 'An act to authorize special elections in any incorporate city or town of this state for the purpose of issuing bonds for corporate purposes,' approved the 9th day of March, A. D. 1896, their action hereinbefore set forth should be sustained. Wherefore they pray that the petition of the relator be dismissed, and the order of injunction granted herein be dissolved."

With the return was filed the following affidavit: "Personally appears Charles A. Bowman, who, being duly sworn, says that he is clerk and treasurer of the town council of the town of Newberry, S. C., and is the custodian of all moneys, books, and records of said town; that the tax books of said town show that there are two hundred and seventy-two freeholders therein; that of this number one hundred and sixty are voters in said town; that there has been filed with him, as clerk and treasurer, as aforesaid, petitions asking the said town council to order an election as set forth in the petition of the relator, except that said petition ask that an election be ordered on the question of issuing bonds to the extent of forty-two thousand dollars, for the purpose of constructing a system of waterworks and electric lights for said town, instead of thirty-three thousand dollars, for waterworks, as alleged in the petition; that said petitions are signed by one hundred and forty-six resident freeholders in said town, and of this number eighty-four are voters; that a majority of freeholders, of said town, and a majority of freehold voters of said town, have signed said petition. C. A. Bowman.

"Sworn to before me, this 29th day of May, 1896. John M. Kinard, C. C. C. P. [L. S.]"

Mower & Bynum, for relator. Hunt & Hunt, for respondents.

McIVER, C. J. This is an application, addressed to this court, in the exercise of its original jurisdiction, by the relator, a resident taxpayer and freeholder of the town of Newberry, praying for an injunction to restrain the respondents, constituting the town council of said town, from ordering an election to determine the question whether the town of Newberry shall issue its bonds to obtain the means of establishing a system of waterworks and electric light plant in and for said town. It will be seen from the petition (which, with the return and affidavit annexed thereto, should be incorporated in the

report of this case) that the facts are undisputed, and that the application is based upon the ground that the act of the general assembly, under which the respondents are assuming to act, is in conflict with the provisions of the present constitution, and therefore affords no authority for the action which the respondents are proposing to make.

Section 5, art. 8, of the constitution, reads as follows: "Cities and towns may acquire, by construction or purchase, and may operate, waterworks systems and plants for furnishing water and lights to individuals, firms and private corporations for reasonable compensation: provided, that no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns, who are qualified to vote on the bonded indebtedness of said cities or towns." Section 13, art. 2, of the constitution, contains the following provisions: "In authorizing a special election in any incorporated city or town in this state for the purpose of bonding the same, the general assembly shall prescribe, as a condition precedent to the holding of said election, a petition from a majority of the freeholders of said city or town, as shown by its tax books," and, after proceeding to declare who shall be qualified to vote at such election, concludes as follows: "And a vote of the majority of those voting in said election shall be necessary to authorize the issue of said bonds." So that the constitution plainly provides that the general assembly, in authorizing a special election for the purpose referred to, shall prescribe, as a condition precedent to the holding of such election, a petition from the majority of "the freeholders of said city or town as shown by its tax books." And it is contended by the relator that this condition precedent has not been complied with, and hence that respondents have no legal authority to take any action in the premises. It seems that the general assembly has passed two acts, which, it is claimed, are applicable to this question: First, an act entitled "An act to authorize all cities and towns to build, equip and operate a system of waterworks and electric lights, and to issue bonds to meet the costs of the same," approved March 2, 1896 (22 St. at Large, 83); and, second, an act entitled "An act to authorize special elections in any incorporated city or town of this state for the purpose of issuing bonds for corporate purposes," approved March 9, 1896 (23 St. at Large, 88). By the first act, it is provided "that before any election shall be held under the provisions of this act a majority of the freehold voters of said city or town shall petition the said city or town council that the said election be ordered"; while, in the second act above referred to, the provision is "that it shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special

election in any such city or town for the purpose of issuing bonds for any corporate purpose set forth in said petition." It appears from the petition that two petitions, set forth in paragraph 7 of the relator's petition herein, have been presented to and filed with the town-council of Newberry; one purporting to come from "the undersigned freehold voters of the town of Newberry," asking that an election be ordered in accordance with the provisions of the act first above referred to, approved March 2, 1896; and the other purporting to come from "the undersigned freeholders of the town of Newberry," praying that an election be ordered, "as required by law," without referring to any specific act of the general assembly, for the purpose of allowing the citizens of said town to vote upon the question whether the town of Newberry shall issue bonds not exceeding \$42,000, for the purpose of establishing a system of waterworks and electric light plant. It also appears from the affidavit of the custodian of the books and records of the town, which is not controverted, "that the tax books of said town show that there are two hundred and seventy-two freeholders therein; that of this number one hundred and sixty are voters in said town"; and that the petitions above referred to are signed by 146 resident freeholders in said town, and, of this number, 84 are voters; and that a majority of the freeholders of the said town, as well as a majority of the freehold voters of said town, have signed said petitions. This shows that all the conditions precedent to the ordering of the election have been complied with, for the petitions have been signed, not only by a majority of the freehold voters, as required by the act approved March 2, 1896, but also by a majority of the freeholders, as required by the constitutional provision.

It is contended, however, by the relator, that inasmuch as the act of March 2, 1896, goes beyond the provision of the constitution, by authorizing the election to be ordered upon the petition of a majority of "the freehold voters," while the constitution provides that the petition shall be signed by a majority of "the freeholders," the act is unconstitutional, and therefore affords no authority for ordering the election. Conceding that, in so far as the act goes beyond the provisions of the constitution, it is unconstitutional, and, so far as the excess is concerned, it is a nullity, the question still remains whether that necessarily renders the whole act a nullity. There can be no doubt that the fact that an act of the legislature is unconstitutional in some of its features does not necessarily render the whole act unconstitutional. *Barry v. Iseman*, 14 Rich. Law, 129; *Wardlaw v. Buzzard*, 15 Rich. Law, 158, in which latter case it was said that even the same section of an act might be unconstitutional when applied to one class of cases, and constitutional when applied to another class. See, also, *Curtis v. Renneker*, 34 S. C. 468, 13 S. E. 664, where

the same doctrine is recognized. It may be, therefore, that while so much of the act of March 2, 1896, as prescribes that the petition for an election shall be signed by a majority of voters, as well as freeholders, is clearly in excess of the constitutional power conferred, and therefore null and void, yet, eliminating such excess as a nullity, the act may remain good for so much of such requirement as is in conformity to the constitution; in other words, that said act may be read as if it did not contain the word "voters," and only required a majority of the freeholders, as provided in the constitution, to sign such petition; for, the conceded fact being that the petitions praying that an election should be ordered were signed by a majority of the freeholders, as well as by a majority of the voters, the constitutional requirement has been complied with, and its efficiency cannot be impaired by the fact that the petitions were also signed by a majority of the voters, which was a mere work of supererogation. But, be that as it may, it seems to us clear that the action which the respondents are about to take, and which the relator seeks to enjoin, can be fully supported by the second act above referred to, approved March 9, 1896, which is unquestionably in direct conformity to the provisions of the constitution. That act, which, as we have seen, is "An act to authorize special elections in any incorporated city or town in this state, for the purpose of issuing bonds for corporate purposes," expressly provides, in the express language of section 13, art. 2, of the constitution, as a condition precedent to the holding of such an election, "a petition of a majority of the freeholders of said city or town, as shown by the tax books"; and the undisputed evidence in this case is that a petition so signed has been presented and filed with the town council of Newberry, praying that an election may be ordered, as required by law, for the purpose of allowing the citizens of said town to vote upon the question of whether the town of Newberry shall issue bonds not exceeding \$42,000, for the purpose of establishing a system of waterworks and electric light plant. If, then, the establishment of a system of waterworks and electric light plant can properly be regarded as a corporate purpose, of which there can be no doubt, under the express provisions of section 5, art. 8, of the constitution, hereinabove set out, authorizing cities or towns to acquire, by construction or purchase, systems of waterworks and plants for furnishing lights, and to operate the same, it is quite clear that this last-mentioned act, the constitutionality of which has not been, and, as far as we can see, cannot be, questioned, affords full authority for the town council of Newberry to order the election as prayed for in the petition.

Counsel for relator, in their argument here, contend that there is a wide difference between freeholders of a town and freehold

voters of such town, and that the one cannot be substituted for the other, and has cited several cases to sustain his proposition. While we are not disposed to question the proposition contended for when applied to a proper case, it may not be amiss to notice the cases which he has cited. The first case to which he refers is *Harshman v. Bates Co.*, 92 U. S. 569, in which it is held, among other things, that where the constitution of Missouri forbids the general assembly from authorizing any county, city, or town to become a stockholder in, or to loan its credit to, any corporation unless two-thirds of the qualified voters of such county, city, or town shall, at a regular or special election, assent thereto, an act of the general assembly only requiring the assent of two-thirds of the qualified voters "who vote at such election" was unconstitutional. But that case, so far as the point mentioned is concerned, was expressly overruled by the subsequent case of *County of Cass v. Johnston*, 95 U. S. 360; *Waite, C. J.*, in delivering the opinion of the court, saying: "All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares." The same doctrine was recognized in *Morton v. Comptroller General*, 4 S. C., at page 462 et seq.; and again in the *Bond Debt Cases*, 12 S. C., at page 285. See, also, *Cooley, Const. Lim.* 141. The next two cases referred to are *Harrington v. Town of Plainview*, 27 Minn. 224, 6 N. W. 777, and *Town of Plainview v. Winona & St. P. R. Co.*, 36 Minn. 505, 82 N. W. 745, which hold that, where the constitution required a question of local taxation to be submitted to the electors, a statute empowering resident taxpayers to authorize a town to issue bonds in aid of a railroad was unconstitutional, for the very obvious reason that the statute undertook to confer upon resident taxpayers the power to determine a question which by the constitution was conferred upon a very different class of persons,—electors. In *Town of Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541 (subsequently recognized by the supreme court of the United States, in *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. 610), where the statute of 1869 empowered a county judge, upon the petition of a majority of the taxpayers of any municipal corporation, to proceed, in the manner prescribed by the statute, to determine whether the bonds of the town of Mentz should be issued in aid of a certain railroad, which act was amended by the act of 1871, so as to confer such jurisdiction upon the county judge only when the application was made by a majority of the taxpayers, "not including those taxed for dogs or highway tax only," it was held that a petition framed under the act of 1869, and in disregard of the additional provisions contained in the act of 1871, which was presented after the passage of the act of 1871,

failed to confer any jurisdiction upon the county judge, inasmuch as it failed to show that a majority of such taxpayers as were then alone authorized to make the application had done so. The only remaining case cited is *People v. Smith*, 45 N. Y. 772, which simply holds that a petition for an election must be in strict conformity to the act providing for an election. It is to be observed that in none of these cases was it made to appear, as it was in the case under consideration, that all of the requirements, both of the constitution and of the acts, were complied with, and hence we are unable to perceive how those cases can affect our present inquiry; for even if it should be conceded that our first act above referred to, approved March 2, 1896, in going beyond the constitutional requirement that, as a condition precedent to the ordering of an election, a petition of a majority of the freehold voters, instead of a petition of a majority of the freeholders, should be presented, failed to confer authority upon the respondents to order the election, yet the second act, approved March 9, 1896, being strictly in accordance with the constitution, certainly was sufficient to confer the requisite authority. The essential fact involved in the condition precedent being that an application from a majority of the freeholders to the municipal authorities to order an election being conceded by the pleadings and proceedings, we cannot doubt the authority of the town council to order the election as prayed for. The judgment of this court is that the petition for injunction be dismissed.

(47 S. C. 166)

## STATE v. RICHARDSON.

(Supreme Court of South Carolina. July 16, 1896.)

## CRIMINAL LAW—TWICE IN JEOPARDY—CONSTITUTIONAL LAW—WITHDRAWAL OF CASE FROM JURY—CONSENT.

1. Const. 1868, art. 1, § 18, declared that "no person, after having been once acquitted by a jury, shall again, for the same offense, be put in jeopardy of his life or liberty." The new constitution, in article 1, § 17, provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty"; and, in article 17, § 11, subd. 5, that "all indictments which shall have been found, or may hereafter be found, for any crime or offense committed before the adoption of this constitution, may be prosecuted as if no change had been made, except as otherwise provided herein." It also further provides that all laws inconsistent with its provisions shall cease on its adoption. Held that, as regards former jeopardy, the rights of a defendant charged with having committed a crime before the new constitution went into effect, but who was placed on trial afterwards, were governed by the provisions of the new constitution.

2. After a jury have been impaneled and sworn in a criminal case, the trial cannot stop short of a verdict without the consent of the defendant, except for imperative reasons, such as the illness of a juror, the judge, or defendant, the absence of a juror, or a disagreement; and where a case, after the trial has commenced, is withdrawn from the jury on account

of the absence of a witness for the state, the defendant has been once placed in jeopardy, and may plead it in bar of another trial.

8. The fact that a defendant who is without counsel does not object to the withdrawal of the case from the jury, and a postponement of the trial, does not constitute a consent, or waiver of his right to plead the fact in bar of a second trial.

Appeal from general sessions circuit court of Spartanburg county; Buchanan, Judge.

Aaron R. Richardson was convicted of a crime, and appeals. Reversed.

Judge Buchanan, in passing on the question involved, made the following ruling: "At the calling of the state against Aaron R. Richardson, when called upon to plead, he interposes the plea of former jeopardy. The offense charged in the indictment is alleged to have been committed on the 27th day of November, 1895, before the new constitution went into effect. The defendant contends that the change in the provisions of the new constitution means such a change as allows a plea of former jeopardy, instead of former acquittal or former conviction, under the constitution of 1868; that, by reason of having been put upon trial yesterday, he was arraigned and pleaded not guilty and, one witness being examined on the stand, such examination or procedure, or whatever it may be called, was putting the prisoner in former jeopardy under the new constitution; and that, by reason of such former jeopardy, he is now entitled to his discharge. On the part of the state it is contended that he was in no jeopardy, and that the case could be withdrawn from the jury at any time before a verdict was reached; that being surprised, and having only one witness on the stand, and not being sufficient to make out the case, the offense having been committed before the new constitution went into effect, he was entitled to trial, and the state was entitled to put him upon trial again, and produce its witnesses, as if nothing had occurred looking to his trial. The court holds, it being a novel question, there being no decision since the new constitution was adopted upon the point, and the court having no authorized official copy of the constitution before it, the offense having been committed before the new constitution went into effect, and being in doubt as to the proper conclusion to come to, there being no authority, and the prisoner being entitled to appeal, and the state not being entitled to appeal, in order that the question may arise and be decided as early as possible, the prisoner's plea of former jeopardy is overruled."

Thomason & Bomar, for appellant. Solicitor Schumpert, for the State.

McIVER, C. J. The defendant in this case was arraigned under an indictment for grand larceny, in stealing live stock, on the 2d day of March, 1896, and upon his arraignment pleaded not guilty, and thereupon a jury was duly impaneled and sworn according to law, and charged with the trial of the case. The

solicitor, having opened the case for the state, and examined the prosecutor as a witness, discovered that one of his witnesses was absent, he having been permitted, by mistake, to go home, and he thereupon moved the court "to withdraw the case from the jury; and the court (there being no objection made by the prisoner) did withdraw the said case from the jury, and had the prisoner remanded to jail, and ordered the next case on, which was *The State v. James Bracy*, which was tried and disposed of. That on the next day, to wit, on Tuesday, the 3d day of March, 1896, the said Aaron R. Richardson was again brought into court, and arraigned for the same, identical offense for which he had been put on trial the day before, held and arraigned under the same indictment, and upon his arraignment, through his counsel, put in plea of former jeopardy, viz. that he was put in jeopardy for the same offense on the day before. To this the solicitor replied that he had not been put in jeopardy such as the law contemplated, which was acquittal or conviction." His honor, Judge Buchanan, overruled the plea, for the reasons set forth in the "case," which should be incorporated in the report of this case; and the trial proceeded, which resulted in a verdict of guilty; and, sentence having been passed, defendant appeals, upon the ground set out in the record, which makes the single question whether there was error in overruling the plea.

One of the settled rules of the common law was that no one shall be twice put in jeopardy upon the same charge. As is said in *Cooley, Const. Lim. (2d Ed.)*, at pages 825, 826: "One thing more is essential to a proper protection of accused parties, and that is that one shall not be subject to be twice put in jeopardy upon the same charge." And, at page 827, the same author says: "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict, which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause." The same doctrines are laid down in 1 *Bish. Cr. Law (6th Ed.)*, at section 1013 et seq., and are fully recognized in the leading case of *State v. McKee*, 1 *Bailey*, 651. If, therefore, this question is to be determined by these well-settled principles of the common law, there could be no doubt that there was error in overruling the plea of former jeopardy; for the "case" shows that the defendant was put upon his trial under a valid indictment, before a court of competent jurisdiction, and after a jury was charged with the trial of the case, and after one witness in behalf of the state had been examined, the solicitor was permit-

ted to withdraw the case from the jury, simply for the reason that one of his witnesses was absent, and the defendant was, on the next day, again put upon his trial for the same, identical offense. It is true that it is stated in the "case" that, when the solicitor moved to withdraw the case from the jury, no objection was made by the prisoner; but it also appears in the "case" that the prisoner was not at that time represented by counsel, and it would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury simply because he interposed no objection, which, possibly, he did not know he had a right to do. Besides, consent is active, while not objecting is merely passive. The old adage, "Silence gives consent," is not true in law; for there it only applies where there is some duty or obligation to speak. *State v. Edwards*, 13 S. C. 30; *State v. Senn*, 32 S. C. 401, 11 S. E. 292. If it had appeared in the "case," as it does not, that the prisoner was asked whether he objected to the motion to withdraw the case from the jury, and he had said "No," or had even remained silent, then the result would have been different. As it was, however, we think it would be going too far to hold that he consented to a withdrawal of the case. Indeed, as was said by Mr. Justice McGowan in *State v. Briggs*, 27 S. C., at page 85, 2 S. E. 856, 857: "Were a party is put to his trial upon a criminal charge, the case must proceed in the manner prescribed by law until a verdict or a mistrial is reached. We know of no authority for suspending it for a time, or even to stop short of a verdict, except in extraordinary circumstances, such as the illness of one of the jury, the prisoner, or the court, the absence of a jurymen, or the impossibility of agreeing on a verdict." It would be a fearful thing to vest in a prosecuting officer the power to stop a trial after it had commenced, simply because such officer found that he was unable to establish the charge, by reason of the absence of a witness, or a failure to prove what he had expected; for, as said by O'Neill, J., in *State v. McKee*, supra: "It would be, in effect, allowing to the solicitor a power which this court denies that itself possesses, of subjecting the prisoner to a new trial as often as it might be necessary to obtain a verdict of guilty." Of course, no one who knows the officer who conducted the prosecution in this case would for a moment suspect him of abusing the powers committed to him; but the court must lay down rules applicable to all cases and to all persons alike, and cannot permit such rules to be affected by the deservedly high character of this particular officer.

It may be said that this question is not to be determined by the rules of the common law, but by the express constitutional provision contained in section 18 of article 1 of the constitution of 1868, which was in force at the time the offense charged against the defendant was committed, to wit, on the 27th day of November, 1895; and it has been

held in *State v. Shirer*, 20 S. C. 406, 407, and *State v. Wyse*, 33 S. C. 589, 12 S. E. 556, under that constitutional provision, that the benefit of the plea of former jeopardy could only be invoked where the person has once been acquitted by a jury of the same offense, for that section reads as follows: "No person, after having been once acquitted by a jury, shall again, for the same offense, be put in jeopardy of his life or liberty." Accepting these two cases as a correct construction of the constitutional provision just quoted, it may well be contended that the entry of a nolle prosequi, or a withdrawal of a case from the jury, after it has been charged therewith, amounts to an acquittal, for there is high authority for that view. In 11 Am. & Eng. Enc. Law, 949, it is said: "Before the jury is impaneled and sworn, the prosecuting officer may enter a nolle prosequi at his pleasure, and it will be no bar to a subsequent prosecution for the same act; but if it is entered after the jury is impaneled and sworn, without the consent of the defendant, it is equivalent to an acquittal, and he cannot be again put in jeopardy for the same offense." On the next page we find the same doctrine as to the effect of a discharge of the jury, announced in the following language: "The discharge of the jury in a criminal case, upon a valid indictment, without the consent of the defendant, not called for by imperative necessity, operates as an acquittal, and bars a further trial." And this doctrine is supported by quite a number of cases cited in the notes. To the same effect, see 1 Blash. Cr. Law, § 1016. And in our own case of *State v. McKee*, supra, it was held that, after a jury has been charged with the trial of a prisoner upon an indictment for a capital offense, it cannot be discharged, and the prisoner remanded for a second trial, except for the following causes: (1) The consent of the prisoner; (2) the illness of one of the jury, the prisoner, or the court; (3) the absence of one of the jurors; (4) the impossibility of their agreeing upon a verdict. In the conclusion of the opinion of the court in that case, O'Neill, J., uses the following language: "The solicitor having entered a nolle prosequi after the jury were charged, and they being discharged, without any lawful cause, upon which the prisoner can be remanded for trial a second time, it follows that he is acquitted." So, here, we might say that, after the jury were charged with the trial of this case, they having been discharged without any lawful cause, the prisoner "is acquitted." Hence, even if the question which we are called upon to determine is to be governed by the terms of the constitution of 1868, above quoted, there would still be the strongest reason for holding that the plea of former jeopardy should have been sustained.

But, as the constitution of 1868 had been superseded by the provisions of the present

constitution before this plea was interposed, we do not see how its validity can be properly tested by a constitutional provision which had been abrogated before the plea was filed, and before the facts upon which the plea is based occurred; for the facts upon which such plea is based occurred in March, 1896, long after the present constitution went into effect. The defendant is asserting a right guarantied to him by a provision of the present constitution, which right arose and is founded upon certain facts which occurred since the adoption of the present constitution; and we can see no propriety in testing such right by a provision of a former constitution, which had been abrogated or superseded before the right in question arose. The fact that the offense with which the defendant is charged was alleged to have been committed before the adoption of the present constitution, and while the constitution of 1868 was in force, cannot affect this question. In subdivision 3 of section 11 of article 17 of the present constitution it is declared as follows: "The provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them shall remain in force until such legislation is had." And, in subdivision 5 of the same section of the same article, the provision is as follows: "All indictments which shall have been found, or may hereafter be found, for any crime or offense committed before the adoption of this constitution, may be prosecuted as if no change had been made, except as otherwise provided herein." Hence, as the indictment in this case charged a crime committed before the adoption of the present constitution, it should be prosecuted as if no change had been made, except as otherwise provided in the present constitution. Now, as section 17 of article 1 of the present constitution, among other things, provides as follows, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty," which secures the exemption of every person charged with crime from being twice tried upon the same charge, in phraseology different from that employed, for the same purpose, in section 18 of article 1 of the constitution of 1868, if there is any inconsistency between the two provisions, then, by the express terms of subdivision 3 of section 11 of article 17 of the present constitution, above quoted, the provision of the constitution of 1868 had ceased and determined before the facts occurred upon which the plea in question was founded, and there was no provision then in force except that found in the present constitution, for it is quite clear that such provision required no legislation to enforce the same. And as declared by subdivision 5 of section 11 of article 17, above set out, this indictment, charging a

crime committed before the adoption of the present constitution, must be prosecuted under the law as changed by the present constitution. This view does not come in conflict with the constitutional provision forbidding the enactment of any *ex post facto* law; for, as is said by Cooley in his work on *Constitutional Limitations* (pages 265 and 266): "I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." In accordance with this view, it has been held in this state, in the case of *State v. Williams*, 2 Rich. Law, 418, that where a person was convicted of forgery when that crime was punished with death, and, pending his appeal, the legislature passed an act reducing the punishment, he must suffer the reduced punishment, although the act was passed after the offense had been committed, and after conviction thereof. So, in *State v. Sullivan*, 14 Rich. Law, 281, it was held that an act revising the jurisdiction of a superior court, so as to enable it to try persons for offenses committed during a period when an inferior court had exclusive jurisdiction to try them, is not an *ex post facto* law. See, also, to same effect, *State v. More*, 15 Rich. 57, and *State v. Howard*, Id. 274, as well as the recent case of *State v. Cooler*, 30 S. O. 105, 8 S. E. 692. It seems to us the principle is well stated in Cooley, *Const. Lim.* 272, as follows: "So far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts, and create new ones; and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." If, therefore, it be true, as seems to have been supposed, that the immunity granted by the constitution of 1868 to a person accused of crime from being twice put in jeopardy of his life or liberty extended only to a case in which the accused has once been formally acquitted by a jury, and the provision of the present constitution extends such immunity to a case in which the accused has once before been "put in jeopardy of his life or liberty," in the long-established and well-recognized sense of those terms, so that a formal acquittal by a jury is not now necessary to

sustain a plea of former jeopardy, it is quite certain that the new provision, so far from dispensing "with any of those substantial protections with which the [previously] existing law surrounds the person accused of crime," actually "mollifies the rigor of the criminal law," and really enlarges the immunities previously afforded. It is clear, therefore, that the present constitutional provision, even when applied to a case which arose prior to the adoption of the present constitution, cannot, with any propriety, be regarded as an *ex post facto* law. Indeed, unless the accused can avail himself of the immunity from a second prosecution for the same offense afforded by the provision of the present constitution, the practical effect would be to deny him such immunity altogether; for, if the provision of the constitution of 1868 is inconsistent with that found in the present constitution, as seems to be supposed, he could not avail himself of the provision in the constitution of 1868, for, as we have seen, that provision was abrogated before the fact occurred upon which his plea rested, and hence he would be left without remedy.

We must conclude that the plea interposed by defendant should be tested by the provisions of the present constitution, and those provisions, being couched in terms familiar in the common law, should receive the same construction and be given the same significance, as has been well settled at the common law. And as we have seen, the well-settled construction was that a person is said to be put in jeopardy whenever he is put upon his trial, before a court of competent jurisdiction, under a valid indictment, and a jury has been charged with his trial; and the jury is said to be thus charged when they are impaneled and sworn. If, after that, the prosecuting officer enters a *nolle prosequi*, or withdraws the case from the jury, without the consent of the prisoner, it operates as an acquittal, and he cannot again be put upon his trial for the same offense. We think, therefore, that the circuit judge erred in overruling the plea interposed by the defendant in this case. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court, with instructions to sustain defendant's plea, and to discharge the defendant.

(47 S. C. 390)

DAVIS v. FLORIDA CENT. & P. R. CO.  
(Supreme Court of South Carolina. July 28, 1896.)

RAILROAD COMPANIES—KILLING OF LIVE STOCK—  
NEGLECT—PRESUMPTION—STOCK LAW.

In a suit for killing live stock, it is not error to charge that the presumption of negligence, arising from the mere finding of live stock killed by a railroad company, being a rule of evidence, has not been modified by the fact of the stock law being in force, but that the jury may take the stock law into consideration

as a circumstance in the determination of the question of negligence.

Appeal from common pleas circuit court of Hampton county; Buchanan, Judge.

Action by J. J. Davis against the Florida Central & Peninsular Railroad Company for damages for the negligent killing of two mules. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. J. C. Hutson and James W. Moore, for appellant. W. S. Tillinghast, for respondent.

JONES, J. This is a suit for damages for the negligent killing of two mules by the defendant company, while operating a train of cars in Hampton county, over the South-Bound Railroad. The jury found a verdict for \$300. The defendant appeals. The only exception pressed before this court is as follows: "Because his honor refused to charge the jury the following, as requested by the defendant's attorney: 'That, where the stock law is in force, the defendant is not required to use the same care and caution as in localities where such law is not in force.'" This request was not unqualifiedly refused. His honor charged the jury as follows: "I am requested to instruct you that, where the stock law is in force, the defendant is not required to use that same care and caution as in localities where such law is not in force. I cannot charge that in the language in which it is here. I charge you this: That, as said by the supreme court recently, that *Danner's Case* [4 Rich. Law, 329], the presumption of negligence, the mere finding of cattle killed by a railroad being a rule of evidence showing negligence, the *prima facie* defense of negligence has not been modified by the fact of the stock law being in force, but the supreme court say, significantly, that that is a circumstance which the jury can take into consideration. So I charge that, modified that way." The charge under consideration is set out in the "case" as quoted above. There seems, however, to have been some mistake in the hearing, reporting, or printing of this charge. Appellant's counsel, with great fairness, concede in their argument that the presiding judge charged, after the preliminary words above, as follows: "I charge you this: that, as said by the supreme court recently, that [the rule in] *Danner's Case*, the presumption of negligence [arising from] the mere finding of cattle killed by a railroad, being a rule of evidence showing negligence, \* \* \* has not been modified by the fact of the stock law being in force, but the supreme court say, significantly, that this is a circumstance which the jury can take into consideration." The first part of this charge is supported by *Jones v. Railroad Co.*, 20 S. C. 249, which holds that the rule in *Danner's Case* is not affected by the statutes relating to fencing stock, and the latter part of the charge is consistent with *Molair v. Railway Co.*, 29 S. C. 160, 7 S. E. 63, 64, where Chief Justice McIver, delivering the opinion, uses

this language: "While it is quite true that the [stock] law does not operate as a license to railroad companies to kill stock or cattle straying upon their tracks passing through inclosed lands, and does not exempt them from liability for negligently killing such animals, yet, for the very good reason suggested in the Case of *Simpkins*, 20 S. C. 258, it is an element to be taken into account in considering the question of negligence." The circuit judge, therefore, while upholding the rule in *Danner's Case*, allowed the jury to take into consideration the stock law as a circumstance in the determination of the question of negligence. In *Harley v. Railroad Co.*, 31 S. C. 152, 9 S. E. 782, where the refusal of such a request to charge was held error, it appeared in the evidence that the stock law was in force when the cow was killed, which made such charge material, and the refusal to charge was unqualified. In this case, so far as the record shows, there was no evidence that the stock law was in operation where the mules were killed; and the circuit judge practically gave the defendant the benefit of the principle of law contended for. There was therefore no error. The judgment of the circuit court is affirmed.

(93 Va. 440)

## ENGLEBY et al v. HARVEY.

(Supreme Court of Appeals of Virginia. July 23, 1896.)

## PARTNERSHIP—WHAT CONSTITUTES—ASSIGNMENT OF CONTRACT—AUTHORITY OF AGENT—STATUTE OF FRAUDS—FRAUDULENT ASSIGNMENTS.

1. A bridge company was awarded a contract by a city to build a bridge, and to make the necessary excavations for approaches. The company assigned its rights to J., which assignment was ratified by the city. The company then contracted with J., as the general contractor, to do the masonry and furnish the superstructure, for which J. agreed to pay according to the monthly estimates made by the city as the work progressed. The contract for the erection of the bridge was entered into between the city and J., as assignee of the company's rights. *Held*, the evidence was sufficient to show that J. was the sole contractor, and that no partnership existed between J. and the company.

2. A bridge construction company, as the lowest bidder for the erection of a bridge, assigned its rights to J., who entered into the contract as sole contractor. A material man furnishing lumber for the bridge, having refused to furnish more unless he was certain to be paid for it, was told by the engineer of the bridge to supply the lumber, and he would get his money as soon as the work was completed. *Held* that, in the absence of evidence tending to show authority on the part of the engineer, the bridge company was not bound by his promise.

3. In such case, the promise, being an undertaking to answer for the debt of J., was void, under the statute of frauds.

4. Where a bridge company, in order to obtain money to carry on its work, assigned a portion of the first estimate to become due thereunder, and subsequently assigned its claim for the residue of the contract price, such assignment was not fraudulent as to material men whose claims had not at the time been created or contracted for.

v. 25s.E.no.5—15

Appeals from hustings court of Radford; George E. Cassell, Judge.

Action by Lewis Harvey against Joseph T. Engleby, agent, and others. There was judgment for plaintiff, and defendants appeal. Reversed.

L. H. Cocke, for appellants. J. C. Wysor and Gardner & Wharton, for appellee.

RIELY, J. There is no evidence to sustain the allegation of the bill that the American Bridge & Iron Company and E. S. Jones were partners in the construction of the bridge for the city of Radford, or in any part of the work; nor the contention that they were joint contractors. The city of Radford advertised for bids to build a bridge across Connelly's Branch, and make the necessary excavations and fills for the approaches to the same; and on April 27, 1893, it awarded the contract to the American Bridge & Iron Company. Making excavations and fills not being in its regular line of business, the bridge company, on the same day, assigned its bid to E. S. Jones, which assignment the city approved and ratified. The bridge company then entered into a contract with Jones, as the general contractor for the work, to do all the masonry and furnish the superstructure of the bridge, for the sum of \$13,450, which amount Jones agreed to pay monthly, according to monthly estimates made by the city engineer as the work progressed, less the amount of the masonry, for which the company agreed to pay Jones at the rate of \$6 per cubic yard. On May 12, 1893, the contract between the city and Jones, as assignee of the bid of the American Bridge & Iron Company, was reduced to writing and duly executed by them. It shows that he was the sole contractor with the city for the entire work, and was so recognized and treated by the city.

The claim of the appellee, Harvey, with the exception of the order of G. C. Cordier on E. S. Jones for \$31.05, for balance due him for day labor, the justice of which is not supported by any testimony, is for lumber furnished to and under contracts wholly with Jones. It was consequently not a debt due from the bridge company, but Jones alone was liable for it. Harvey states in his deposition that, after he had furnished a part of the lumber, he told the engineer of the bridge company, who was in charge of the erection of the bridge, that he would not furnish the balance of the lumber unless he was certain that he would get paid for it, and that the engineer told him to go on and furnish the lumber, and that he would get his money as soon as the bridge was completed, "for the lumber furnished and to be furnished." G. W. Landmen, of the firm of Landmen & Sadler, who assigned to the appellee their claim, testified that after his firm had furnished a part of the lumber under their contract with Jones, and he had failed to pay for it, they became uneasy, and went to a man by the name of Lipe-

comb, the "boss" man for the bridge company in erecting the bridge; and that he told them to go on and furnish the lumber, and that they would get their money "for the lumber furnished and to be furnished." These statements of the engineer and the man Lipscomb were relied on to bind the bridge company to pay for the lumber.

In the first place, there is no evidence that either the engineer or Lipscomb was authorized by the bridge company to make any such promise or agreement, or that it was at all within the scope of their duties or employment; and, if not, the statements made by them fixed no liability on the company to pay for the lumber. If, however, such undertaking was within the scope of their authority or employment, it would, nevertheless, not bind the company. Jones was the sole contractor for the lumber, and he alone was liable for the payment of what had been furnished and that which was to be furnished. It was his debt, and in no respect that of the bridge company. The original liability was wholly his, and not to any extent or in any manner that of the company. The contract for furnishing the lumber had in good part been performed, and the alleged undertaking was to pay for the lumber already furnished, as well as for that to be thereafter furnished. The promise was not confined to the part of the debt to become due, but included also the part already due. It was simply a verbal promise to pay the whole debt. Where such promise is entire, as was the case here, and it relates in part to a matter which renders it necessary under the statute of frauds that the promise should be in writing, the whole promise is void. Jones was not a party to the undertaking, nor was his liability for the debt in any wise extinguished or reduced by it. His original liability remained unaffected. So that the promise relied on, if conceded to have been authorized, was simply an undertaking to pay or see paid the debt of another. Being purely a collateral undertaking, and not in writing, it was void under the statute. Code Va. § 2840; *Noyes' Ex'r v. Humphreys*, 11 Grat. 636; and 3 Minor, Inst. (2d Ed.) pt. 1, pp. 180, 181.

The American Bridge & Iron Company, after contracting with Jones to furnish and erect the superstructure of the bridge, in order to obtain money to carry on this and other work it had contracted for, assigned to Joseph T. Engleby, agent, on January 10, 1894, the sum of \$1,000, to be paid out of the first estimate to become due to it on account of said work, and on January 17, 1894, assigned to him the residue of the money for which it had contracted to do the work. This was a plain and common business transaction, and furnishes no ground for the claim of an intended fraud on the appellee or his assigns, whose debts had not then been created, or the lumber even contracted for. The charge of fraud, which is made in the bill against the assignment, is not sustained by

any testimony in the cause, and is denied by the answers.

The object of the writing referred to in the record as the "Osborne agreement" was, upon its face, to adjust a controversy that had arisen between the parties over the contract for the construction of the bridge, and the making of the necessary excavations and fills; to prescribe the manner in which should be distributed the balance of the money to be received for the work from the Mercantile Trust & Deposit Company, of Baltimore, from the sale of bonds of the city of Radford, which the city had issued to pay the cost of the said improvement; and to appoint an impartial person to receive the money, and pay it out in the manner prescribed. It is not easy to see how the agreement is affected with or is evidence of any fraud, and the record contains no evidence to prove that it was entered into for a fraudulent purpose. It is a rule universally recognized, except in a particular class of cases, within which this case does not come, that he who alleges fraud must clearly and distinctly prove it. The law never presumes fraud, but the presumption is always in favor of innocence, and not of guilt. *Hord's Adm'r v. Colbert*, 28 Grat. 49; *Herring v. Wickham*, 29 Grat. 628; *Crebs v. Jones*, 79 Va. 381; *Gregory v. Peoples*, 80 Va. 355; *Moore v. Triplett* (Va.) 23 S. E. 69; and *Kerr, Fraud & M.* 382, 384. The case is one of hardship as respects the appellee, Harvey, and it will be unfortunate if he should lose his debt in consequence of the insolvency of Jones; but the court, because of the merit of his claim or the misfortune of the original debtor, cannot declare fraud where it is not shown to exist, nor impose a liability where none was ever incurred. So much of the decrees of the hustings court as decide that the American Bridge & Iron Company is jointly liable with E. S. Jones for the payment of the debt of the complainant, and adjudge that John G. Osborne pay to J. C. Wysox, counsel for the complainant, the sum of \$700, which should have been decreed to J. T. Engleby, under the assignments made to him, or withhold from him any other moneys to which he may be entitled under the assignments, must be reversed, and the cause remanded to the said court for further action in accordance with the views herein expressed.

(33 Va. 106)

#### NORFOLK & W. R. CO. v. AMPEY.

(Supreme Court of Appeals of Virginia. April 23, 1896.)

PLEADING—DUPLICITY—SPECIAL DEMURRER—BILL OF EXCEPTIONS—EVIDENCE—MOTION TO STRIKE OUT—MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—INSTRUCTION—EXCESSIVE DAMAGES.

1. Code, § 3272, provides that, on demurrer, the court shall not regard any defect in the declaration unless there be omitted something so essential to the action that judgment accord-

ing to the law and the very right of the cause cannot be given, and was reported by the revisors of the Code with the note that it was intended to abolish special demurrers. *Held*, that special demurrers were abolished, and therefore the defect of duplicity which theretofore could only be reached by special demurrer was no longer ground for demurrer.

2. An action for personal injuries being a transitory action, an allegation in the complaint as to the place of the injury is unnecessary.

3. A bill of exceptions must specially and definitely set forth the allegation of error, and so much alone of the evidence and proceedings as is necessary to render clear the propriety or impropriety of the ruling excepted to.

4. A motion to strike out evidence, admitted without objection, must recall and point out distinctly the objectionable answers or statements; and a motion to strike out all the testimony of a witness that gave his opinion "as to any matter in issue" is properly overruled.

5. The master cannot relieve itself of the duty to its servants to furnish reasonably safe appliances by delegating such duty to a subordinate.

6. Where the negligence of the master is the proximate cause of an injury to a servant, the fact that the negligence of a fellow servant also contributed thereto does not relieve the master of liability.

7. Plaintiff, a brakeman of the defendant railroad company, before attempting to couple cars, discovered that their drawheads were damaged, rendering the coupling dangerous, and notified the conductor, whose duty it was to inspect the cars for defects, of such fact, and requested him to signal the engineer to back the train lightly, so that the coupling could be made. The conductor directed plaintiff to make the coupling, but failed to signal for the train to be moved lightly, and, in making the coupling, plaintiff's hand was caught between the drawheads, and injured. *Held*, that plaintiff did not, as a matter of law, assume the risk.

8. An instruction that it was the duty of the master to provide "efficient" fellow servants, instead of "competent," is not ground for reversal.

9. A verdict for \$3,500, for the loss of an arm, by a brakeman 21 years of age, will not be disturbed as excessive.

Error to corporation court of Petersburg.

Action by Infant Ampey against the Norfolk & Western Railroad Company. There was a judgment for plaintiff, and defendant brings error. *Affirmed*.

George S. Bernard and W. H. Mann, for plaintiff in error. Wm. B. McIlwaine and G. S. Wing, for defendant in error.

**RIELY, J.** The declaration contains three counts. The defendant demurred to the whole declaration, and also to each count thereof, in which demurrers the plaintiff joined. The corporation court overruled the demurrers, and this action of the court constitutes the first assignment of error.

The main objection to the declaration relates to the first count; and the foundation of the objection is that this count alleges three distinct grounds of negligence as the cause of the injury sustained by the plaintiff, either of which would of itself, independently of the others, constitute a sufficient ground for the action. In other words, the claim is that the count is bad for duplicity. The grounds so stated are the negligence of the

defendant in failing to exercise due care in selecting competent servants, in failing to provide a sufficient number of train hands, and in failing to supply and maintain suitable and safe machinery and instrumentalities for the conduct of the business of the defendant. They are conjunctively alleged as concurrent causes, which, co-operating together, produced the injury. It is very questionable whether this constitutes duplicity. It is stated by eminent text writers on the subject of "Pleading" that no matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point. Steph. Pl. 232, 233, 233; 4 Minor, Inst. pt. 2, p. 937; and Insurance Co. v. Saunders, 86 Va. 969, 11 S. E. 794. But, even if this count was obnoxious to the charge of duplicity, the fault could not be taken advantage of on a general demurrer. The objection for duplicity relates to matter of form only, and does not go to the substance of the pleading. Being an objection to the form, and not to the substance, of the declaration, it could only be availed of, even at common law, with all of its rigid rules of pleading, by special demurrer. The party demurring was required to lay his finger upon the very point. Chit. Pl. 655, 662; 4 Minor, Inst. pt. 2, p. 939; 5 Rob. Prac. 305; Smith v. Clench, 2 Adol. & E. (N. S.) 836; Fairfax v. Lewis, 11 Leigh, 243; Kennaird v. Jones, 9 Grat. 189; Ounningham v. Smith, 10 Grat. 257; Smith's Adm'r v. Lloyd's Ex'r, 16 Grat. 310, 313; Grayson v. Buchanan, 88 Va. 251, 13 S. E. 457; and King v. Howard, 1 Cush. 141. Where special demurrers have been abolished, duplicity in pleading cannot now be reached by a demurrer. 5 Rob. Prac. 305; 3 Rob. Prac. 509; King v. Howard, 1 Cush. 141; Coyle v. Railroad Co., 11 W. Va. 107; and Sweeney v. Baker, 13 W. Va. 200. Section 3272 of the Code is as follows: "On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence, that judgment, according to the law and the very right of the cause, cannot be given. \* \* \*" This language was incorporated into the Code at the revision of 1849, upon the suggestion of the revisors, who, in reporting it to the legislature, appended the following note: "This section is so framed as to prevent a demurrer being sustained to any pleading for such matters of form as heretofore were required to be specially alleged as causes of demurrer, and which, if so alleged, were available. Its effect is to abolish special demurrers." Report of Revisors, p. 849; and 5 Rob. Prac. 509. It was held by this court in Smith's Adm'r v. Lloyd's Ex'r, 16 Grat. 310, 313, that the effect of this statute was to abolish special demurrers. Consequently, mere duplicity

in a count in a declaration is no longer with us a ground of demurrer.

Neither in the petition for the writ of error, nor in the brief of counsel for the plaintiff in error, is any ground relied on in support of the demurrer to the second count. An inspection of it discloses no defect, and it is to be presumed that none exists.

The objection to the third count is that it does not set forth a cause of action in the city of Petersburg. Even if the allegation of place were necessary, the objection is not well founded, for it is expressly averred at the beginning of the count that it was at the city of Petersburg that the coupling in effecting which the injury was alleged to be sustained was required to be made. But this is a transitory action, and it was unnecessary to set forth in the declaration the place at which the act which caused the injury was done. Code, § 3243; 4 Minor, Inst. pt. 1, pp. 574, 575, 590; Id. pt. 2, pp. 955, 956; 3 Rob. Prac. N. P. 503-506. If the objection was aimed at the jurisdiction of the court, then this was the province of a plea in abatement to the jurisdiction, and not of a demurrer. Code, § 3260. It is unnecessary to aver in the declaration that the cause of action arose or that the matter is within the jurisdiction of the court. Section 3244.

The next assignment of error relates to the refusal of the court to exclude from the consideration of the jury certain parts of the testimony given by the plaintiff himself upon the trial. It is sought to raise the question upon the bill of exceptions taken to the refusal of the court to set aside the verdict and award a new trial, which sets forth all of the evidence given upon the trial, together with the objections to the evidence and rulings of the court as they were noted during the progress of the trial, and much other matter. It is simply a stenographic report of all that transpired, signed by the judge, and falls to comply, so far as the alleged errors under consideration are concerned, with the familiar and well-established practice in respect to bills of exceptions. Where a ruling of the trial court is relied on as erroneous, and it is intended to make it, if not remedied, the basis of an application to an appellate court for a writ of error, particularly where it relates to the admission or exclusion of evidence or to an instruction, it should be directly brought to the attention of the trial court; and, if not corrected by appropriate action, it should then be specified in a proper bill of exceptions, unincumbered by irrelevant matter, and signed by the judge of the court. And, while it is permissible to embrace in the same bill more than one exception, it tends to produce confusion, and the practice is not to be commended; but, if adopted, the bill of exceptions should, as in the case of a single exception, specifically and definitely set forth the allegation of error, and so much of the evidence as is necessary to render clear the propriety or impropriety

of the rulings of the court which were excepted to. Where a bill of exceptions is not taken in accordance with the established practice; the objections made to rulings of the court in respect to the admission or exclusion of evidence, although noted at the time, are to be treated by the appellate tribunal as waived or abandoned. In the case of Railroad Co. v. Shott (Va.) 22 S. E. 811, 813, Judge Harrison, in delivering the opinion of the court, said: "In the case at bar, the bill of exceptions under consideration is a single bill of exceptions, setting forth all the evidence introduced on the trial taken to the refusal of the court to set aside the verdict and grant a new trial. It does not conform to the rule of practice already laid down, and therefore the numerous objections made to the admission and rejection of evidence at the time it was taken must be regarded by this court as abandoned." The bill of exceptions in this case does not differ from the bill in that in respect to the question under consideration, and the like conclusion must follow. With these observations on the nature of the bill of exceptions upon which this assignment of error is founded, we could properly dismiss its further consideration, but we will briefly examine the three objections in respect to the evidence which the plaintiff in error has chosen to select out of the many rulings made by the court.

The first objection is to the refusal of the court to exclude so much of the testimony of the plaintiff as undertook to state what were the rules and regulations of the company in reference to the employment of its servants; and the third objection is to the refusal of the court to exclude so much of each and every question asked the witness as called for, and so much of every answer that gave, the opinion or belief of the witness "as to any matter in issue in the case," all of which questions had been asked and the answers to them been given by the witness without objection from the defendant. The motion to exclude did not specify the particular statements or answers that were deemed objectionable by the defendant. The effect of the motion was to impose a burden on the court that it was not called upon to bear. It could not be expected to explore all of the testimony of the witness, and ascertain and winnow out the exceptionable parts of it, when the defendant had not seen proper to object to its admission, and, after it had been given, did not take the pains to specify particularly what it asked to have excluded. A party who asked to have evidence excluded that has been admitted without objection must recall and point out distinctly the exceptionable answers or statements, or the court may properly overrule the motion to exclude. *Harri-man v. Brown*, 8 Leigh, 697; *Buster's Ex'r v. Wallace*, 4 Hen. & M. 82; *Parsons v. Harper*, 16 Grat. 64; *Friend v. Wilkinson*, 9 Grat. 31; and *Trogden's Case*, 31 Grat. 862.

The only other objection relied upon un-

der this assignment of error relates to the question which called for the language used by the conductor to the plaintiff whenever couplings had to be made by him on the trip out from Norfolk, as well as at the coupling attempted at Petersburg, where he was injured, and the answer given in reply to the question. No objection to this evidence was pointed out, except the general one that it was impertinent and illegal, without specifying wherein it was impertinent and illegal. The object of the question and the effect of the answer were to show the incompetency of the conductor, and related directly to one of the principal allegations of the first count of the declaration. The evidence was relevant to the issue, and the court did not err in admitting it over the objection of the defendant.

The next assignment of error relates to the action of the court in giving certain instructions, and refusing others.

The first instruction given by the court announced the proposition that it was the duty of the defendant company to provide safe and suitable machinery and appliances, and to furnish competent and vigilant servants for the conduct of its business, and that the plaintiff had the right to presume that it had done so. It is conceded that the instruction correctly propounds the law. It is equally clear that it directly applied to the issue made by the pleadings. It was not therefore liable to the objection that it announced merely an abstract principle of law. *Shelton v. Cocke*, 8 Munf. 191; *Johnston v. Moorman*, 80 Va. 131. But it was argued that the defendant had not provided safe and suitable machinery and appliances and competent servants, and that, therefore, there could be no presumption in his case that it had performed its duty; and consequently it was error so to instruct the jury. Such objection to the instruction is based upon a misconception of the evidence, for it clearly shows that the defective couplings which caused the injury to the plaintiff were encountered, and the incompetency of the conductor was manifested, during the progress of the train on its journey, and were not previously known by him.

The other instructions can be more intelligently disposed of after reviewing the material parts of the evidence, and recurring to the law applicable thereto.

The plaintiff left Norfolk on December 30, 1891, in the capacity of middle brakeman on a freight train of the defendant company. Upon its arrival at Suffolk, the fireman, who had been taken sick, was relieved from duty, and the front brakeman put in his place, the effect of which was to devolve all the breaking and coupling of the cars on the plaintiff. He was thus required to perform, in addition to his own proper duties as middle brakeman, all the duties of the front brakeman. Against this he remonstrated to the conductor, but to no purpose. The train, when it

left Norfolk, was composed of 45 cars; at Suffolk it took on 16 cars, making 61; and it was ordered that it take on 15 more cars upon its arrival at Petersburg. When the train arrived at Petersburg, the engine and 10 cars were cut loose, and passed through the switch, whence they were backed down the track to the cars which were to be taken into the train at this point. The coupling of the first car was made, and then the train came back to take on the next car. The plaintiff found great difficulty in making this coupling. Five ineffectual efforts were made by him to effect it. These cars had been in a wreck, which had shivered the dead blocks, and badly twisted the drawheads, besides causing one to be higher than the other. After endeavoring unsuccessfully to make the coupling with a stick, the plaintiff informed the conductor, who was near by, superintending and directing the coupling of the cars, of the defective condition of the drawheads, and of his inability to make the coupling with a stick. The conductor then ordered him to throw aside his stick, and couple the cars with his hand. The plaintiff replied that the coupling, though dangerous, could be made with the hand if the train was moved back "lightly." Thereupon the plaintiff returned to the car to make the coupling with his hand, as he was directed to do, while the conductor signaled the engineer to move the train back for that purpose; but instead of giving the signal to the engineer to back the train slowly and gently, as the plaintiff had stipulated should be done, the conductor gave simply the signal to back. The engineer consequently caused it to move back in the ordinary way, and at the usual speed, with the result that the hand of the plaintiff was mashed, and his arm had to be amputated. It is perfectly clear that, although the negligence of the conductor contributed to produce the accident, the defective, improper, and unsafe condition of the appliances for coupling the cars was the immediate and primary cause of the injury. But for their condition, which rendered the act of coupling the cars difficult and dangerous, the plaintiff would not have been hurt.

It is a fundamental principle of the law of master and servant that the master personally owes to his servants the duty of using ordinary care and diligence to provide for their use, in his service, sound and safe machinery, materials, and instruments, and such appliances as are reasonably calculated to insure their safety; and he is equally bound to inspect and examine all those things from time to time, and to use ordinary care and skill to discover and repair defects in them. If, therefore, the master knows, or would have known if he had used ordinary care to ascertain the facts, that the machinery, instruments, or appliances which he has provided for the use of his servants are defective and unsafe, and the servant is thereby injured, the master is lia-

ble. This doctrine has been so frequently asserted by courts of last resort and of the highest character that it cannot now be considered open to question. *Shear. & R. Neg.* § 194; *Railroad Co. v. Nuckols' Adm'r* (Va.) 21 S. E. 342; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Fuller v. Jewett*, 80 N. Y. 46; *Ford v. Railroad Co.*, 110 Mass. 240; *Spicer v. Iron Co.*, 138 Mass. 426; and *Cooper v. Railroad Co.*, 24 W. Va. 37. This is one of the personal duties which the master has impliedly contracted to perform towards his servants, and the law will not allow him to escape liability for an injury resulting from the failure to perform it by intrusting the performance of the duty to another. He cannot divest himself of the duty, nor relieve himself from responsibility for its nonperformance, by delegating it to any subordinate officer or servant. *Shear. & R. Neg.* § 204; *Cooley, Torts*, 561; *Booth v. Railroad Co.*, 73 N. Y. 38; *Ford v. Railroad Co.*, 110 Mass. 240; *Railroad Co. v. Jackson*, 55 Ill. 492; and *Cooper v. Railroad Co.*, supra. In *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 590, Mr. Justice Field said: "It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant, so as to exempt himself from liability for injuries to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from liability." It is a further principle of the law of master and servant that a master cannot make the wrong of another an excuse for his own default. He cannot shelter himself from liability for an injury to one of his servants behind the negligence of a fellow servant. If a servant is injured through the fault of the master to perform any of those duties which the law imposes on him personally, such as providing, inspecting, and keeping in repair and good order safe and suitable machinery, instrumentalities, and appliances for the use of the servant in his employment, and such fault of the master proximately contributes to the injury, it is no defense for the master that the negligence of a fellow servant also contributed to produce the injury. *Shear. & R. Neg.* § 187; *Cooley, Torts*, 560; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Booth v. Railroad Co.*, 73 N. Y. 38; *Cone v. Railroad Co.*, 81 N. Y. 206; *Elmer v. Locke*, 135 Mass. 575; *Railway Co. v. Henderson*, 37 Ohio St. 549; and *McMahon v. Henning*, 1 McCrary, 516, 3 Fed. 353. In *Railroad Co. v. Nuckols*, supra, the president of the court, in delivering the opinion, laid down, among other propositions which are fully warranted by the great weight of authority in this state and else-

where, the following: "Where the injury to the servant has been occasioned by the default of a fellow servant, concurring with the negligence of the master, the latter is liable as though he only were at fault." If, therefore, the conductor was guilty of negligence in the manner of signaling the engineer to back the train, and such negligence contributed to the injury received by the plaintiff, but, in giving such signal, the conductor was, under the law, merely a fellow servant of the plaintiff, yet his negligence, concurring with that of the defendant in failing, in violation of its plain duty, to maintain safe and suitable appliances for the discharge of the duties undertaken by the plaintiff, does not operate to relieve or diminish the liability of the defendant. It is liable for the injury "as though it only were at fault."

Among the rules of the defendant, the following, for freight conductors and freight brakemen, are disclosed by the evidence:

"672. Conductors of freight trains report to and receive their instructions from the train master. At terminal stations they must obey the orders of the yard master."

"673. They are responsible for the safety, prompt movement, and proper care of their trains, for the conduct of the men employed therein, and for the signals, lamps, and tools intrusted to their care."

"679. They must see that the couplings and brakes of the cars of their trains are in good order before starting, and inspect them when the train stops for water or for other trains."

"692. Freight brakemen report to and receive their instructions from the train master. While on the train they are under the direction of the conductor. At terminal stations they must obey the orders of the yard master."

The writ of error comes before us upon a certificate of the evidence. Viewing the evidence under the settled rules applicable in such case, it shows that Petersburg was not a terminal station of the defendant company, and consequently the plaintiff was subject to the orders of the conductor, and not of the yard master, when the injury happened. The inspection of the couplings and brakes of the cars at the time of the accident devolved, under the rules of the company, upon the conductor, and he, in respect to this matter, stood in the shoes of his principal. He occupied, in relation to it, the place, as denominated by the law, of "vice principal." The cars had been in a wreck, and the couplings thereby injured. Of this the defendant was aware, or ought to have been. It was its personal duty to have had them put in good order. It had not done so. This was its own negligence, for which it was liable for a consequent injury to a servant whose duty required him to use them. If the defendant had not previously acquired knowledge of the defective and unsafe condition of the couplings, it yet did

so prior to the injury. The plaintiff informed the conductor of their condition, and of the difficulty of making the coupling before the attempt to make it was made, in which effort he was hurt. He was the representative of the company in respect to this matter, and his knowledge became, in the law, the knowledge of his principal. But instead of refusing to take up these cars as a part of his train, which he testified it was his right and duty to do, or taking proper precaution to avoid the danger that was liable from using the damaged couplings, he ordered the plaintiff to make the coupling with his hand, and negligently failed to observe the precaution upon which the plaintiff consented, in obedience to the order of the conductor, to undertake the task.

But it was argued by the learned counsel for the defendant company that, the plaintiff having discovered that the drawheads were out of order, and that their bad condition made the effort to couple the cars difficult and dangerous, he assumed the risk in attempting to couple them, and waived all right of action against the defendant for the injury that ensued. The train was on its way from Norfolk to Crewe. The defendant company had ordered that these cars, which had the damaged drawheads, should be taken up and carried forward by the train on its journey. This could not be done until they were duly coupled into the train. The defects in the couplings were not discovered by the plaintiff until this duty had to be performed. He did not become aware of the defects until it became his duty to adjust the couplings. That was about 4 o'clock in the morning of a mid-winter night. There was no one to whom he could report their bad condition, except the conductor of the train, under whose orders he was working. This he promptly did. The conductor replied by ordering him to make the coupling. The coupling was a necessity of the occasion. The duty to make it devolved on the plaintiff by virtue of his employment. Obedience is the primary duty of a servant, and it was incumbent on the plaintiff to couple the cars, unless the act was attended with such great danger that a man of common prudence would not undertake it. This was not the case. The plaintiff saw that the coupling could be effected without injury to himself if extraordinary care and caution were exercised. He stipulated with the conductor for the observance of the necessary precaution. It is to be presumed that the conductor also thought that the coupling could be effected without necessarily incurring danger, or he would not have ordered it to be done.

When the right of a servant to recover for an injury received while using defective machinery or appliances, which the master has provided for his use, is questioned, because of previous notice of the defect, the mere "isolated fact of risk" is not the only matter to be considered. All the circumstances are to be taken into account. The law does not pre-

scribe a rule so inflexible or unwise as that a servant must forthwith refrain from using a defective machine or appliance, or immediately quit the service of the master, upon the discovery of the defect in the machine or appliance, or that he is working by the side of a negligent fellow servant, upon the pain of conferring immunity upon the master from all liability for an injury incurred in consequence of such defect or incompetency. The true test in all such cases is whether a person of ordinary prudence, acting with such prudence, would, under all the circumstances, have refused to incur the risk. In *Shearman & Redfield on Negligence* it is said: "If a servant of ordinary prudence would not have believed that he could, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing the right to complain if, while pursuing his ordinary course, he suffers from such defect. And so, if the danger is one which a servant of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, the servant would not, by continuing his service, lose his right to recover damages suffered by him while using such precautions." Section 214. See, also, sections 211 and 212; and *Hough v. Railway Co.*, 100 U. S. 213, 225. In *Patterson v. Railroad Co.*, 76 Pa. St. 393, the court said: "If the instrumentality by which the servant is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. \* \* \* But where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely avoided by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

The plaintiff followed the order of the conductor, obedience to whom the rules of the defendant exacted of him. He did what the exigencies of the occasion required of him in the discharge of the service he owed the defendant; and he stipulated for the observance by the conductor of the precautions which the unsafe implements he had to use suggested. He himself believed that, if such precautions were observed, the act required of him could be safely performed; and it is to be presumed from the order of the conductor, after having notice of the defect in the couplings, that he was of the same belief. The plaintiff did only that which an ordinarily prudent brakeman would have done under like circumstances, and his conduct does not bar him from recovering from the defendant damages for the injury which he sustained.

The foregoing principles are now to be applied to the instructions complained of. The main purpose of the objections made to in-

structions 2 and 3 as given by the court, and also to the amendments made to instructions 2, 3, and 4 as asked for by the defendant, was to raise the question whether or not the conductor was a fellow servant of the plaintiff. In the matter of seeing that the couplings and brakes of the cars of his train were in good order before starting, and of inspecting them when the train stopped for water or other trains, he was not a fellow servant; for, it being the personal duty of the defendant to inspect and have in good order the instrumentalities and appliances to be used by its servants, as well as to provide them in the first instance, and it having, by its rules, delegated this duty to the conductor to the extent above mentioned, he was not in its discharge a fellow servant of the crew in charge of the train under his orders. Further than this it is not necessary in this case to decide, and it is not our purpose to do so. It will be time enough to decide the much-mooted question of the relation of a conductor of a train to the crew under him when it becomes necessary to do so. In so far as the instructions declare that the conductor was not a fellow servant of the plaintiff in the matter of inspecting and seeing that the couplings and brakes of the cars of his train were in good order, there was no error; and, although the instructions go beyond that in holding that the conductor was not a fellow servant of the plaintiff, yet, even if erroneous in doing so, the defendant could not possibly be prejudiced by the error. The evidence conclusively establishes the default of the defendant in having defective and unsafe couplings, which it became necessary for the plaintiff to use in discharge of the duties within the scope of his employment, and that such default was the proximate cause of the accident; and it matters not whether the conductor was a fellow servant of the plaintiff or not. In either case the result would be the same. Although the conductor was guilty of negligence, and such negligence contributed to produce the injury, yet, as it was concurrent with the wrong of the defendant, it furnished no excuse for the negligence of the latter, and could not affect the extent of his liability for the injury.

Objection was also made to the substitution by the court, in the fifth instruction asked for by the defendant, of the word "efficient" before "men," so as to make the instruction read "efficient men." In this there was clearly no error. It was the duty of the defendant to provide competent men for its service. "Efficient," in the relation in which it was used, was the equivalent of "competent," and expressed no more than the duty which the law imposes on the defendant.

The assignment of error that the verdict was contrary to the law and the evidence has already been substantially and fully disposed of, adversely to the contention of the plaintiff, in error, and need not be separately or further considered.

The final complaint of the petitioner is that the damages awarded by the jury are excessive. There is no legal measure of damages in a case of this kind, and their estimation is peculiarly within the province of the jury, who are deemed especially competent to determine such matters. It is well settled that the court will not disturb the verdict in such a case, unless the amount allowed is so great as to evince prejudice, partiality, or corruption on the part of the jury, or that they were misled by some mistaken view of the merits of the case. *Farish v. Reigle*, 11 Grat. 697; *Railroad Co. v. Shott* (Va.) 22 S. E. 811; and *Electric Co. v. Garthright* (Va.) 24 S. E. 267. The plaintiff had just attained his majority. He was a young, industrious, and able-bodied man, and was earning good wages. When injured, besides supporting himself, he was taking care of his mother, who was a widow with nine children. He had no resource to this end except his personal labor. He was hurt on December 31, 1891. The trial took place in February, 1894; and up to that time, on account of his physical disability, he had been unable to obtain any employment. The loss of an arm is a serious matter to any person, but peculiarly so to one wholly dependent upon manual labor for a livelihood. The physical suffering he endured from the injury was also to be considered. The amount of the verdict, to wit, \$3,500, does not excite, under the circumstances, a suspicion of the existence of any of the grounds upon which a court may interfere with the verdict.

We are of opinion, upon the whole case, that there is no error in the judgment of the corporation court, and that the same should be affirmed.

(93 Va. 293)

#### SULPHUR MINES CO. v. THOMPSON'S HEIRS.

(Supreme Court of Appeals of Virginia. June 25, 1896.)

EJECTMENT—EVIDENCE—PARTIES—TITLE TO SUPPORT—DESCRIPTION IN DEED—SUFFICIENCY—EXTRINSIC EVIDENCE—APPEAL—OBJECTIONS NOT RAISED BELOW—TRUST DEED—POWER COUPLED WITH INTEREST—REVOCATION—DEATH OF GRANTEE—SALE—VALIDITY—CONDITIONS PRECEDENT—BURDEN OF PROOF—RECITALS IN DEED—ADVERSE POSSESSION—COLOR OF TITLE—PRIVATE MAPS AND SURVEYS—CLAIM OF RIGHT—HARMLESS ERROR.

1. In ejectment, where the identity of the land was in dispute, extracts from the land books of a district other than that in which the land in suit was located, showing that a tract containing the same number of acres, and lying at the same distance from the courthouse, and in the same direction, was listed from 1832 to 1874 to "George E. Pottie's Estate," of which plaintiffs were claimants, and from that time to the beginning of the suit to "George E. Petrus," were admissible, together with tax tickets showing that plaintiffs had during this entire period paid the taxes on the land so listed.

2. A statement in the land books, entered since the beginning of the controversy, that "it is believed this is the George E. Pottie land" (referring to the land then listed to "George E.

Pettus"), was a mere expression of opinion, and not admissible.

8. The overruling of a general objection to evidence cannot be assigned as error for the first time on appeal, though a portion of such evidence was inadmissible.

4. When land is described in a deed as adjoining the lands of certain persons named, parol evidence is admissible to show the location of the adjoining lands, in order to identify that conveyed.

5. A description of the land conveyed, as a tract lying in a certain county, "on the north fork of the C. river, being a part of the land I purchased from M., \* \* \* joining the lands of" persons named "and my own, \* \* \* containing, by estimation, two hundred and thirty acres, be the same more or less," etc., is sufficient, if the property intended to be conveyed can be identified with the aid of extrinsic evidence.

6. On the death of an executor who had acquired the legal title to land at a trustee's sale, his heirs were the proper parties to bring ejectment, whether the property was purchased by their ancestor in his own right, or for the benefit of his testator's estate, and to save the debt secured by the trust.

7. When land is purchased by an executor at a trustee's sale, for the benefit of the estate, and to save the debt secured by the trust, it will be treated in equity as personalty; but in a court of law it is real estate.

8. Where plaintiffs in ejectment traced their title back to the year 1765, and showed that those under whom they claimed held possession of the land for 45 years thereafter, under color of title, and that the records prior to that year were destroyed, the jury were warranted in presuming an original grant from the commonwealth.

9. The power of sale conferred on the trustee in a deed of trust, or his personal representative in case the former dies before exercising such power, is not revoked by the death of the grantor.

10. The fact that the power of sale in a deed of trust, and the estate and interest coupled therewith, are subsequently separated, the power passing by the express terms of the trust to the personal representative of the trustee, and the estate itself descending to his heirs, will not revoke such power.

11. A deed by a trustee under a power of sale in a deed of trust conveys an absolute estate in a court of law, whether the conditions of the trust deed have been complied with or not.

12. Where a deed of trust conferred power of sale on the personal representative of the trustee in case the latter died before exercising it, such representative being clothed with a naked power, cannot convey a good title unless the conditions of the trust deed authorizing the sale have been complied with.

13. The burden is on a purchaser from the personal representative of the trustee in a deed of trust to show that the conditions made a prerequisite to the exercise of the power of sale have been complied with.

14. Where power of sale is conferred by a deed of trust on the personal representative of the trustee in case the latter dies before exercising it, mere recitals in the deed executed by the representative are not prima facie evidence that the conditions prerequisite to a valid exercise of the power of sale have been performed, no actual possession by the purchaser under such deed being shown.

15. In ejectment, extrinsic evidence is not admissible to show that land not embraced in a deed was intended to be conveyed thereby.

16. A private survey and map, never recorded, and not referred to or made a part of the deed under which a party claims, cannot be considered color of title, though admissible to show the character of his claim of right.

17. Adverse possession for the statutory period under mere claim of right, unlike that under color of title, is limited to such portion of the tract as was actually occupied, cultivated, and inclosed by the claimant.

18. A refusal to instruct that adverse possession of a part of the land in suit for the statutory period, under color of title, was possession of the whole, is harmless error, where the jury find as a fact that claimant was not in adverse possession of any portion of the tract for the requisite time.

19. Where there are conflicting titles, the junior claimant can gain no possession of the land in controversy as against the senior claimant without actual occupancy of some portion thereof, though the possession of the senior claimant be constructive only.

Error from circuit court, Louisa county; D. A. Grimsley, Judge.

Ejectment by the heirs of John Thompson, deceased, against the Sulphur Mines Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Frank V. Wilson, Christian & Christian, and Leake & Carter, for plaintiff in error. F. W. Sims and John Junter, Jr., for defendants in error.

BUCHANAN, J. Upon the trial of this cause, which is an action of ejectment, the court permitted the plaintiffs, over the objection of the defendant, to introduce in evidence extracts from the land books of Louisa county, showing that a tract of land containing the same number of acres, and lying the same distance from the courthouse, and in the same direction, as the land in controversy, was charged on the land books for the purposes of taxation. From the year 1832 to the year 1873, inclusive, the land was charged in the name of "George Pottle's Estate," and from the year 1874 to the institution of this action it was charged to "George Pettus." They were also allowed to introduce in evidence tax tickets showing the payment of taxes on the land so listed upon the land books.

One objection to this evidence was that the land was charged upon the land books of a different district from that in which the land in controversy was located, and, as one of the questions in the case was the identity of the land sued for, the evidence tended to mislead the jury. The evidence was offered to show that the claimants of George Pottle's estate had during that period made claim to the land, and paid taxes thereon. This action was brought for their benefit, and they had the right to show that during that period they were asserting their claim to, and paying taxes on, the land in controversy.

The question whether the tract of land sued for, and the tract to which they had asserted claim, and upon which they had been paying taxes, was the same tract, was for the jury. The fact that it was taxed in a different district from that in which the land in controversy was located was a circumstance tending to show that it was not the same land, but was not conclusive of it, and was

no sufficient reason for excluding the evidence from the jury.

Another objection made to the extracts from the land books is that they contained the following statement: "In 1871, Pottle, Geo. E., 25 acres Con. Creek, N. E. 12. Subsequently George E. Pottle's name was dropped, and the name of Geo. Pettus appeared with the same number of acres, location, bearing, and dis. from C. H. as above. It is believed that this is the Geo. E. Pottle land."

The statement was made in the land book in the year 1890, after the controversy in this case had arisen. The last sentence in it is a mere expression of an opinion, not a statement of fact, and was clearly inadmissible. If the court's attention had been called to the statement, it would, doubtless, have excluded it; but the objection made, as shown by the bill of exceptions, was to "all and each of said extracts and receipts."

This objection being general, the court properly overruled it, as the extract, except the statement complained of, was clearly admissible in evidence. The objection to exclude was too broad.

The party objecting ought to have pointed out specifically the objectionable part, so that the court might have excluded it, and allowed the residue of the extract to go to the jury. The assessor who made the statement complained of was, during the progress of the trial, examined as a witness. He explained the circumstances under which the statement was made, so that the jury had all the facts upon which he based his opinion. It is scarcely possible that his expression of opinion could have prejudiced the defendant under the circumstances; but if it did, having failed to make the proper objection in the court below, it cannot make it here now for the first time. *Warren v. Warren* (decided at March term, 1896, of this court) 24 S. E. 913.

The assignment of error that the description of the land intended to be conveyed by the deed from Cosby to Dear, made in the year 1785, is so vague and indefinite that no title passed by it, cannot be sustained. The deed describes the land as one "certain tract or parcel of land, situate, lying, and being in the county of Louisa, on the north fork of Contrary river, being a part of the land I purchased from Barnett Mitchell, the lower end of the said tract joining the lands of Thomas Bond, John Timberlake, William Cliff, and my own, that was taken from the said tract of land here described, sold by the said Charles Cosby to Charles Dear, containing, by estimation, two hundred and thirty acres, be the same more or less," etc. It is true that the deed does not describe the land by courses and distances, but it is described as lying in Louisa county, on the north fork of Contrary river, as a part of the land conveyed by Barrett Mitchell to Cosby; that it adjoins the lands of Bond, Timberlake, Cliff, and the grantor.

Extrinsic evidence was admissible to ascertain the location of the adjoining lands called for, so as to apply the deed to its proper subject-matter. If with the aid of such evidence the land could not be identified, then the plaintiffs must fail in their action; but the deed upon its face is not so defective in the description of the land as that the court could pronounce it ambiguous or uncertain, and exclude it from the jury. No court is at liberty to pronounce an instrument ambiguous or uncertain until it has brought to its aid, in its interpretation, all the lights afforded by collateral facts and circumstances which are properly provable by parol. 1 Greenl. Ev. §§ 298, 300. The court properly admitted the deed in evidence.

The plaintiffs in the action are the heirs of John Thompson, deceased, who sue for the benefit of the claimants of the unadministered estate of George Pottle, deceased. Thompson was the executor of Pottle, and it is claimed that at a trustee's sale of a tract of land, which the evidence tends to show was claimed to be the land in controversy, he became the purchaser. The deed conveying the property to him describes him as the executor of George Pottle. Whether he purchased the property in his own right, or for the benefit and for the purpose of saving the debt of his testator's estate, is immaterial. In either event he was invested with such title to the property as passed by his grantor's deed. Upon his death it descended to his heirs at law, to be held by them as trustees for Pottle's estate if it was purchased by their ancestor for the benefit of that estate; for their own benefit if purchased for himself. In any action at law for the recovery of the land, the heirs of John Thompson, assuming that the legal title passed by the deed to him, whether they sued for themselves or for the benefit of the estate of Pottle, were the proper and only parties who could sue. In an action of ejectment, the holder of the legal title, as a rule, alone can sue. If the property was purchased for the benefit of Pottle's estate, and to save the debt secured by the trust, it will be dealt with in a court of equity as personal estate, but in a court of law it is real estate.

Another ground of objection relied on is that the plaintiffs failed to trace their title back to the commonwealth, or further back than the year 1765. It was necessary for the plaintiffs to show that they had legal title to the land in controversy. This might have been done by showing a grant therefor from the crown or commonwealth, and by connecting themselves therewith by a regular chain of title. This could not be done, it was claimed, because of the destruction during the late war of the records of Hanover county, from which Louisa county was formed. It might also have been done by showing such a state of facts as would warrant the jury in presuming a grant. The evidence tended to prove that

those under whom the plaintiffs claimed had taken possession of the land under, at least, color of title, and held it for many years.

A number of deeds were offered in evidence for a tract of land of which the land in controversy was claimed to be a part. The first deed offered in evidence was from Garrett to Pryor, in 1765. Pryor conveyed to D. Smith, in 1768; D. Smith to William Smith, in 1770; William Smith to Mitchell, in January, 1779; Mitchell to Cosby, in October, 1779; Cosby to Dear, in 1785; and Dear to William Grady, in 1786. Each of these conveyances, except the first, shows that possession of the land was delivered by each vendor to his vendee. In 1810, Grady executed the deed of trust to Edwards, trustee, to secure Pottle. The evidence tends to show that Grady was in the possession of the land when he died, during or soon after the close of the war in 1812, and that the parties under whom the plaintiffs claim were in the possession of the land from the year 1768 to the year 1812 or 1815, a period of some 45 years.

The evidence of possession and the destruction of the records were sufficient to warrant the jury in presuming a grant for the land in controversy to Garrett, or those under whom he claimed.

One of the links in the plaintiff's chain of title was a deed from Reuben Edwards, administrator of John Edwards, trustee in the deed of trust executed by William Grady to secure a debt due George Pottle. Whether or not the grantor in the deed of trust was dead when the sale was made under the trust, in the year 1813, does not clearly appear. He was dead in 1830, when the deed to the purchaser at the sale was made. It is contended that, upon the death of the trustee in the deed of trust, the legal title to the trust subject descended to his heirs, and that the power to sell passed to his personal representative by the terms of the deed of trust; that this power of sale being a naked power, not clothed with an interest, and not having been exercised during the lifetime of the grantor, the power to sell was revoked by his death, and that any sale or conveyance made thereafter by the personal representative of the trustee was a nullity.

It is true in the case of a mere naked power that it dies with the donor, and cannot be exercised after his death, although it may have been irrevocable during his life; but this consequence only follows in those cases where the power is a naked power, and is to be exercised in the name and as the act of the person who granted the power. Where the power is coupled with an interest, so that it may be exercised in the name and as the act of the donee of the power, the death of the person who conferred the power has no effect upon it.

The reason given why the death of the donor revokes the power in the one case, and not

in the other, is that in the case of a naked power, the interest or title being vested in the person who confers the power, it remains in him, and can only pass out of him by a regular act in his own name. The act of the donee of a naked power, to be effectual, must be the act of the principal, done in his name, and be such an act as the principal himself would be capable of performing at the time the act was done. When the principal dies (being incapable thereafter of performing any act himself), all powers which he has conferred upon others, and which must be exercised in his name as principal, are, of necessity, revoked. Such powers die with him, for it would be an absurdity to allow an act to be done in the name and as the act of a principal who was dead when the act was done,—to allow an agent to do for him and in his name what he had no power to do for himself. Story, Ag. § 488.

But where the estate or interest upon which the power is to be exercised passes with it, and vests in the donee of the power, he acts in his own name. The estate or interest being in him, he can convey it in his own name. He is not a substitute, acting in the name and place of another, but is a principal, acting in his own name, by virtue and in pursuance of powers which limit his estate or interest. In such a case the reason which limits the power to the life of the person giving it no longer exists, and the rule ceases with the reason upon which it is founded.

In *Hunt v. Rousmanler*, 8 Wheat. 174, an attorney in fact was invested with authority to sell a brig at sea, and pay the proceeds to the creditor. It was held in that case (Chief Justice Marshall delivering the opinion of the court) that the death of the principal revoked the power of attorney, although it was irrevocable in his lifetime, by reason of the interest of the creditor in its execution. The power was to be exercised in the name of the principal, and this could not be done after his death.

In the same case, when it was decided in the trial court, Mr. Justice Story said: "When it is said that a naked power is extinguished by the death of the person creating it the language is meant to be confined to those cases in which, as in the case now before the court, the power is to be executed in the name and as the act of the grantor, and not of the grantee." 2 Mason, 244, Fed. Cas. No. 6,889.

In the case of *University v. Finch*, 18 Wall. 106, a deed of trust had been executed before the late Civil War to secure a debt. The grantors were residents of and lived in one of the Confederate States. The property was located and the trustee lived in the state of Missouri. A sale was made during the war. It was claimed that the power was revoked by the war. The supreme court of the United States denied this, and held that the power under which the sale was made "was irrevocable."

In *Berry v. Skinner*, 30 Md. 567, it was held that the power of sale given in a mortgage was not revoked by the insanity of the mortgagor; that neither his insanity nor death would in any manner interfere with the mortgagee's right to execute the power of sale in the mode and manner stipulated by the parties; and the reason given was that a power "coupled with an interest, so that it can be executed in the name of the donee or trustee, is irrevocable."

Washburn, in his work on Real Property (volume 2, side p. 499), says, in discussing the power of sale given in a mortgage, that "such a power is coupled with an interest, and is appendant to the estate, and irrevocable. It consequently passes with the estate by assignment; nor does it die with the mortgagor."

In *Hunt v. Rousmanier*, cited above, Chief Justice Marshall said: "We know that a power to A. to sell for the benefit of B., ingrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it."

Perry on Trusts (section 602) says: "It is a universal rule that a power coupled with an interest is irrevocable; and as a power of sale inserted in a mortgage or deed of trust to a creditor to secure a debt, or to a third person for his benefit, is a power coupled with an interest, it cannot be revoked by any act of the grantor or donor of the power. Not even the death or the insanity of the grantor or donor will annul or suspend its exercise. The debt remains; the right or lien on the property remains; and the power is coupled with them. In other words, the power is annexed to the property, and is an irrevocable part of the security, and goes with it."

The power of sale conferred upon the trustee in a deed of trust being irrevocable, the death of no one nor all of the parties to it could affect the right of the creditor or his personal representatives to have the power of sale enforced. If the trustee died before executing the power of sale, and there was no provision made in the trust for some other person to exercise that power, resort to a court of equity would have been necessary (as the law was at the time the deed of trust in question was executed) for the appointment of another trustee, or to have a sale made by a commissioner of the court. In either case, however, the sale, when made, must, as far as practicable, be in the manner and upon the terms prescribed by the deed of trust. *Crenshaw v. Seigfried*, 24 Grat. 272, 279.

In the deed of trust under consideration, to avoid the necessity of resorting to a court of equity if the trustee died before executing the power conferred upon him, the trust expressly conferred the power of sale upon his personal representative.

The fact that the power to sell and the estate or interest coupled with it were afterwards separated, the power passing by the terms of the trust to the personal representa-

tive of the trustee, and the estate or interest descending to his heirs, did not revoke the power of sale any more than it reconveyed the estate.

Although the personal representative of the trustee was not clothed with the estate or interest conveyed by the deed of trust, a sale by him, if made, in pursuance of the trust, would divest the heirs of the trustee of the title or interest, and invest the purchaser therewith, by virtue of the provisions of the deed of trust and the deed of the personal representative to the purchaser. *Bank v. Eldridge*, 115 Mass. 424, 428; *Carrington v. Goddin*, 13 Grat., at page 601, etc.

In the case of *White v. Stephens*, 77 Mo. 452, where the deed of trust provided that, in case of the absence, death, refusal to act, or disability in any wise of the trustee named therein, the then-acting sheriff of the county should, at the request of the holder of the note secured, sell the property, and execute a deed to the purchaser, the condition upon which the sheriff was authorized to sell having arisen, he sold and conveyed the property. The validity of his sale was attacked, but the court said: "In the case at bar the title passed from the grantor to the trustee named in the deed of trust, as a security for the debt, and was subject to be divested upon the execution of the power by the sheriff, and the conveyance of the sheriff was not required to be made in the name of the grantor in the trust deed; and the well-known rule announced in *Hunt v. Rousmanier*, that an attorney in fact cannot execute a conveyance in the name of his principal, after the death of the principal, is therefore inapplicable here." The sheriff's sale and conveyance, which were made in pursuance of the trust, were held valid. See *Beal v. Blair*, 33 Iowa, 318, 321; *Clark v. Willson*, 53 Miss. 119, 128, 129.

We do not think that the power of sale was revoked by the death of the grantor in the deed of trust, but continued in full force, for the benefit of the creditor whose debt was secured by it.

The personal representative of the trustee sold, and made a conveyance. His deed recites that the conditions upon which he was authorized to sell had arisen, and that the sale was made in pursuance of the trust. Objection was made to the introduction of this deed in evidence, and afterwards a motion was made to exclude it, upon the grounds that it was made in the exercise of a naked power, that there was no evidence that a sale was ever made under the trust, and that the recitals in the deed were not evidence of the facts recited.

The trustee in a deed of trust takes a legal, though a defeasible, title; and a deed from him to a purchaser conveys an absolute estate in a court of law, whether the conditions of the trust deed have been complied with or not, though a different rule prevails in a court of equity. *Taylor v. King*, 6 Munf. 358;

Harris v. Harris, Md. 367; Pownall v. Taylor, 10 Leigh, 172, 183.

But the personal representative of the trustee being clothed with a naked power, not coupled with an interest, and his right not being absolute, but conditional, his deed would not invest a purchaser from him with title, unless the conditions existed upon which a sale was authorized, and the sale was made in accordance with the terms of the trust. The burden of proving these facts was upon the party claiming under the deed, and the recitals in the deed, unless made so by statute, were not prima facie evidence of the existence of such facts.

Few principles of law are more firmly settled than that in the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of the power should precede it; that, when the validity of a deed depends upon acts in pais, the party claiming under it is bound to prove performance of those acts; and that, unless there be some statute making the recitals in the deed of the person making the sale prima facie evidence of the regularity of the proceedings, the acts in pais relied on to sustain the sale must be proved by evidence aliunde. *Flanagan v. Grimmet*, 10 Grat. 421, 425, 426, and cases cited; *Walton v. Hale*, 9 Grat. 194, 197, 198; *Reusens v. Lawson*, 91 Va. 226, 236, 21 S. E. 347; *Deputron v. Young*, 134 U. S. 241, 256, 257, 10 Sup. Ct. 539.

The case of *Robnett v. Preston*, 4 Grat. 141, is relied on as authority for dispensing with such proof. That was the sale of land by a sheriff under an execution. Actual possession had been taken and held by the party claiming under the sale and deed of the sheriff, for a sufficient length of time to bar a recovery by the original owner if the possession could be considered adverse to his title. In that case, to support the possession, the presumption of the regularity of the proceedings was allowed. But in this case no such possession is shown. There is no evidence in the case that the plaintiffs, or those through whom they claim, ever took actual possession of the land under that deed. The sale purports to have been made in 1818. The deed was made in 1830. This action was brought in 1890. No possession under it is shown. To hold that the recitals in that deed are prima facie evidence of the existence of the facts recited under these circumstances would violate every principle of law applicable to deeds executed under a naked power.

The motion of the defendant to exclude ought to have been sustained.

The eighth bill of exceptions is based upon the action of the court in giving four instructions asked for by the plaintiffs, and in refusing to give five of the eleven instructions asked for by defendant.

Whether the action of the court in giving the plaintiffs' instruction numbered 1, and in refusing to give the defendant's instructions

numbered 9 and 10, was correct or not, depends upon the question whether the defendant's possession of the land in controversy was under color of title, or only under claim of right or title.

The defendant claimed the land in controversy under a deed which conveyed a certain tract of land known as the "Victoria Furnace Property." The metes and boundaries of the land conveyed were not set out, but it was described as the same land which Orenshaw and others, the vendors of the defendant, had purchased from Jordon and others, and which the last-named parties had purchased in a chancery cause, and which had been conveyed to them by a commissioner of the court, and to these deeds reference is made in the deed to the defendant. The land conveyed to the defendant was described to be the right, title, and interest of the vendors in and to the said Victoria Furnace property, as set forth and described in said deed from Henry W. Murray, special commissioner, etc. The land in controversy is not covered by the deed to the defendant, nor by the deeds of those under whom he claims. The evidence tends to show that in the year 1866 or 1867, the then owners of the Victoria Furnace property had a survey made of the property claimed by them, and that the land in controversy was embraced within that survey; that the land in controversy had prior to that time been treated and used as a part of the furnace property; that the purchasers of the land had been shown the survey and plat in question, as showing the boundaries of the furnace property, before they purchased; but no reference was made to it in any of the conveyances of the Victoria Furnace property, nor was it ever conveyed by the metes and boundaries of the survey and plat referred to.

The evidence also tended to show that, after the survey and map were made, the subsequent owners of the furnace property claimed the land in controversy as a part of the furnace tract, and exercised acts of ownership upon it; but the evidence as to the continuity and extent of these acts of ownership is conflicting. During this period there is no pretense that the plaintiffs had actual possession of any part of the land in controversy.

Upon this state of facts, or rather upon the evidence tending to show these facts, the defendant claimed that it had color of title to the land in controversy, and that its possession of a part of the land was possession of all the land claimed by it, including the land in controversy.

The deed of the defendant, as stated above, did not embrace the land in controversy. While the description was general, and the metes and boundaries were not given, the deed referred to the prior conveyances of the same property, and under which the defendant claimed, and it is limited to the lands covered by and embraced in those deeds.

The survey and plat made by the owners of the Victoria Furnace property, in 1866 or 1867, not having been made a part of the subsequent conveyances of the property, and the land not having been conveyed by the metes and boundaries given in that survey and plat, they cannot be looked to in ascertaining what land was covered by the defendant's deed. They are not parts of the deed, and parol evidence in a court of law is not admissible to show that land not embraced in the deed was intended to be conveyed by it. To allow this would violate the settled rule that the terms of a writing cannot be contradicted or varied by verbal evidence. If there was a mutual mistake in the execution of the deed, it must be corrected by consent or in a court of equity; and, until so corrected, the rights of the parties are limited by the deed as written.

The defendant must be held to have color of title only to the lands embraced within its deed. Color of title necessarily implies that the party relying upon it must claim under something that has the semblance of title. A private survey and map, never recorded, not referred to or made a part of the deed under which the party relying on it claimed, cannot be considered color of title. *Creekmur v. Creekmur*, 75 Va. 430, 438-440; *Shanks v. Lancaster*, 5 Grat. 110; *Ang. Lim.* § 404; *Sedg. & W. Tr. Title Land*, §§ 762, 772; *Hutch. Land Titles*, § 389.

The survey and map were proper evidence to show the character of the defendant's claim of right or title. If it and those under whom it claims were continuously in adverse possession of the whole or any part of the land in controversy for the statutory period prior to the institution of this action, then its title to the land, to the extent that it and those under whom it claims had occupied, cultivated, inclosed, or otherwise excluded the owner from it, became perfect; but, if such occupancy did not extend to the whole of the land in controversy, its possession would be limited to the land so held, and could not be extended to the residue of the land in controversy, as would have been the case if the possession had been taken and held under color of title, instead of claim of right to title only.

Instruction No. 1, given by the court at the request of the plaintiffs, was framed in accordance with the foregoing views, correctly stated the law, and was properly given. The defendant's instructions Nos. 9 and 10, being in conflict with these views, were properly refused.

But if the survey and map, under the facts of this case, could be held to be color of title, so that the possession of a part of the land in controversy would have been possession of the whole, no injury resulted to the defendant from the action of the court in its rulings upon the instructions numbered 1, 9, and 10.

The jury were of opinion that the defendant

and those under whom it claimed had not been in the adverse possession of any part of the land in controversy for 15 years prior to the institution of this suit. Being unable to show that it had perfected its title to any part of the land in controversy by adverse possession, no harm could possibly have resulted to it from the court's refusal to instruct that a possession of part of the land in controversy was a possession of the whole, for, if the court had so instructed, the result would have been the same, in the view the jury took of the evidence.

The long-continued possession of the defendant and those under whom it claims of the Victoria Furnace property proper—that is, of the land it claimed outside of the land in controversy—could not be regarded as possession of the land in controversy, even if its title papers covered, as they did not, the land in controversy.

Where there are conflicting titles, if the junior claimant settles within his boundary, but outside of the interlock or land in controversy, he gains no actual possession of the land in controversy, whether the possession of the senior claimant be actual or constructive only. Where there is no controversy, the rule that possession of part is possession of the whole is to be taken in reference to the entire tract; but, where there is a conflict of titles, it is to be taken in reference to such conflict. Without actual possession of some part of the land in controversy, the junior claimant can gain no possession of that subject against the better right of the senior claimant. If the law were otherwise, as was said by Judge Baldwin, the lawful owner might be dispossessed, not only without his knowledge, but without the means of acquiring it. *Taylor v. Burnside*, 1 Grat. 169, 200 (side p. 190).

Without discussing in detail the action of the court in giving and refusing the other instructions given and refused, it is sufficient to say that, under the facts of this case, the rulings of the court upon these instructions were correct.

The judgment of the circuit court must be reversed, and the cause remanded for a new trial to be had in accordance with this opinion.

(83 Va. 364)

COLDIRON et al. v. ASHEVILLE SHOE CO.  
(Supreme Court of Appeals of Virginia. July 9, 1896.)

#### EQUITY—EVIDENCE—JUDGMENT LIEN.

1. The entire answer of a defendant to a bill in equity, which is responsive to the allegations of the bill or to interrogatories filed therewith, is to be considered as evidence for defendant, and to be taken as true, unless overcome by the testimony of two witnesses, or one witness and corroborating circumstances, or by documentary evidence.

2. Under Code, § 8567, providing for judgment liens on lands of or to which the defendant is possessed or entitled at or after the date of

the judgments, the judgment creditor is not a purchaser, and acquires no greater rights than the debtor, and cannot subject to his judgment lands which the debtor holds as agent for those rightfully entitled thereto.

Appeal from circuit court, Lee county; W. T. Miller, Judge.

Bill by the Asheville Shoe Company against W. S. Coldiron and others. Decree for complainant, and defendants appeal. Reversed.

Bullitt & Kelly, Mathews & Maynor, and Orr & Blankenship, for appellants. Duncan & Hyatt, Pennington Bros., J. H. Fulton, and A. L. Pridemore, for appellee.

**RIBLY, J.** The liability of certain lands in Lee county for the payment of judgments recovered against J. J. Kelly, Sr., is the matter for determination in this case. These lands were purchased with the proceeds of other lands in Wise county, that had belonged to Kelly. In determining this matter, the main question for consideration is whether Kelly did in fact convey, in 1884, to his daughter Rebecca Coldiron and to his son James F. Kelly his land in Wise county, which is designated in the record as the "Moon-Kelly Tract" for upon the decision of that question the case, in our view, mainly turns. It appears that Kelly, Sr., owned a number of tracts of land in Wise county, and, being attacked in 1884 with a dangerous malady, determined, instead of making a will, to divide up and convey his lands to his children. Conveyances to this effect are in the record, all of which bear date on September 1, 1884, and were acknowledged before the same notary public on March 4, 1885. Among these conveyances are the deeds to Rebecca Coldiron and James F. Kelly for the Moon-Kelly tract of land. They bear the same date, and were acknowledged before the same notary public, and on the same day, as the other deeds. Some of these deeds were recorded in a short time thereafter, while others were not recorded for several years, and others, still, were never recorded. Among the last are the deeds to Rebecca Coldiron and James F. Kelly. It is not questioned that they were executed and acknowledged as they purport to have been; but it is claimed by the appellees, who are the judgment creditors, that they were never delivered, and consequently that the land remained the property of the grantor. The Asheville Shoe Company, having recovered, in 1891, a judgment against Kelly, Sr., filed its original and amended bills to enforce the lien thereof against the lands in Lee county, which, it averred, he had bought of James B. Richmond and John M. Johnson, and fully paid for, but had not obtained the legal title. The bill expressly charged that he was seised and possessed of these lands in his own right, and required him to answer the bill upon oath. The complainant subsequently filed a supplemental bill, in

which it alleged that Kelly, Sr., "had sold, but not conveyed," the land bought of Richmond to his son James F. Kelly and to W. S. Coldiron, the husband of his daughter Rebecca, and the land bought of Johnson to his son David Kelly and to Sampson Bishop, the husband of his daughter Jemima, and charged that the "said sales" were made without consideration deemed valuable in law. It called upon W. S. Coldiron, Rebecca Coldiron, James F. Kelly, Sampson Bishop, Jemima Bishop, and David Kelly, who were made defendants, and upon J. J. Kelly, Sr., to answer the bill upon oath, and to answer also upon oath a number of special interrogatories. Among these were the following, which were respectively designated as "E," "F," and "H": "Do you and each of you state what land or lands or interests in real estate J. J. Kelly, Sr., now owns or claims to own, and give a full description thereof; also, what land or lands or interest in real estate derived by sale or gift or deeds from J. J. Kelly, Sr., you or your respective wives own or have or pretend or claim to have or own." "If any such ownership or claim of ownership is discovered, do you and each of you state your respective knowledge, information, and belief fully and without shifts or reservation as to the value thereof, and as to the consideration given or to be given therefor, its real value, and every other fact in relation thereto." "Do you or any of you know or believe or have you heard of anything not heretofore stated by you which will throw any light on the matters mentioned in any part of this bill, or in the original or in the amended bill heretofore filed in this cause? If so, state fully what you know, have heard, or believe."

J. J. Kelly, Sr., filed a full and explicit answer to the original, amended, and supplemental bills. His co-respondents, W. S. Coldiron, Rebecca Coldiron, James F. Kelly, Sampson Bishop, Jemima Bishop, and David Kelly, filed brief answers, in which they referred to and adopted the answer of Kelly, Sr., as their answer, and averred that the statements therein contained were true. Kelly, Sr., in his answer to the several bills, and special interrogatories, after denying that he was seised or possessed of, or had any right to, or any beneficial interest in, any real estate whatsoever in Lee county, answered that the said lands were bought for Rebecca Coldiron and James F. Kelly with the proceeds of sale of the Moon-Kelly tract of land, in Wise county, which he had conveyed to them in 1884, and had sold for them to E. B. Moon in 1888. He further answered that he had divided his lands in Wise county among his children, and conveyed the same to them, as hereinbefore mentioned, and filed the deeds or all that are material to this controversy. He stated, further, that "the said deeds were delivered to the said children shortly after the dates of the acknowledg-

ments thereof, and that, ever since, the lands therein respectively conveyed have been considered and have been the lands of his said children, respectively." The only witness examined by the complainant to disprove a delivery of the deeds was F. M. Clarkston, a son-in-law of Kelly, Sr., and to whose wife one of the conveyances was made. He testified that he did not know anything about their delivery, and did not know that he ever heard of it. His testimony, at best, is mere negative evidence, for he did not say that the deeds were not delivered, but merely that he did not know that he had ever heard of their delivery. It is manifest that he misapprehended the purport of the question, for the deed to his wife was recorded, and the land conveyed by it to his wife was subsequently sold and conveyed by him and her to the Virginia Coal & Iron Company.

The conduct of the parties in dealing with the land was much relied on to overthrow the answers. The record shows that although Kelly, Sr., had conveyed the Moon-Kelly tract of land to Rebecca Coldiron and James F. Kelly, in 1884, he conveyed it to Bullitt & McDowell, a prominent law firm, by deed dated March 24, 1888; and that Moon, claiming that Kelly had agreed to sell the land to him on March 23, 1887, brought suit to rescind the sale to Bullitt & McDowell, and annul their deed. This the court refused to do. Negotiations subsequently ensued between Kelly, Bullitt & McDowell, and Moon, with the result that Bullitt & McDowell reconveyed the land to Kelly; and he, on October 14, 1888, conveyed it to Moon for the price of \$55,503.68, for which amount two notes were given, payable to Kelly, one being for \$10,838.33, and the other for \$44,725.35, which was secured on the land. It is stated in the answer that the sale and conveyance of the land by Kelly in his own name, instead of in the names of Rebecca Coldiron and James F. Kelly, to whom he had conveyed it, were by their direction, and are explained upon the ground that their deeds had not been recorded, and they thought that a better sale could be made of the land as a whole than by a separate sale of their respective parts of it. The land being the property of Rebecca Coldiron and James F. Kelly, by virtue of the conveyances made of it to them by their father in 1884, it followed that the proceeds of its sale to Moon likewise belonged to them; and their father held the notes, by operation of law, in trust for their benefit.

The answer, in further response to the bill, states that Kelly, Sr., after consultation with James F. Kelly and Rebecca Coldiron and her husband, purchased, in February, 1889, from Richmond and Johnson, the lands in Lee county, which it is sought in this suit to subject to the payment of the judgments against Kelly, for the benefit of his said two children, and paid for the same with the notes given by Moon for the land in Wise county, the en-

tire note for \$10,838.33 being assigned for such purpose, and so much of the note for \$44,725.35 as was sufficient to pay the balance of the purchase money, and they took possession of the lands so purchased. The title bonds, however, were taken by Kelly in his own name, but never recorded. Afterwards, on June 2, 1890, he assigned and transferred, with the consent of Rebecca Coldiron, the title bond for the land bought of Richmond to her husband, W. S. Coldiron, and to James F. Kelly; and on June 30, 1890, he assigned and transferred the title bond for the land bought of Johnson to Jemima Bishop and David Kelly. This last bond was so assigned by direction of the parties interested in pursuance of an exchange of lands that had taken place between a part of them, and of an agreement between the children to make a better provision for William Kelly, whose property, an old mill, acquired in the division made by Kelly, Sr., of his lands among his children in 1884, had turned out to be practically valueless, while the Moon-Kelly land had rapidly appreciated beyond all expectation, in consequence of the speculation in mineral lands. Evidence was introduced by the complainant to the effect that Kelly, Sr., in 1893 or 1894, had represented to the circuit court of Lee county, when presented as surety on some official bond, and also to Hamblen, to whom he became surety on the bonds of his son-in-law Clarkston, for the purchase of a tract of land, that he was the owner of the lands in Lee county, and was worth from \$40,000 to \$50,000; but it was not shown that W. S. Coldiron, Rebecca Coldiron, James F. Kelly, Jemima Bishop, or David Kelly, to whom the title bonds to the said lands were assigned, or any of them, were present when these statements were made, or ever heard of them. This was certainly not competent evidence as against them, and could not affect their rights. It was duly excepted to, and cannot be considered. It was also claimed that when, in 1892, the lands were rented out by the court to pay Kane's judgment against Kelly, Sr., Coldiron became the renter, and raised no controversy at that time as to Kelly's ownership of the land. The testimony of D. C. Sewell, who was the commissioner, does not sustain such contention; but, on the contrary, he states that Coldiron, shortly before the renting, showed him what he took to be a title bond from Richmond for the land, and that on the back of it was an "indorsement of a transfer of the same to W. S. Coldiron, and to perhaps others," and, according to the impression of the commissioner, stated at some time that he was renting his own land.

The answer of Kelly, Sr., which by reference thereto and adoption by the said claimants of the land is made their answer also, is responsive to the allegations of the several bills of complainant, and to the comprehensive and searching interrogatories heretofore recited, and the whole of it is to be taken as evidence for the defendants. It cannot

be separated, and a part regarded as evidence and the rest rejected. *Morrison's Ex'rs v. Grubb*, 23 Grat. 342; *Ward's Adm'r v. Cornett*, 91 Va. 676, 22 S. E. 494. And, being responsive, the answer is to be taken as true, unless it be overcome by the testimony of two witnesses, or one witness and corroborating circumstances, or by documentary evidence alone. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280; *Thompson v. Clark*, 81 Va. 422; and *Jones v. Abraham*, 75 Va. 466. While the conduct of the parties in dealing with the lands both in Wise and Lee counties excites grave suspicion, yet it is not sufficient to overcome the effect which we are required, under the familiar and long-established rule of courts of equity, to give to the answer as evidence. It is therefore to be taken as true; and, being true, it is to be considered as establishing that Kelly, Sr., in 1884, divided his lands in Wise county among his children, and conveyed the same to them, respectively. It is to be considered as establishing that he made and delivered to Rebecca Coldiron and James F. Kelly deeds for the Moon-Kelly land, from which it follows that, upon the sale thereof to Moon, the proceeds of the sale became their property; that he bought, after consultation with them and for their benefit, from Richmond and Johnson, the lands in Lee county, with the proceeds of sale of the Moon-Kelly land; and that, although he took the title bonds in his own name, he acquired no beneficial interest in these lands, but merely held the equitable title in trust for the rightful parties. And the fact is to be emphasized that all this took place, not only prior to the recovery of the judgments to the payment whereof it is now sought to subject the lands in Lee county, but, so far as appears from the record, before the debts on which the judgments were recovered, with the exception of one debt, for a comparatively small amount, were even contracted. The conveyance of the Moon-Kelly land to Rebecca Coldiron and James F. Kelly was made on September 1, 1884. It was sold and conveyed to Moon on October 16, 1888. The lands in Lee county were bought from Richmond and Johnson in the spring of 1889, and were paid for out of the notes given by Moon; and the assignment of the title bonds for these lands was made by Kelly, Sr., to the parties now claiming the lands, in June, 1890; while no one of the judgments was recovered prior to September, 1891, and, with a single exception, no one of the debts was contracted earlier than 1891. So that neither when the judgments were recovered against J. J. Kelly, Sr., nor when the debts were contracted, did he have title to, or own any interest whatever in, the Moon-Kelly land; but the title thereto was in Moon, to whom it had been sold and conveyed for a full and valuable consideration, and the deed duly recorded. These judgments could not, therefore, possibly consti-

tute liens upon it. And it is to be added that the division by Kelly, Sr., of his lands in Wise county among his children, was made when he was free from debt, and no reason existed why he might not lawfully do so. They were made, too, at a time when he was sick with a dangerous disease, from which his recovery was uncertain, and when he could not have meditated the perpetration of a fraud upon creditors whose debts were not contracted until several years afterwards.

Inasmuch as the lands in Lee county were bought by Kelly, Sr., with the proceeds of the sale of the tract of land in Wise county, which he had previously given to Rebecca Coldiron and James F. Kelly, when he had the right to do so, they were entitled to the entire beneficial interest in the said lands, and he had no interest therein upon which the judgments against him could operate, or which could be subjected to their payment, or of the debts upon which they were founded. Judgments constitute liens only on such real estate of the debtor of or to which he is possessed or entitled at or after the date of the judgment. Code Va. § 3567. Kelly was neither possessed of nor entitled to the lands in Lee county when the judgments sought to be enforced against them were recovered. He had neither the possession nor any beneficial interest in them. At no time did he hold anything beyond the mere equitable title, and this he held as the agent of the parties who were rightfully entitled to the lands, or in trust for them; and no statute required in such case the recordation of the title bonds to prevent judgments against him from attaching as liens on the lands. "Authorities without number might be cited to show," said Judge Burks in *Borst v. Nalle*, 28 Grat. 433, "that, where statutory enactments do not interfere, the creditor can never get by his judgment more than his debtor really owns, and to this he will be confined, as he should be, by courts of equity." Equally pertinent and emphatic is the language used by Judge Staples in *Floyd v. Harding*, 28 Grat. 407: "It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time in favor of third persons; and a court of chancery will limit the lien of the judgment to the actual interest which the debtor has in the estate. The creditor is in no sense a purchaser. He has no equity whatsoever beyond what justly belongs to his debtor. His claim is to subject to his lien such estate as the former owns, and no more."

For the foregoing reasons, we are of opinion that the circuit court erred in decreeing a sale of the lands in Lee county to pay the judgments against J. J. Kelly, Sr., and for this error its decree must be reversed.

(93 Va. 433)

## NOEL v. NOEL.

(Supreme Court of Appeals of Virginia. July 23, 1896.)

LIMITATION OF ACTIONS—PROVING NEW PROMISE  
—COMMENCEMENT OF ACTION—PROCESS—  
MATURITY OF DEBT.

1. Under Code, § 2922, providing that a new promise may be shown in evidence by a plaintiff, without pleading it, to repel the bar of the statute of limitations, pleaded by defendant, on reasonable notice to the defendant before trial, it is not error to reject such evidence where no notice has been given.

2. The provision of Code, § 3220, that process shall be issued before the rule day to which it is returnable, is mandatory, and a writ issued on the rule day to which it is returnable is void, together with all rules and proceedings based thereon; and the suing out of the writ being the commencement of the action, where a writ so issued is quashed, and a new writ ordered, and served, the commencement of the action, so far as relates to the statute of limitations, dates from the issuance of the new writ.

3. As to the time when a cause of action sued on arose, the plaintiff is bound by his own pleading and proofs, though he might at his election, on the facts shown, have treated the debt as maturing at a later date.

Error to hustings court of Radford; George E. Cassell, Judge.

Action by R. J. Noel against Thomas J. Noel. Judgment for defendant, and plaintiff brings error. Affirmed.

Phlegar & Johnson and Longley & Jordan, for plaintiff in error. J. C. Wysor, for defendant in error.

CARDWELL, J. This is an action of assumpsit, brought by the plaintiff in error in the hustings court of the city of Radford, to recover of the defendant in error a balance of \$517, as due on the price and value of certain goods sold and delivered by the plaintiff to the defendant on the 21st day of November, 1891. The memorandum of the plaintiff's attorney directing the writ to issue to the second November rules, and the declaration, were filed on the 19th of November, 1894, which was the second rule day of the court. The writ accordingly issued was executed and returned on that day. November 21, 1894, a bill of particulars was filed with the clerk. At the first December rules, 1894, the following rules were taken: "Common order confirmed, and office judgment." Upon the calling of the case, on the 13th of December, 1894, the hustings court quashed the process, because it appeared on its face to have issued on the rule day to which it was returnable, and remanded the case to rules for a new process. At the second December rules, 1894, December 17th, the following rules appear to have been taken: "Alias process returned executed. Declaration filed, and common order;" and at the first January rules, 1895: "Common order confirmed, and writ of inquiry." This so-called "alias process" does not appear in the record. February 6, 1895, another writ was issued, returnable to the second February rules, 1895, which was executed

February 11, 1895, but no rules seem to have been taken on this process. At the April term, 1895, the cause was continued for the defendant to the next issue term of the court; and at the June term, 1895, the defendant filed his several pleas of non assumpsit, non assumpsit within three years and offsets, to which the plaintiff replied generally, and issues were joined. The declaration is in the common count only, and declared on the debt as due and on request, November 21, 1891, and the bill of particulars filed with the declaration made it due as of that date. The plaintiff proved the transaction out of which the debt sued on arose, and the balance due thereon; but, in the progress of the trial, the time when the debt became due was drawn in controversy by the plaintiff's testimony in relation to certain bonds that he alleged that the defendant was to have given him for two credit payments, at 12 and 18 months from the day of the sale of the goods; whereupon the defendant objected to this testimony, because the declaration alleged that the debt sued upon was due on request, and thereupon plaintiff's counsel said, in the presence of the court and jury, that "our claim is that the debt sued on became due on the 21st of November, 1891"; and the defendant then withdrew his objection to the testimony. In this connection, the plaintiff offered to introduce in evidence the following writing: "On November 21, 1891, I purchased of R. J. Noel his one-half interest in the Radford Drug Co., consisting of stock, furniture, and fixtures, on which I owe him a balance, and in consideration of which I hereby agree not to plead the statute of limitations on the account that he holds against me for his interest in Radford Drug Co., this the 17th day of November, 1894. [Signed] T. J. Noel." To the introduction of this writing, the defendant objected, which objection the court sustained, on the ground that the same had not been pleaded by a special replication to the plea of the statute of limitations; and this ruling of the court constitutes plaintiff's first bill of exceptions. The plaintiff then offered in evidence the record in the case, including the memorandum on the memorandum book for process bringing the suit, the process which issued November 19, 1891, the rules taken thereon, as appeared by the rule book, and the order quashing the process and remanding the case to rules for a new process, and also offered to prove by the deputy clerk of the court that no other memorandum had been made or order given by the plaintiff or his attorney for process for the bringing of a second suit between these parties; that no writ tax had been charged or paid on such a suit; that no rules had been taken thereon, and no declaration filed therein; and that the process issued on the 6th day of February, 1895, was issued in obedience to the order of the court remanding the case, brought November 19, 1894, to rules for new process therein. But to the introduction of

this record, and the testimony of the deputy clerk, the defendant objected, and the court sustained the objection, and this ruling of the court constitutes plaintiff's second bill of exceptions. The evidence being all in, the court, at the instance of the defendant, gave the jury two instructions, the substance of which was that if they believed from the evidence the debt became due on November 21, 1891, and that the suit was not brought until February 6, 1895, the debt was barred, and that the only writ they could take into consideration was the writ issued February 6, 1895. Objection was made by the plaintiff to the instructions, the giving of which constitutes his third and fourth bills of exceptions. The verdict of the jury was for the defendant upon his plea of the statute of limitations, etc.; and the plaintiff moved to set the verdict aside, as contrary to the law and evidence, which motion was overruled, to which ruling the plaintiff took his fifth bill of exceptions.

The first assignment of error in the petition for the writ of error awarded by this court is to the ruling of the trial court in excluding the defendant's written admission of the indebtedness sued on. Section 2922 of the Code, after providing that, where there is a new promise of payment of money due on an award or contract, the plaintiff may sue on such promise or on the original cause of action, etc., contains this further express provision: "If the action be on the original cause of action, in answer to the plea under section 2920 [plea of the statute of limitations], the plaintiff shall be allowed, without pleading it, to show such promise in evidence to repel the bar of the plea, provided he shall have given the defendant reasonable notice, before the trial, of his intention to rely on such promise." It is not pretended that any such notice as is required by this statute was given the defendant, that a new promise implied from the paper in question was to be relied on by the plaintiff to repel the plea of the statute of limitations. It is contended, however, that the paper was competent evidence on the general issue, i. e. to prove the debt sued on, and that for this reason it was error to exclude it; but this position is untenable, as it was not offered and was not needed for that purpose. Had it been offered to prove the debt, and been relevant, its rejection was not prejudicial to the plaintiff, as his debt was amply proved by other evidence, and the defendant offered none in rebuttal.

The second and third assignments of error may be considered together. The second is to the action of the court in excluding the record in the case, which was intended to show to the jury that the case was in court —i. e. pending—from November 19, 1891, and that the court, by its own order, continued it as the same case; and the third is to the giving of the instructions asked for by the defendant. Section 3220 provides that, in

an action of the character of this, "process shall be issued before the rule day to which it is returnable, but may be executed on or before that day," etc. If this be a mandatory statute, then the process issued in this case on the rule day to which it was returnable is a void process, and any rules or proceedings taken thereon are void also, and of no effect or value. That it is a mandatory statute seems too clear to admit of discussion. The suing out of the writ is the commencement of an action at law, and this is ascertained *prima facie* by the attestation of the clerk; but the real time of issuing may be shown in evidence. *Joynes*, Lim. 189, 190, and cases cited. In one of the cases cited (*Burdock v. Green*, 18 Johns. 14), it was held that "the issuing of the writ is the commencement of the suit in all cases where the time is material, so as to save the statute of limitations"; and this authority is cited with approval in other cases cited in *Joynes* on Limitations, *supra*. Therefore, there being no suit commenced by the writ issued November 19, 1891, the record made by the clerk of the proceedings on this writ was in fact no record, and the order of the court remanding the case to rules gave the said writ no vitality, as the law confers no such power on the court. It being a void writ, there was no action pending, and it follows that the record of the proceedings thereon was void also, and wholly immaterial for any purpose at the trial of the case. Therefore the refusal of the court to allow the alleged record to go to the jury was right; and there was also no error in the instruction that the jury could only consider the writ issued on the 6th of February, 1895. The plaintiff might have brought his action on the special contract that he attempted to prove, and which provided for a credit of 12 and 18 months as to a part of the purchase price of the goods sold, laying his demand for the debt as due to him after the expiration of the credit; or he might have brought his action for damages for the breach of the contract of the defendant by his failure to give the bonds for the deferred payments; but the plaintiff elected to bring his action for money due on request. The debt is declared on as due November 21, 1891. The bill of particulars filed shows it to have been due on that date. Plaintiff's counsel stated at the trial that the claim of plaintiff was that the debt was due on that date; and the plaintiff himself, on cross-examination, said: "I suppose, according to the papers in the case, the amount was due November 21, 1891, as he [defendant] failed to give the notes as had been agreed upon." It is true that the burden was upon the defendant to prove that the cause of action did not accrue within the statutory period (*Goodell's Ex'rs v. Gibbons*, 91 Va. 608, 22 S. E. 504); but he had a right to rely, as he did, on plaintiff's proof as to this. The instruction to the jury that if they believed

from the evidence that the debt sued on became due November 21, 1891, the debt was barred, was justified by the evidence, and proper to be given.

The remaining assignment of error is to the refusal of the court to set aside the verdict as contrary to the law and the evidence. From what has been said as to the evidence, it sufficiently appears that the verdict was not plainly against the evidence, or without evidence to sustain it; and, this being so, this court would not be justified in interfering with it. *Brugh v. Shanks*, 5 Leigh. 598; *Hill v. Com.*, 2 Grat. 595; *Grayson v. Com.*, 6 Grat. 712; *Blosser v. Harshbarger*, 21 Grat. 214; and *Pryor v. Com.*, 27 Grat. 1009.

We are of opinion that there is no error in any of the rulings of the lower court, and its judgment is therefore affirmed.

(93 Va. 427)

**MOUNT v. RADFORD TRUST CO. et al.**  
(Supreme Court of Appeals of Virginia. July 23, 1896.)

**CORPORATIONS—RIGHT OF STOCKHOLDER TO SUB—  
HEARING IN VACATION.**

1. A stockholder in a corporation cannot maintain an action in equity in relation to the corporate property without alleging the refusal of the corporation to sue after reasonable demand, or facts which excuse such demand; and in such case the corporation is an indispensable party, the relief, if granted, being to the corporation, and not the stockholder.

2. Where there has been no consent entered of record, as provided by Code, § 8427, to hear a case in vacation, a court has no authority to decide a case on the merits on a motion to dissolve an injunction heard in vacation.

Appeal from hustings court of Radford; George E. Cassell, Judge.

Bill in equity by J. K. Mount, against the Radford Trust Company and others. Decree for defendants, and plaintiff appeals. Decree amended and affirmed.

Hoge & Hoge, for appellant. Gardner & Wharton, for appellees.

**BUCHANAN, J.** The appellant instituted a suit in equity in the corporation court of Radford city against the appellees, in behalf of himself and all other stockholders of the Radford Publishing Company, who would come in and contribute to the costs of the suit. He alleged in his bill that he was the owner of 51 shares of the stock of that corporation; that the Radford Land & Improvement Company claimed to hold a deed of trust on all the property of the publishing company to secure the payment of a note for \$1,000, payable to the Radford Land & Improvement Company, and then held by the Radford Trust Company, as assignee; that the note was not paid at maturity, and that the trustee had advertised the trust subject for sale, for the payment of the \$1,000 and its interest, without giving the publishing company credit for certain sums which it had

paid on the debt, and that he also proposed to sell for an additional sum paid out for insurance upon the trust property, for which there was no authority; that, while he (the complainant) was a stockholder of the publishing company, he had no personal knowledge of the execution of the pretended deed of trust, nor of the note whose payment it was given to secure; that he had been unable to obtain access to the books of the publishing company, and was unable to ascertain by what authority the note and deed of trust were executed, and that he therefore denied that the same were legally authorized by the publishing company, or constituted any valid claim upon its property; that he was advised that, at the time of the execution of the deed of trust, there were other and valid outstanding debts and demands against the publishing company, and that it had no right to prefer its creditors, and that, even if the deed of trust was authorized by the proper authorities of the company, it was without warrant of law, and of no effect; that third parties had, after the execution of the pretended trust, leased the property of the publishing company, and assumed the payment of its debts; and that after they had so assumed its indebtedness, and thereby became principal, and the publishing company a mere surety, the Radford Land & Improvement Company, the payee in the \$1,000 note, had extended the time for its payment after it became due, without the knowledge and consent of the publishing company, and thereby released it from further liability thereon.

The prayer of the bill was that the Radford Trust Company, M. C. Jamison, the trustee in the deed of trust, Gardner & Wharton, attorneys, and Jones, Page, and Miles, the leasees of the property, be made parties defendant to the bill; that they be required to answer, but not under oath; that the note for \$1,000, and the deed of trust to secure it, be declared null and void, or, if they should be deemed valid and in force, that an account of the indebtedness of the publishing company be taken as of the date of the deed of trust; that it be held to inure to the benefit alike of all its creditors; that the publishing company be exonerated from further liability for the \$1,000 note assumed by Jones, Page, and Miles; that in the event the publishing company be held to be not exonerated from its payment, the note be credited with all proper credits, and the estate, real and personal, of Jones, Page, and Miles, be subjected, first, to its payment; and that the Radford Trust Company, assignee, the Radford Land & Improvement Company, M. C. Jamison, trustee, and Gardner & Wharton, attorneys, be enjoined and restrained from further proceedings under the deed of trust; and that general relief be afforded the complainant.

An injunction was granted as prayed for on the 25th of September, 1895. A motion was made to dissolve the injunction on the 14th day of October, following, before the

judge in vacation, at which time the Radford Trust Company, the trustee, Jamison, and Gardner & Wharton, attorneys, filed their separate demurrers and answers, to which answers the complainant filed general replications. The motion to dissolve was continued by consent until December 2, 1895, which was in the vacation of the court. Upon that day, the motion was heard upon the bill, the answers of the defendants, treated as affidavits on the motion to dissolve, and depositions of witnesses. The court dissolved the injunction, decided the case upon the merits, held the deed of trust valid, and directed the trustee to execute it.

From that decree, the appellant appealed to this court.

He assigns as error, first, that the court erred in dissolving the injunction.

A stockholder in a corporation has no right to bring a suit in his own name in a court of equity upon a cause of action existing in the corporation, and in which the corporation itself is the proper complainant, except where it actually or virtually refuses to institute or prosecute such suit. The corporation holds the title, legal or equitable, to the corporate property, and is, as a rule, the only proper party to sue for wrongful dealings with its property. If, however, the corporation is unwilling or unable to sue, then a stockholder has the right to institute proceedings in equity for the protection of his interests in the corporation. The reason why he is allowed to do this when he has no estate in the corporate property, either legal or equitable, is stated by Mr. Pomeroy as follows: "The stockholder does not bring such suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought. He is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation. It is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder (plaintiff). The corporation is therefore an indispensably necessary party, not simply on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree." Pom. Eq. Jur. § 1095.

In order that a stockholder may institute such a suit, he must allege and prove that a request or demand has been made upon the board of directors or other body managing the corporation that they institute proceedings on the part of the corporation against the wrongdoers, and their refusal to do so

after reasonable request or demand; or he must allege such a state of facts as will show that the defendants whom he charges with the wrongdoing constitute a majority of the board of directors or managing body at the time of the suit, or that they or a majority of them are under the control of the defendant wrongdoers, so that the court may infer that they would refuse to bring such suit; or he must allege such facts in his pleading as will show that it is reasonably certain that a suit by the corporation would be impossible, and that a demand to sue would be useless. Then, in either case, the stockholder may, without averring or proving that he made any request or demand, maintain such suit. Pom. Eq. Jur. § 1095; Cook, Stock, Stockh. & Corp. Law (3d Ed.) §§ 740, 741; Hawes v. Oakland, 104 U. S. 450.

If the facts existed upon which the appellant based his suit, the Radford Publishing Company was the proper party to sue, and he had no right to sue unless it actually or virtually refused to do so. He does not allege that he had made any request to or demand upon its board of directors that they should institute proceedings for the protection of the company's property, and that they had refused to do so; neither does he allege any such state of facts from which the court might reasonably infer that such request or demand would be unavailing, and therefore unnecessary. He gives no reason whatever in his bill why it became necessary for him to institute a suit for the protection of the publishing company's property and rights. He not only failed to make the necessary averments in his bill to give him a standing in a court of equity, but he also omitted to make the publishing company (which was an indispensable party) a party to his suit.

The bill did not make a case which entitled the appellant to sue. The court ought not to have granted an injunction in the case in the first instance, and properly dissolved it upon the motion to dissolve. But, upon that motion, it had no right, even if the appellant had shown that he had the right to bring the suit, to decide the case upon the merits. It was a motion to dissolve an injunction in vacation. There had been no consent entered of record, as required by the statute, which authorized the court to hear the case in vacation upon the merits. Code, § 3427.

The decree appealed from, so far as it purports to pass upon the merits of the case, is therefore void, and must be disregarded. We are of opinion that the decree must be amended in that respect, and, as amended, affirmed, and the cause remanded to the said corporation court, with direction, upon the hearing of the cause, to dismiss the bill of the complainant unless he can amend it in accordance with the views expressed in this opinion; but the dismissal shall be without prejudice to the rights of any one.

(99 Ga. 235)

## POE et al. v. ELLIS.

(Supreme Court of Georgia. July 13, 1896.)

## ACTION FOR CONVERSION—WHO MAY BRING—PLEADINGS.

1. Where a partnership composed of two persons had pledged to a creditor, as security for a debt, certain goods to be manufactured by the partnership, and had covenanted to ship the same to such creditor, to be sold, and the proceeds applied in satisfaction of the debt, and one of the partners, after the manufacture of the goods, delivered the same to a third person, who had full knowledge of all the facts, such delivery being the result of a collusive and fraudulent scheme between this partner and the third person, the purpose of which was to defraud the creditor and the other partner, the latter could maintain for the creditor's use an action against the third person for the goods thus converted, or their value.

2. In the present case the declaration was not demurrable for want of a cause of action, or for want of proper parties, or for failure to set forth certain exhibits.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

The following is the official report:

To the petition of J. D. Ellis, suing for the use of Greig & Jones, the defendants, J. W. Poe & Bro., filed a demurrer for want of a cause of action, for want of proper parties, and for want of sufficient and proper exhibits attached to the petition. The demurrer was overruled, and defendants bring error. Affirmed.

The petition alleges that defendants are indebted to plaintiff for the use of Greig & Jones \$468.09. On November 24, 1894, plaintiff and J. C. Ludlam were partners in the business of manufacturing naval stores, as Ellis & Ludlam. They were largely indebted to Greig, Jones & Wood for money advanced to carry on said business, and Greig, Jones & Wood held mortgages on all the property of Ellis & Ludlam to secure such indebtedness and the performance of the covenants in the mortgage, dated December 14, 1892, one of which covenants was that Ellis & Ludlam should ship to Greig, Jones & Wood all the spirits of turpentine and rosin made by them, to be sold by Greig, Jones & Wood, and the proceeds to be applied to the payment of the indebtedness of Ellis & Ludlam to them, and that they would not ship or consign such goods to any other person. Defendants at the same time were manufacturers of naval stores near the same place, and well knew of the facts before stated. About November 20th, without the knowledge or consent of plaintiff or of Greig, Jones & Wood, Ludlam fraudulently and secretly delivered to defendants 20 casks of spirits of turpentine, of the value of \$226.36, and 49 barrels of rosin, of the value of \$241.79, all being the property of Ellis & Ludlam, and manufactured by them on and with the property covered by said mortgages. Defendants, combining and confederating with Ludlam

to defraud plaintiff and Greig, Jones & Wood, and to deprive them of the turpentine and rosin, or the proceeds thereof, converted the same to the use of themselves, and failed and still fail and refuse to turn over the same or the proceeds to plaintiff or Greig, Jones & Wood. Said action, aided and abetted by defendants, was a breach of the covenants in the mortgage, which, under its terms, became and was immediately due; and the mortgagees started proceedings to foreclose the mortgages on all the property of Ellis & Ludlam, and the same were foreclosed on February 22, 1895, under the power of sale contained therein, and all the property of Ellis & Ludlam was sold at public outcry for \$6,000, that being the highest and best bid. At the time of the sale, Ellis & Ludlam were indebted to the mortgagees \$7,500, and are liable for the difference of \$1,500 between the amount due and the product of the sale. On February 1, 1895, the firm of Greig, Jones & Wood was dissolved, Wood selling his interest to Jones and Greig, who formed a new partnership as Greig & Jones, and now own the debt against Ellis & Ludlam. The firm of Ellis & Ludlam is dissolved, and the manufacturing business is no longer carried on by them, and neither has any individual right or claim on the property or fund, the subject of this suit, except for the use of Greig & Jones. The plaintiff prays judgment for the use of Greig & Jones against defendants for \$468.09.

J. H. Martin, for plaintiffs in error. Williams, Smith & Williams, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 228)

## CUMBERLAND GAP BUILDING &amp; LOAN ASS'N v. WELLS et al.

(Supreme Court of Georgia. July 13, 1896.)

## REMOVAL OF CAUSES—AMENDMENT OF COMPLAINT.

The right to remove a cause from a state to a federal court being complete as the case stood upon the filing of the plaintiff's declaration, the defendant's right of removal cannot be taken away by any subsequent amendment by the plaintiff, reducing the amount of the debt or damages for which the action was originally brought so as to render the claim for a sum less than the requisite jurisdictional amount in the federal court. Jones v. Foreman, 66 Ga. 372; Dill. Rem. Causes, §§ 96, 188.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

The following is the official report:

Wells & Ellerbe brought an equitable petition against the Cumberland Gap Building & Loan Association, of Cumberland Gap, Tenn., praying for an injunction to prevent

it from selling certain property under a deed, or from bringing an action on said deed or on the note given therewith, for decree cancelling the deed, and for judgment against defendant for \$5,000 damages. The petition was brought on March 13, 1895. On August 3, 1895, the defendant company presented its petition to the superior court, accompanied by its bond, alleging that the suit was of a civil nature, in which there was a controversy wholly between citizens of different states, plaintiffs being citizens of Georgia, and defendant a citizen of Tennessee, and praying for a removal of the case to the circuit court of the United States. Thereupon the plaintiffs amended their declaration so as to strike the prayer for \$5,000 damages, praying in lieu thereof for \$1,800 as their damages. To this amendment defendant objected, but the same was allowed, and the petition for removal denied. Defendant excepted, and brings error. Reversed.

Dessau & Hodges, for plaintiff in error.  
J. W. Haygood and Gustin, Guerry & Hall, for defendants in error.

**PER CURIAM.** Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 221)

#### CLARK v. THOMPSON.

(Supreme Court of Georgia. July 13, 1896.)  
SALE OF PERSONALTY—CONSIDERATION—TROVER—  
NEW TRIAL—SUFFICIENCY OF MOTION.

1. An absolute contract for the sale of personalty is not void, although a part of the consideration of the sale may be the payment of a debt infected with usury; and, where such a contract is evidenced by a written bill of sale, the vendee may maintain thereon an action of trover against the vendor. *Hicks v. Marshall*, 67 Ga. 713; *Harris v. Hull*, 70 Ga. 832; *Barfield v. Jefferson*, 2 S. E. 554, 78 Ga. 220.

2. The evidence in this case warranted a finding that the sale was absolute, and not for the purpose of securing a debt; and it affords no cause of complaint to the defendant that the money verdict in the plaintiff's favor was for an amount less than that which the evidence authorized.

3. This court cannot sustain a ground of a motion for a new trial which merely alleges that the trial judge "erred in not allowing defendant's attorney to open and conclude, he having claimed the right to do so."

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

The following is the official report:

R. M. Thompson brought bill trover against Jesse S. Clark for a lot of household and kitchen furniture. Defendant pleaded that the debt for which he gave a bill of sale to plaintiff was for money borrowed from plaintiff; that on June 27, 1893, he gave his note and mortgage to plaintiff for \$100, and the plaintiff let him have \$65 thereon, reserving \$35 for the use of or interest on \$65 for six months' time, as specified in the note, the

amount so reserved being usury; that on March 15, 1894, after the mortgage became due, the note and mortgage were taken up, and plaintiff advanced him \$50 more, taking a bill of sale to the property named in the mortgage; that the usury reserved in the mortgage entered into the bill of sale to the amount of \$32.70; and that said bill of sale was only security for the money loaned defendant, and was not an absolute conveyance of the title, and is void on account of the usury therein contained. At the trial, plaintiff elected to take a money verdict in lieu of the property. The testimony was directly conflicting upon issues set up by the plea. The jury found for the plaintiff, \$138.43; and defendant's motion for a new trial was overruled, and he brings error. Affirmed.

The motion alleges that the verdict is contrary to law and evidence, and that it shows on its face that the jury did not find for the plaintiff the value of the property, but found the amount of the debt, with interest, which defendant insists could not be done in a trover case. Also, that the verdict shows that the jury found the bill of sale was not absolute, but only a security for the debt, and therefore the verdict was contrary to the court's charge, as follows: "Now, if it is a usurious contract, more than seven per cent. is charged as interest or contracted for, then that changes the proposition somewhat. If the bill of sale was only given to secure a usurious debt, and not an absolute bill of sale, then the plaintiff could not recover, for the reason that, the bill of sale being given to secure a usurious [contract], the law renders the bill of sale void, and the plaintiff could not recover." Also, that "the court erred in not allowing defendant's attorney to open and conclude; he having claimed the right to do so."

J. W. Walters, for plaintiff in error. S. J. Jones, for defendant in error.

**PER CURIAM.** Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 631)

#### TOMPKINS v. COOPER.

(Supreme Court of Georgia. Jan. 13, 1896.)  
ENFORCEMENT OF VENDOR'S LIEN—DEFICIENCY  
DECREE—FOREIGN JUDGMENT—CON-  
CLUSIVENESS.

1. The Code of Alabama declares that, in "suits for the enforcement of equitable liens, execution may issue for the balance found due after a sale of the property ordered and decreed to be sold." Code, § 3605. It was, under the practice prevailing there, competent and lawful for a court of chancery in that state, upon a proceeding by a vendor of land against the vendee to enforce the former's equitable lien for the purchase money, to enter a decree, in the nature of a general judgment, against the vendee for the balance of such purchase money remaining unpaid after a sale under the original decree of foreclosure; and this is true al-

though the complainant's bill, after specifically praying for the foreclosure sale, contained no other prayer, except one for general relief.

2. The decree sued upon being a valid one under the laws of Alabama, the plaintiff's action upon it was maintainable in the courts of this state.

3. The decree upon which the present action is based being on its face final, the mere pendency of equitable proceedings in the courts of Alabama, whether state or federal, to set that decree aside, presents no obstacle to the rendition of a judgment upon such decree by a court of this state.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Frances M. Cooper against Henry B. Tompkins. Judgment for plaintiff. Defendant brings error. Affirmed.

Alex. C. King, Wm. B. Farley, and Alston & Palmer, for plaintiff in error. Glenn & Rountree and C. D. Maddox, for defendant in error.

SIMMONS, C. J. Cooper sold and conveyed to Tompkins, a resident of this state, a tract of land in Golbert county, Ala., and in the conveyance reserved a lien upon the land for unpaid purchase money. Subsequently a bill was filed by Cooper in the chancery court of the county, in which the land was situated, against Tompkins and against the East Sheffield Land Company, of that county, in which it was alleged that Tompkins had sold the land to the East Sheffield Land Company, which was then in possession of the same, and that a certain amount was due the complainant by Tompkins, as unpaid purchase money; and he prayed that he be decreed to have a vendor's lien upon the land, and that the land be sold for the payment of such unpaid purchase money, with interest. The bill also contained a prayer for general relief. Each of the defendants acknowledged service of the bill, and appeared and answered. The answer admitted the allegations of the bill to be true, and that the defendants had no legal right to resist a decree for the foreclosure of the lien. The court decreed that the complainant was entitled to the relief prayed for, and that, if the balance of purchase money found to be due the complainant (the amount of which was set out in the decree) was not paid within a specified time, the register of the court should proceed to advertise and sell the land in a manner mentioned, and, out of the proceeds of the sale, retain costs and expenses, and apply the remainder to the payment of the amount found to be due,—the balance, if any, to await further orders,—and that the register make conveyance of the land to the purchaser upon the payment of the purchase money. Afterwards a report was filed by the register, showing that he had complied with the directions of the decree, and had sold the land and made a deed to the purchaser, but that, after applying the pro-

ceeds of the sale to the complainant's demand, there still remained due on the decree an amount stated. The complainant moved for a decree against Tompkins for this balance, and the court subsequently rendered a decree ratifying and confirming the report of the register, and decreeing that the complainant recover of Tompkins the amount of this balance, and that execution issue against him therefor. An action was brought in this state against Tompkins upon the decree for this balance, and on the trial of the case it was contended by the defendant that the decree was invalid, inasmuch as the complainant's bill contained no prayer for an accounting, or for a general judgment or general decree of any kind, and the chancery court therefore had no jurisdiction or authority to render such a decree.

Code Ala. § 3605, declares that "in all foreclosure suit, or suits for the enforcement of equitable liens, execution may issue for the balance found due after a sale of the property ordered and decreed to be sold." The statute is remedial, intended to cure the deficiency of the common law, according to which such a balance was recoverable only by a distinct, independent suit at law. See *Tedder v. Steele*, 70 Ala. 347; *Winston v. Browning*, 61 Ala. 80. The bill, as we have seen, contained a prayer for general relief; and under the practice in Alabama the court, upon a prayer for general relief, will award whatever relief may be consistent with the allegations of the bill,—relief which is merely incidental, or is not a departure from the case made by the bill. *May v. Lewis*, 22 Ala. 646; 1 Brick. Dig. p. 704, § 930. We have not been referred to any decision of the supreme court of Alabama, and have found none, in which it has been held that where there is a balance due after the sale of the property, in a case of this kind, a specific motion or notice to the defendant is necessary to authorize a decree for the unpaid balance. Such a decree follows as a matter of course, as necessary to the complete, final disposition of the cause, and consequently notice of it to the defendant is not necessary. He has notice that the court may and will grant all the relief within the scope of the bill. That a prayer for general relief is sufficient to authorize such a decree, see *Nolen v. Woods*, 12 Lea, 615.

The decree sued upon being a valid one under the laws of Alabama, the plaintiff's action upon it was maintainable in the courts of this state; and, being upon its face final, the mere pendency of equitable proceedings in the courts of Alabama, whether state or federal, to set the decree aside, presents no obstacle to the rendition of a judgment upon the decree by a court of this state.

It follows from what has been said that the court did not err in striking the pleas set out in the record, nor in refusing to grant

a continuance on account of the pendency of litigation in Alabama to set aside the judgment sued upon, nor in overruling the objections of the defendant to the introduction of the transcript of the record in the case in which that judgment was rendered. Nor did the court err in rendering judgment against the defendant for the amount sued for. Judgment affirmed.

(97 Ga. 114)

**SINGER MANUF'G CO. v. WRIGHT.**

**SAME v. THOMAS et al.**

(Supreme Court of Georgia. July 15, 1895.)

**CONSTITUTIONAL LAW—UNIFORMITY OF TAXATION  
—TAXES ON OCCUPATIONS—INTERSTATE  
COMMERCE.**

1. It is within the constitutional power of the general assembly of this state, in the imposition of specific taxes upon occupations, to classify the subjects of taxation, taxing some and omitting to tax others; and the principle of uniformity required by paragraph 1, § 2, art. 7, of the constitution is not violated so long as a given tax is made uniform upon all individuals belonging to the particular class on which it is imposed.

2. A specific tax, levied under a statute of this state upon persons engaged in the conduct of a particular business, is not violative of paragraph 3, § 3, art. 1, of the constitution of the United States, as being an interference on the part of the state with commerce between the several states, where the property employed in such business has been brought into this state, and has, itself, become subject to taxation therein. Nor is such a tax obnoxious to the fourteenth amendment to the federal constitution, as denying to any person "the equal protection of the laws," where all persons of a given class, designated and described by the special occupation in which they engage, are subjected to the same specific tax, and the individual complaining falls within the class upon which such tax is imposed.

3. The law in question being constitutional, and the taxes thereby imposed being legal, the judgments below were right, irrespective of the question whether the plea of *res adjudicata* was or was not well founded in law.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Actions by the Singer Manufacturing Company against William A. Wright and against L. P. Thomas and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Geo. Hillyer, for plaintiff in error. J. M. Terrell, Atty. Gen., Dorsey, Brewster & Howell, and C. I. Winn, for defendants in error.

**LUMPKIN, J.** These two actions were, by consent, consolidated, and tried together as one case by the presiding judge without a jury. They were brought to recover amounts of money paid at different times by the plaintiff in error for the purpose of preventing a sale of its goods under executions which had been issued for certain taxes alleged to be due the state of Georgia. The payments were made under protest, and the sewing-machine company insists that the law under which these taxes were levied is unconstitutional,

(1) because in conflict with paragraph 1 of section 2 of article 7 of the constitution of Georgia (Code, § 5181), which provides that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws"; (2) because in conflict with clause 3 of section 8 of article 1 of the constitution of the United States, familiarly known as the "Interstate Commerce Clause"; and (3) because violative of the fourteenth amendment of that constitution, which forbids any state from denying to any person within its jurisdiction the equal protection of the laws. The particular language of the statute thus called in question is to be found in paragraph 17 of section 2 of the general tax act of 1886, and is in the following words: "Upon every sewing machine company selling or dealing in sewing machines, by itself or its agents, in this state, and upon all wholesale dealers in sewing machines selling sewing machines manufactured by companies that have not paid the tax herein required, two hundred dollars for each fiscal year or fractional part thereof, to be paid to the comptroller-general at the time of commencement of business; and in addition to the above amount, said companies or wholesale dealers shall furnish the comptroller-general a list of all agents authorized to sell machines, and shall pay to said comptroller-general the sum of ten dollars for each of their agents, in each county, for each fiscal year or fractional part thereof, and upon the payment of said sum, the comptroller-general shall issue to each of said agents a certificate of authority to transact business in this state." Acts 1886, pp. 16, 17.

1. There is no longer any ground for questioning, in this state, the constitutional power of the general assembly, in the imposition of specific taxes upon occupations, to classify the subjects of taxation, taxing some and omitting to tax others; or for asserting that the "uniformity clause" in the article of our constitution which relates to taxation is violated so long as a given tax is made uniform upon all individuals belonging to the particular class on which it is imposed. In *Mayor, etc., v. Weed*, 84 Ga. 683, 11 S. E. 235, it was held flatly that the general assembly could classify all subjects of taxation, exclusive of property, and tax all classes at a rate operating uniformly upon each of its members; and the conclusion reached by the court is well supported by the opinion delivered by the present chief justice. The rule as to the taxation of property is stated in *Wells v. Mayor, etc.*, 87 Ga. 400, 13 S. E. 442, and recognized in *Railroad Co. v. Wright*, 87 Ga. 487, 13 S. E. 578. The question of the authority of the general assembly to classify and tax business occupations was also involved in the case of *Weaver v. State*, 89 Ga. 639, 15 S. E. 840, and the following language, quoted from the opinion, and to be found on page 642, 89 Ga.,

and page 841, 15 S. E., is pertinent and applicable to the point now under consideration: "It is too well settled to require discussion that a tax upon a business or occupation is not a tax upon property within the meaning of the *ad valorem* and uniformity clause of the constitution. And it is not a valid objection that another business or occupation is not taxed, or is taxed a different amount. The requirement as to this kind of taxation is that it shall be uniform upon all business of the same class." In *McGhee v. State*, 92 Ga. 21, 17 S. E. 276, the distinction between the taxing powers of the general assembly over property and other subjects of taxation is pointed out, the reason for this distinction stated, the doctrine of the *Weed Case*, *supra* (though it is not cited), practically reaffirmed, and the extent of its operation still further illustrated. For instance, it is there said (page 26, 92 Ga., and page 278, 17 S. E.): "We think, further, that occupations which are taxed may be divided into various classes." And this is true upon principle, and as a sequence from the reasoning of the previously adjudicated cases. It would, therefore, seem to be established that it is not only within the power of the general assembly to make one general class of all persons engaged in manufacturing or dealing in sewing machines, for the purpose of taxing them upon their occupations, but it may constitutionally make for this purpose a more limited class, composed of persons engaged in the sewing-machine business, and consisting of those transacting such business in specified or particular ways. The general assembly can tax the occupations of all persons engaged in the liquor traffic; but, if it saw proper, it could undoubtedly impose an occupation tax upon those only who sold liquors at wholesale. So it may impose an occupation tax upon persons engaged in the sewing-machine business without being constrained to make the tax universal in its operation upon all persons engaged in all branches of that business. We understand the words, "sewing-machine company," as used in the statute now under consideration, to mean a company which manufactures sewing machines; and therefore, in the present instance, the general assembly has made a class consisting of manufacturers of sewing machines who sell by wholesale or by retail, and of wholesale dealers selling machines manufactured by companies that have not paid the tax required by the law in question. Thus manufacturers and certain wholesale dealers are put in the same class. This is a natural and reasonable classification. Companies engaged in selling their own machines at retail, through various agents, doubtless do a very large business, and are, therefore, reasonably classified with wholesale dealers. The plaintiff contends that the tax is not uniform, because no tax is required of retailers of machines who are not manufacturers. This contention, in view of what has already been said,

cannot be sound; for, if the right to classify at all is conceded (and we have shown it must be), even an arbitrary classification would not, for that reason alone, be unconstitutional. But, as just intimated, we do not wish to be understood as saying that the classification made in this instance is arbitrary or unreasonable. It is not necessary to the legality or fairness of the tax that all retailers of machines should be included, and required to pay the same amount. The general assembly might well deem it in accord with a sound public policy to encourage the small dealer in his initial efforts to build up a business by exempting him from a tax he could ill afford to pay, and taxing others in the same line of trade, but doing a business the volume of which warranted the additional burden of an occupation tax. Whenever the small dealer, by reason of success, became a wholesaler, he would, of course, become liable to taxation as a member of the class to which he would then belong.

The most serious question for determination as to the constitutionality of the law in hand, in view of the "uniformity clause" above mentioned, is this: Is its language sufficiently comprehensive in meaning to embrace all manufacturers of sewing machines who sell at retail? Unless it is, the law must fail; because, when once a class is established, every member properly belonging to that class must be taxed, or else the uniformity required is destroyed. If the words "every sewing-machine company" are applicable only to corporations or partnerships, then individuals manufacturing and selling sewing machines would not be reached. It may be true, in point of fact, that there are no single individuals in Georgia answering to this description; but the law should be broad enough in its terms to include any person who may at any time, upon his own account, enter upon such business, for otherwise it would be possible for an individual to begin the transaction of this very business, and escape a tax which corporations in the same business are compelled to pay. An omission of this kind in a taxing law might, in some instances, operate as an invitation to individuals to undertake business enterprises, because of an attendant nonliability for taxes, and a consequent advantage to be gained over competitors engaged in the same business who are specifically named and taxed. At any rate, such an omission makes a discrimination which the constitution forbids. We think, however, that so far as the law with which we are now dealing is concerned, the whole difficulty may be properly removed by simply holding that the words "every sewing-machine company" would apply to a sewing-machine "man" who undertook to engage in the manufacture and sale of such machines in this state. This construction, upon reflection, will be found not to be a strained or unreasonable one. On the contrary, we think it is en-

tirely permissible, when reference is had to the object of the law in question,—that object being, not to tax a company or person carrying on the business, but the business itself. Of course, if the tax be upon the business, it is entirely immaterial whether such business be carried on by an individual, a partnership, or a corporation. As has been seen, the power of the legislature extends only to classifying business occupations into different branches, and laying upon each separate branch thus created such a tax as is deemed proper. The legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformly upon all. Therefore it would certainly seem the most natural and reasonable inference that the general assembly, in passing the law in question, attempted to accomplish what it had an undoubted right to do, rather than that which the constitution expressly forbids. It should be the purpose of courts to give effect to legislative intention, and, where that intention is not perfectly clear, the unbending rule is that such a reasonable construction of the statute as will render it harmonious with constitutional restrictions should invariably be adopted. In the present instance we are quite sure the legislature intended that this tax should apply to the business in question, no matter by whom the same might be conducted. Literally, the word "company" could only mean a corporation or a partnership; but a literal construction is not demanded, and a few illustrations, taken from our legislative enactments on the subject of taxation, will show that this word "company" has often been used therein, not only loosely, but in a sense which renders it perfectly evident it was intended to embrace single individuals. Thus, in the tax acts of 1886, 1888, 1890, 1892, and 1894, taxes were imposed upon telephone, circus, brewing, and sewing-machine companies. It can hardly be doubted that in some, at least, of these several instances, the legislature unquestionably intended that the tax should be imposed upon the business designated, even though conducted by an individual. For instance, if Adam Forepaugh exhibited in this state his great circus and menagerie, of which he was the sole owner and proprietor, although he was not literally a "circus company," it would surely not be denied that he would be subject to the tax imposed on such companies. Again, if a single individual had sufficient capital to establish and conduct a brewery, he would in like manner have to pay the tax imposed on brewing companies, although, strictly speaking, not himself a company. These illustrations might be further extended, but it is deemed unnecessary. It is quite probable that our general assembly did not, in express terms, impose a tax on single per-

sons who might engage in the sewing-machine business, for the reason that, in point of fact, none such were then engaged in conducting the business in this state exclusively upon their own account. But, however this may be, we think, in view of what has above been said, the law would reach such a person, if one could be found carrying on the business in question. While, as a general rule, tax laws must be strictly construed as to their operation upon those to be thereby affected, it will not do in every instance to confine words to their literal and ordinary signification. Certainly, if so doing would render a statute unconstitutional, the court should extend the letter so as to save the statute, if possible, the presumption always being in favor of its constitutionality. "Statutes relating to taxation \* \* \* are to be so construed as to carry into effect the obvious intent of the legislature, rather than to defeat that intent by a too strict adherence to the letter." *Cornwall v. Todd*, 38 Conn. 443. So, likewise, it was said in *Big Black Creek Imp. Co. v. Com.*, 94 Pa. St. 450: "Statutes are to be construed so as may best effectuate the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute, and where discovered it ought to be followed with judgment and discretion in the construction, though the construction may seem contrary to the letter of the statute." A clause in the general corporation law of the state of Illinois provided that no city council should grant the right to lay down railway tracks in any street of a city to any steam or horse railway company, except upon certain conditions, and it was held that the word "company," as employed in that clause, embraced natural persons as well as corporations. *Canal Co. v. Garrity*, 115 Ill. 156, 3 N. E. 448. Mr. Justice Scholfield, in delivering the opinion of the court, said (page 164, 115 Ill., and page 451, 3 N. E.): "It is very clear that 'natural persons' are here within the intention, although not within the letter, of the act, for the injury against which protection is intended to be afforded is the laying of railway tracks in the streets. By whom the tracks shall be laid and the cars thereon operated is, manifestly, of no consequence whatever. The same result, in all respects, will follow the laying of railway tracks in the streets and operating cars thereon by individuals as will follow the laying of them by corporations. The use of the word 'company,' we have no doubt, was simply because such tracks are almost always laid and operated by companies. The clause should be read as including both corporations and individuals." The language just quoted will, upon a very casual consideration, be found, in principle, precisely applicable to our present question. We are, therefore, of the opinion that the law imposing the tax complained of is not violative

of the "uniformity clause" of the article of the constitution of this state relating to taxation.

2. Another objection to this law was that it was violative of the "interstate commerce clause" of the federal constitution. We think otherwise. While it is exclusively the province of congress to regulate commerce between the several states, and to protect the same from hostile state legislation, yet, when products are shipped from one state and lodged in another, there to be offered for sale in open market, the business of selling them there is no longer interstate commerce, but assumes a domestic character, and becomes subject to the laws of taxation of force in the state where such business is pursued. The property involved in the conduct of this business, having become intermingled with the general mass of property in the state, has itself become subject to taxation there; and, upon principle, the business of selling it is alike taxable in that jurisdiction. This conclusion is deducible from the decision of the supreme court of the United States in *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091. It is true that where property has been shipped from one state to be sold in another, the business of conducting sales of it would be protected from local legislation burdening it with a tax not imposed upon the same business carried on in articles produced within the state levying the tax. But our statute makes no discrimination whatever as to the business of sewing-machine companies with reference to the question whether or not the machines sold are manufactured within this state or elsewhere. The general tax act of 1890 with reference to the sewing-machine business is quite similar to that of 1886 on this subject, except that the language employed in the act of 1890 expressly includes within the class of persons subject to the tax "all wholesale and retail dealers in sewing machines, selling machines manufactured," etc. In the case of *Weaver v. State*, supra, that act was attacked as being in conflict with the federal constitution, "because it is an attempt to discriminate against the productions of other states," concerning which this court said: "The tax is imposed upon the business of selling or dealing in sewing machines in this state, irrespective of the state or country in which the machines are manufactured"; and accordingly held that the act was not unconstitutional in the respect indicated, citing *Manufacturing Co. v. Wright*, 33 Fed. 124, where the same question now in controversy under our tax act of 1886 was involved. In concluding our discussion as to the paragraph of that act upon the construction and constitutionality of which the present case turns, we need only add that, if it is not in conflict with the constitution of this state, or with the "interstate commerce clause" of the constitution of the United States, it necessarily follows that this law is not obnoxious to

the fourteenth amendment to the federal constitution, which forbids denying to any person "the equal protection of the laws"; for, except as above indicated, no reason was urged or suggested why it was not in complete harmony with that amendment.

3. Another interesting and important question was made in this case, upon which, however, we do not deem it essential to pass. The defendants below filed a plea alleging that in a case between the same parties as are now before the court it had been finally adjudicated by the supreme court of the United States that the Slinger Manufacturing Company was liable for the very taxes now made the subject-matter of controversy. Having reached the conclusion that, irrespective of any former adjudication in that case, the sewing-machine company was liable for the taxes imposed upon it, it is obviously unnecessary to determine whether the plea of *res adjudicata* was or was not well founded in law. Judgment affirmed.

(97 Ga. 76)

#### MYERS v. STATE.

(Supreme Court of Georgia. April 29, 1896.)

COMPETENCY OF JUROR—PREJUDICE—CRIMINAL LAW—CONDUCT OF TRIAL—EVIDENCE—INSTRUCTIONS—CONFESSIONS—CREDIBILITY OF WITNESS.

1. Courts are the agencies employed by organized society for the administration of laws designed for the protection of its members in the enjoyment of their rights; and as, by the organic law of the land, no person can be deprived of life, liberty, or property except upon the judgment of his peers, it is the duty of the courts scrupulously to guard the right of trial by jury as one of the essential incidents of our judicial system, and one the maintenance of which in its purity and integrity is necessary, not only to the perpetuity of our institutions of government, but likewise to the protection of the liberties of the citizen against the possible encroachments of arbitrary power.

2. Upon the trial of a criminal case, the mind of every person chosen as a juror should at the time of his selection, with respect to the person and the particular matter under investigation, be, as between the state and the accused, in a condition of perfect neutrality; and though, upon the *voir dire*, they each do qualify as being thus impartial, a verdict of guilty may, nevertheless, be impeached by satisfactory proof that a single juror entered upon the discharge of his duties with a fixed and determined purpose, formed in advance of hearing the evidence, to convict the accused.

3. The existence of mere ephemeral impressions or opinions, either preconceived, or produced upon the mind by reading newspaper reports, or from hearing rumors and statements under oath or otherwise as to the causes and circumstances attendant upon the commission of a homicide, is not necessarily inconsistent with such a state of mental neutrality as renders one legally competent to sit as a juror; but if such impressions or opinions so far crystallize as to attain in the mind of the juror, in advance of hearing the evidence, that degree of mental conviction upon the question of guilt or innocence which would not readily yield to the evidence, then the juror is not impartial, in contemplation of law, and is incompetent.

4. The probative effect of affidavits submitted pro and con upon a motion to set aside a ver-

dict upon the ground of bias and prejudice of a juror is ordinarily a matter for the trial court; and, where there is upon such an issue a conflict of the evidence, this court will not usually control the discretion of the judge who tried the cause, if he sustain the verdict, even though, as against the affidavit of a single witness showing prejudice, nothing be offered in reply save only the fact that the juror upon voir dire qualified. Yet where two witnesses depose with direct circumstantiality to statements and conduct of a person afterwards selected as a juror, made and occurring before the trial, which evince a deliberate purpose upon his part to convict the defendant in the event he should be chosen as a juror, and no effort is made to discredit such affidavits, either by a contrary statement of the juror as to the facts stated therein, or otherwise (he being at the time accessible), the testimony of such witnesses should be accepted as true; and, if supported by evidence that the facts to which they depose were unknown to the accused or his counsel until after verdict, a new trial should be awarded.

5. While every person accused of crime is entitled to a public trial, it is not necessary to its legality that a great multitude should be in attendance; and the presiding judge should not permit the bar or court room to become so crowded as to impede the progress of the trial, by rendering it difficult for the jurors to enter or leave the box, or by preventing the free movement of counsel and witnesses. Moreover, the jury should not be in such close and constant contact with the audience as that remarks of bystanders as to the guilt or innocence of the accused, or other indications of public feeling for or against him, may reach their ears or come under their observation. The bar, at least, should at all times be kept sufficiently open and clear for the prompt and orderly dispatch of the business of the court.

6. It does no violence to the constitutional prohibition against compelling a person accused of crime to give testimony tending in any manner to criminate himself for an officer to whose custody such a person is committed to take from the person of the accused any article of apparel which may be material as evidence upon his trial; and if such officer, under such circumstances, take the shoes of a prisoner, and compare them with certain tracks found near the scene of the alleged homicide, he may testify to the result of his comparison, notwithstanding an objection upon the ground that the evidence was illegally obtained. Where, therefore, under such circumstances, the trial judge erroneously sustained a motion to rule out the evidence of the officer, to the effect that he had made such a comparison, and giving the result of the same, but omitted to state to the jury that the testimony so ruled out should not be considered by them, such omission affords no ground for the granting of a new trial.

7. The testimony of a witness as to transactions occurring in his absence, based upon information derived from others, is hearsay, and, upon objection made on that ground, should be excluded. Where, therefore, a witness, who was a pawnbroker, testified that, in his absence, the accused, under an assumed name, deposited in his shop a certain watch, and it appeared that the witness spoke to that point, solely upon information derived from his clerk, and from an inspection of his books, together with a certain pawn ticket introduced in evidence, such testimony was but hearsay, and, upon objection, should have been excluded.

8. Though submitted in writing, requests for instructions to the jury based upon theories of the law which upon no candid view of the pleadings and evidence are involved in the issues being tried, should be disregarded by the court; and, consequently, their refusal affords no ground for the reversal of a judgment denying a new trial.

9. Confessions of guilt, being against the in-

terest of the accused, are always admissible, unless improperly obtained; but declarations in his favor are only admissible where, in point of time, their utterance is so nearly contemporaneous with the commission of the alleged offense as to become a part of the *res gestæ*. Where, therefore, it appears that certain statements of the accused were submitted to the jury, which embodied both confessions of circumstances tending to establish his guilt and likewise declarations favorable to him, and where it further appears that the inculpatory statements were improperly obtained, and the exculpatory declarations were not so nearly contemporaneous with the commission of the alleged offense as to be a part of the *res gestæ*, it was proper for the court, in its charge to the jury, though neither side so requested, to withdraw from their consideration all the statements in question, including both inculpatory admissions and exculpatory declarations. The court is not bound to submit false issues, based upon illegal testimony, though neither party to the controversy objects.

10. The bare fact that a reward has been offered for the apprehension of a person accused of crime is a circumstance which may be given in evidence as affecting the credibility of any person offered as a witness and sworn upon the trial, who was instrumental in effecting the arrest, and this without evidence showing affirmatively how and in what manner the credibility of the witness is affected thereby; and it was therefore error for the court to instruct the jury with reference to the testimony of such a witness that "the mere fact that the reward was offered is not any evidence against the credibility of the witness. There must be something in connection therewith to show that the witness testified in view of the reward."

11. Whatever is admitted by the trial judge as evidence is entitled to go to the jury for their consideration, to bear such weight and be given such credit as, in their judgment, it is entitled to receive. Where, therefore, in addition to the parol testimony of the witnesses, written or printed documents or other physical objects are received in evidence as bearing upon the issues made in the case, it is error for the judge to practically withdraw the same from the consideration of the jury, by an instruction that they would come to their conclusion from the evidence, and then immediately adding: "The evidence is what the witnesses testify before you from the stand." The verdict should rest upon the entire evidence, of every character, whether oral or otherwise.

12. Inasmuch as the questions made in this case, other than as herein ruled, including those relating to the motion to continue, the alleged improper conduct of counsel, and the newly-discovered evidence, are not of such a character as that rulings thereon would be of general public utility, and inasmuch as upon another trial the same questions cannot again arise, it is not deemed essential to rule upon the same.

(Syllabus by the Court.)

Error from superior court, Fulton county; Richd. H. Clark, Judge.

W. J. Myers was convicted of murder, and brings error. Reversed.

W. T. Moyers, E. M. & G. F. Mitchell, and Virgil Jones, for plaintiff in error. C. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

ATKINSON, J. The facts necessary to an understanding of the questions made in this case are as follows: William J. Myers was indicted in Fulton superior court for the murder of Forest Crowley. Upon his trial for this offense, he was convicted, and there-

upon moved for a new trial upon numerous grounds. It will be necessary to the determination of the cause to refer to such only of the grounds of the motion for a new trial as we now proceed to set forth:

(1) Because the jury which tried him was not a fair and impartial jury, one of the jurors, to wit, H. T. Huff, having been an unfair, partial, and prejudiced juror, as appears from the affidavits of Benjamin F. Yancey, Abner C. Stamps, J. W. King, Cleveland Wilcoxon, and D. C. Wall, which fact was unknown to defendant or his counsel until after trial, as appears from the affidavits of the defendant and his counsel. In support of this ground of the motion, the defendant submitted an affidavit from Benjamin F. Yancey, to the effect that on Sunday following the killing of Forest Crowley, in Westwood Park, he went to the scene of the killing with D. C. Wall, who was an engineer on the Central Railroad; that they struck up with Mr. H. T. Huff, who was on the grounds in conversation with a doctor, whom the deponent knew by sight, but whose name he did not know; that Huff was discoursing on the killing and the news connected with it, and stated that he had heard they had caught Will Myers in Cincinnati; that Huff was very talkative, and very bitter and vindictive in his talk and in his manner against Myers; that he pointed to a tree, and said Myers ought to be brought back and hung on that tree, so that the whole country could come and see him hanging; that Huff also said that, if he were on the jury, he would sit there until Judgment Day, but what Myers would hang; that he was earnest in his manner, and very prejudiced against the defendant. Deponent went into the courthouse during the trial, and during the progress of the argument and, to his great surprise, saw Huff sitting as one of the jurors. Deponent was surprised, and knew then that Huff was not a fair and impartial juror, and afterwards mentioned the matter to Maj. Wilcoxon, of Mynatt & Wilcoxon, lawyers, who, he is informed, told the matter to the attorneys for Myers. Defendant also introduced affidavit of D. C. Wall, who testified that he was an engineer on the Central Railroad; that he had been such for five years; that he lived at No. 23 Walker street, in the city of Atlanta; that on the Sunday following the killing of Forest Crowley, at Westwood Park, he went out to the scene of the killing with B. F. Yancey, and heard various parties who were there talking; that he did not know H. T. Huff, who was a juror in said case, and did not know whether he was one of the men who expressed themselves as hostile to Myers or not, but that there was considerable talk by several parties, one of whom was with a doctor, or at least he was called a doctor, whose name he did not know; that this man expressed himself in a manner as if he was prejudiced against

Myers; he did point to a tree, and say something about hanging Myers on it; the exact expression deponent does not now remember; that he had never told about this to Myers or any of his family or attorneys until this day. Also, the affidavit of Abner C. Stamps, who testified that he had lived in the city of Atlanta for the past nine years; that he was a commission merchant; that he knew H. T. Huff, who was a juror in the case of the State v. Will Myers; that, shortly after the killing of Forest Crowley, deponent was in Pool's store, on Peters street, in the city of Atlanta, and heard said Huff say, in speaking of the killing, "If I was on that jury, I would sit fifty years, or would break that man Myers' neck;" Huff seemed to have considerable feeling in the matter, and seemed to be greatly prejudiced against Myers; that deponent was out of the city when Myers' trial was in progress, and did not know Huff was on the jury, and for that reason never mentioned these facts before. Also, the affidavit of J. W. King, who testified that he was a commission merchant; had resided in Atlanta for the past two years; that he had read the affidavit of Abner C. Stamps, made in the above-stated case, and was present at the conversation alluded to in that affidavit; that Huff, who was a juror in said case, and who expressed his opinion as testified to by said Stamps, seemed to be very much interested, and prejudiced against Myers, the defendant. In further support of this ground of the motion, the defendant filed the usual affidavits of himself and his counsel as to their ignorance of the existence of the facts set forth in the affidavits above referred to until after the conviction of the accused.

(2) Because the court permitted the court room to be crowded almost to suffocation by an immense crowd of people, the largest crowd that ever gathered in Fulton county court house, packed like sardines in a box, and jammed about the judge's stand, clerk's desk, and on and around the counsel's table, and all round and against the jury; and this crowd was greatly prejudiced against defendant. Counsel for the defendant, during the closing argument of the solicitor general, could none of them get seats, and two of them were compelled to sit on top of a table, and in front of them, and between them and the jury, a crowd of people was packed, while his other counsel was forced to stand in the doorway. A bailiff called the court's attention to the condition of defendant's counsel, and the court said that counsel for defendant could take care of himself. After the jury retired to their room, the crowd took possession of the court room, and made great noise, by loud talking and laughter, that might easily have been heard by the jury. Each time during the trial that the jury was brought to and from their room, a narrow defile in the surging crowd had to be forced to allow them to pass. Defendant says that the court should

have had the crowd kept out of the bar, and reserved it for the persons interested directly in the trial, and out of the court room, so that only a reasonable number should remain, and that the effect of their being massed around and against the jury was to influence and intimidate them; that the crowd was against the prisoner, and communicated their feelings to the jury; and that it was impossible to have a fair trial under the circumstances. As to this ground the court certifies: "I cannot recall that any one sat upon the counsel's table, and, if so, it was not to an extent to interfere with counsel's duties. I am sure there were no numbers between counsel and jury, and, if so, it was only for a moment, in standing or passing, and not so as to interfere with counsel's proper defense of their client. It is true that the court room was crowded, indeed packed, with an audience composed of both sexes, and there was a scarcity of room; but no request was made to me to exclude the audience, which, if made, was impracticable, beyond the requirements of room sufficient to conduct the trial, which at all times was sufficient. Counsel for defendant had the same opportunity of other counsel. Missing Mr. Moyers during the speaking, I found he was standing in the doorway, and he gave as a reason for his position that he would rather stay there,—presumably, to me, as he could get more air, as at the beginning of the trial he complained of a spell of asthma; and everything possible was done to accommodate his condition, even to the raising or lowering of every bash in the room, which made the room too cool for many in the audience, myself included. The trial lasted from Monday morning to Friday afternoon, and at the conclusion Mr. Moyers privately thanked me for the consideration I had shown him during the trial. He was perfectly able to take care of himself in getting admission to the room, and to his proper place therein; and, if he had applied to me to have room made for him, I would have stopped the case until it was done. He made the last argument for the defense, in a speech of three hours, which was both eloquent and ingenious, and in which he was heard attentively and patiently by the court, the jury, and audience. There was no influencing or intimidating the jury by the audience. I kept a balliff at each end of the jury box, with instructions to keep the crowd from contact with them at the sides and in the rear, and which, under my supervision, was faithfully done; and, when they went backward and forward to their room, I was careful to first have sufficient space to do so without contact with the audience."

(3) Because, when Capt. J. M. Wright, chief of the Atlanta detective force, was on the stand as a witness for the state, he testified that he visited the scene of the tragedy in company with the defendant; that he took defendant's shoes out to the scene of the tragedy, and fitted one of them into the tracks. Defendant's counsel immediately objected to

the testimony, and the court sent the jury out pending an investigation of the way the shoes were obtained from the defendant. That investigation showed that Capt. Wright had sent the station-house janitor to defendant's cell and got his shoes. The court ruled that the state must prove by the janitor the circumstances under which the shoes were obtained. Defendant's counsel then asked the court to instruct the jury that the answer of the witness that was given before the objection could be made (that the shoe was fitted into the track) was ruled out. The court replied, "Never mind about that now." The jury then returned to the court room, and Capt. Wright was carried through a minute examination on the subject of tracks; the principal point sought to be made by his testimony being that there were two tracks from the buggy to the dead body, and only one leading back to buggy from the body. Captain Wright testified to other tracks in the vicinity, but that none came within 40 feet of the dead body. Jeff Arnold, the janitor, was shortly afterwards put on the stand, and the jury was sent out by the court. When examined, he swore that he went to Myers' cell, and told him that the detectives wanted his shoes. Also, that he had just been met at the court house by some one acting for the state, who said to him, "Did you take them shoes away from him, or did he give them to you?" and witness said, "He gave them to me," and the man said, "When you get on the stand, you say so, and don't say any more." The court then ruled: "You object to the testimony. I sustain your objection. Our supreme court has said that a man cannot be forced to put his foot in a track. There is no evidence of direct force, but the man was certainly imprisoned, so I think better not to complicate the case with it. Let the jury return to the court room." The jury returned to the court room. The court did not instruct them that the testimony of Capt. Wright, objected to by defendant's counsel, was excluded. Defendant says that the failure of the court so to instruct the jury was error, especially in view of the fact that defendant's counsel had requested it. He says that the jury felt themselves bound to take this evidence; that this evidence was unlawful; that it was evidence that he was compelled to give, and which Capt. Wright testified tended to criminate him; that the jury heard defendant's objection to it, and, when called back, were not told that it was ruled out, and must have presumed that the court had not sustained the objection. Defendant claimed that he had never gotten out of the buggy, and the testimony objected to tended to prove that he had gotten out and gone over the hill. As to this ground the court certifies: "My remembrance is that the jury was sent out before Capt. Wright had testified anything touching the shoes. As soon as I caught the purpose of the testimony relating to the shoes, I sent the jury out; and hence it was unnecessary to instruct them in that particular, for

they had not heard it. As I remember, there was no such request made of the court, in the presence of the jury or otherwise, as contained in this ground."

(4) Because the court permitted N. Kaiser, a pawnbroker, to testify that a watch sworn to by others as belonging to the deceased was pawned in his shop by one passing under the name of C. D. Morlein, when it was shown that the witness was out of town when the watch was pawned, and out of town when the detectives got it from his shop, and he could only speak from the record of his shop, signed by said C. D. Morlein, and even then testified that the record showed a different number for the watch pawned by the said Morlein from the watch produced in court as defendant's. Defendant objected to this testimony because it was irrelevant, was secondary evidence of the contents of the writing, and not the best evidence, the writing being accessible; and because it did not show that it was the same watch as Crowley's, and did not show that defendant was C. D. Morlein, or the man that pawned it. As to this ground the court certifies: "The witness testified that his clerk received the watch, but he identified it by the pawn ticket, which was before the jury, and for them to pass upon. It was in evidence that defendant confessed pawning the watch as Kaiser's. There was some mistake in one of the many figures on the pawn ticket, and it was for the jury to judge if it was the same watch pawned, from Kaiser's evidence, aided by defendant's admission. The fragments of the letter alluded to in this ground were admitted without objection, and there were no requests in writing to charge upon either of the specifications in this ground."

(5) Other grounds of the motion were that the court erred in refusing to charge theories of the defendant that, if guilty at all, he was only guilty as principal in the second degree, or as accessory before the fact.

(6) Because the court erred in charging as follows: "There are admissions here in evidence which were obtained upon the saying to this defendant that it would be better for him if he would tell all about it. It is contrary to law to use admissions obtained that way; hence you must use your discretion in that regard as to what admissions you shall consider legal. There was no motion made before me to exclude the evidence because of its having been obtained improperly, but I deem it my duty to charge you upon the law in reference to that, that no injury in consequence of that shall be done to the defendant. So, as I said before, you must discriminate between those admissions that were received in that way, and such admissions that were not received in that way, and come up to rule as I have laid it down to you, where there was an absence of hope of benefit, or fear of consequence." Alleged to be error, because defendant did not move to exclude any testimony on the ground that it was an admission

made under the representation that it would be better for him to tell all about it; and he alleges the court had no right to instruct the jury to disregard evidence offered against him, which he did not object to. Further, because defendant did not want the evidence excluded, or any doubt cast on its admissibility on the minds of the jury, because he contended that the story or explanation given was the truth; and he alleges he had a right to have the evidence go to the jury of what explanations he made shortly after he was arrested, and in charge of the Atlanta police. Further, because the only evidence obtained in the manner set forth in the charge was the evidence of Chief of Police A. B. Connally, who testified that the Chattanooga chief of police had told the defendant to tell all he knew about it, because it would be better for him. The only other evidence as to the admissions was that of the Cincinnati detective, Meyer, who testified that, offering no inducement to confession, he talked with defendant down in a cell room, and there, with no witnesses present, defendant told him that he and Brown Allen had made it up; that defendant was to take Crowley out there, and meet others; that he did not say what they were to do, but they were to get him out there, and "do him." The charge of the court could only have been understood by the jury to mean that they should disregard the explanation given by Chief Connally, which, if true, showed defendant to be innocent, but that they were authorized to believe the Cincinnati detective's story, which stopped short of the explanation given by Connally. It took away from the jury the explanation that defendant's purpose was a mule trade, and left the assertion that his purpose was "to do him." The statement claimed by the defendant to be exculpatory, and which it was alleged the court illegally excluded from the consideration of the jury by the charge complained of, was made under the following circumstances: Several days after the commission of the homicide, the chief of police of the city of Atlanta went to Chattanooga, Tenn., to meet an officer who had the defendant in custody; the latter having been arrested in Cincinnati, Ohio. The chief of police talked with him at police headquarters in Chattanooga. On that occasion the defendant made a statement to him,—it not having been induced by any hope of reward or fear of injury,—which statement was as follows: "Defendant stated to Mr. Cason and myself [the chief of police] that there was a man by the name of Brown Allen connected with it; that Brown Allen was the cause of him going to Roswell and bringing young Crowley to Atlanta. He said further that he carried young Crowley out in a buggy to the western portion of the city, and that they were met by Brown Allen, and that Crowley got out of the buggy and went with Brown Allen over the brow of a little hill that was there, and that he came back and divided the money with

him [defendant] that he got from Crowley, and gave him the pocketbook and part of the money, a diamond ring, and watch. Defendant said he did not get out of the buggy at all. He [Myers] did not get out of the buggy at all. He said that he had known Brown Allen about ten days. He said Brown Allen got in the buggy with him, and that they drove up to where the street car crosses,—where the street car stops,—and that Brown Allen got out of the buggy. I asked him the question then whether the street car was there at that time, and he said there was no street car in sight, and Brown Allen got out of the buggy, and that he drove back to Atlanta. I asked him, when he first said he met Brown Allen, what took place between them. He says he met Brown Allen about ten days before this crime was committed; that he was connected in some way or other with Brown Allen's sister, or some female relative of his, and that he got infatuated with her in some way; he met her out at Innman Park, and Brown Allen found him there, and they had some words; and that Allen shot at him twice. He said further that Allen made him promise—made him swear—he would not tell anything about this matter. He described Brown Allen as being a medium-sized man; that he sometimes wore a black mustache. He gave us a very indefinite description. He told me that nobody ever saw him with Brown Allen in the city of Atlanta, nor where Brown Allen stayed in Atlanta. He said Allen shot at him before the killing. He went with him again. This killing was afterwards. He said that he got the ring as his part of the booty of the murder. He stated to Cason and myself that the ring was in the vest pocket of the old suit,—the suit he had on when the murder was committed. I telegraphed Capt. Wright, who was acting chief of police, to get the suit of clothes, and try to find the ring. They did not succeed in finding it. He said he had pawned the watch for five dollars and a half at Mr. Kaiser's. Detective Ivey got the watch. This is the watch and chain. He said that, after Brown Allen had come back from over the hill where he went with Crowley, he kinder slapped him in the face with the red pocketbook, and said, 'Now, you can take this, and what money there is in it, and the diamond ring and the watch.' Upon cross-examination it appeared that the statement was made under such circumstances as would render it inadmissible upon the idea that it was improperly obtained. It does not appear, however, to have been objected to specially upon this ground. The only other testimony bearing upon this point was the statement of a witness (William Meyer) who testified substantially as stated in the foregoing ground of the motion for a new trial.

(7) Another ground of the motion was as follows: Because the court erred in charging: "An attack is made upon some of these witnesses who came here from Ohio

and Cincinnati, on account of the reward that has been offered in this case. If you believe that there was a reward offered in this case for the detection of the person who committed the crime, and that these witnesses are to get the reward, and that their testimony was affected by that reward, then you could treat them as so swearing, but the mere fact that the reward was offered is not any evidence against the credibility of the witnesses. There must be something in connection therewith to show that the witnesses testified in view of the reward." Alleged to be error because it takes away from the jury all right to consider whether the witness is testifying to get the reward which he knows has been offered, unless they can explore the inner conscience of the witness. Defendant alleges that it is the prerogative of the jury to say whether they believe, from all the circumstances surrounding the case, the appearance of the witness on the stand, his manner of testifying, his contradictions of his own testimony, his contradiction by other witnesses, his occupation in life, his conduct in the case, and numerous other circumstances shown to the jury, that witness is influenced in his testimony by the reward.

(8) Because the court erred in charging as follows: "As I said, what conclusions you come to will depend upon the evidence that has been submitted to you during the progress of the trial. The evidence is what the witnesses testify before you from the stand." And the court further charged the jury: "There is no witness here who has testified that he saw Myers, or anybody else, shoot the deceased, or otherwise illtreat him. Hence, if Myers is found guilty, or not guilty, will depend upon the circumstances as they are narrated to you by the witnesses." Alleged to be error because it excluded the jury from the consideration of the prisoner's statement of the appearance of the pistol, of the appearance of the clothing of Myers and Crowley, of the hotel register, and of the other evidence in the case which was not purely oral. In this connection the court further charged: "As I said, what conclusion you come to will depend upon the evidence that has been submitted to you during the progress of the trial. The evidence is what the witnesses testify before you from the stand. You see them; you hear them testify; you see their manner of testifying; you know their relations to the case, from the testimony that is introduced; and now, if your deduction is, from all the evidence, that the defendant is guilty, and guilty beyond a reasonable doubt, it would, as I said to you, be your duty to find him guilty; but if you do not believe, from all the evidence, and the deduction you make from it, that the defendant is guilty, or you have a reasonable doubt as to his guilt, then, likewise, as I said, it would be your duty to find him not guilty." And again, in the

same connection: "Hence, if Myers is found guilty, or not guilty, will depend upon the circumstances that are narrated to you by the witnesses." Alleged to be error, because there was written evidence in the case, there were certain physical objects introduced in evidence, as the clothing of the defendant and the deceased, the shoes of the deceased, the pistol of Myers, and the hotel register, and this charge excluded the consideration of this evidence from the jury, and restricted them to the consideration of the oral evidence.

1. We will first consider, in passing upon this writ, whether a court was lawfully organized which had jurisdiction to try the defendant for his life. If there was not, then no legal judgment of conviction could be pronounced against him. The jurisdiction to try capital felonies is vested by the constitution and laws of this state in the superior courts, and a superior court organized for the final exercise of this supreme attribute of a sovereign power must consist of a judge appointed by law, and a jury organized in accordance with the requirements of the law. When these constituent elements exist, the court is complete. Until then, it is not. If it appear on the face of the proceeding that any of the primary requisites to the existence of a valid court are wanting, its judgment is void, and may be attacked at any time and anywhere. If it be apparently organized in accordance with law, and proceed to judgment, after the time limited for exception to judgments rendered by such tribunals, it will be presumed in favor of its jurisdiction, and that its proceedings were in all respects regular and conformable to law. It is as essential to the rendition of a legal judgment in a case in which a jury trial is required that the jury, and each member of it, should be legally competent to sit as a part of the court, as it is that the judge who presides should labor under no legal disability. The right of trial by jury is sacred, wherever the common law prevails, and, though often assailed by persons who little appreciate either its origin, or its usefulness in the administration of the law, is an institution so deeply imbedded in the civilization of this country that, so long as our institutions of government continue, it will not perish from the earth. It constitutes a part of our judicial system, and courts, however organized, are but the agencies employed by organized society for the administration of laws designed for the protection of its members in the enjoyment of their rights; and since, under our benign system of government, no man can be deprived of life, liberty, or property except upon the judgment of his peers, it is the duty of the courts scrupulously to guard the right of trial by jury as one of the essential incidents of our judicial system, and one the maintenance of which in its purity and integrity is necessary, not only to the

perpetuity of our institutions of government, but likewise to the protection of the liberties of the citizen against the possible encroachments of arbitrary power.

2, 3. This defendant was convicted, and is now under sentence of death, and upon the verdict of a jury, one member of which he complains is not legally competent to try him. He alleges that before this juror entered upon the trial of the case his individual judgment was concluded by what he had heard against the prisoner, and that this juror entered upon the trial of this case corruptly, with a deliberate purpose to bring about his execution. In support of this ground of the motion he submitted the testimony of witnesses, two of whom deposed that upon one occasion, soon after the commission of the homicide, the person afterwards chosen as a juror stated in their presence that the accused ought to be hung, and pointed out a tree upon which the execution should take place. He submitted the testimony of two other witnesses who deposed that some time after the homicide occurred, and after the apprehension of this defendant, this juror stated in their presence, with much earnestness and vehemence, that, if he were chosen as a juror upon the trial of the accused, he would sit upon the jury for 50 years, or break his neck. The juror, in response to these several affidavits, filed an answer to the first one above referred to only. His answer to this was not a circumstantial denial of the facts stated, but was evasive, and concluded by the statement that upon the trial of the case he was influenced to the judgment finally reached by nothing save the testimony. The question is whether, upon this state of facts, the juror was impartial. Was he impartial in the sense in which that term is employed by the law? Did he speak truthfully when, upon the *voir dire*, he stated that he had not, from having seen the crime committed, or from having heard any of the testimony, formed or expressed an opinion in regard to the guilt or innocence of the prisoner at the bar? Did he speak truthfully when he said he had no bias or prejudice in his mind either for or against the prisoner at the bar? Did he speak truthfully when he said, "I am perfectly impartial between the state and the accused?" Absolute perfection is not attainable in human affairs. Absolute impartiality or indifference, according to the ancient standards, is not to be expected, even if it were desired. The time has long passed, in the judicial history of this country, when total ignorance of the offense, or circumstances connected therewith, is made the test of the competency of a juror; but the time will never come when absolute honesty and integrity of purpose can be dispensed with, either in the jury box or upon the bench. In olden times, the ideal juror, according to Lord Coke, should stand indifferent as he stands unsworn. He should be as white as paper,—superior to all suspicion of prejudice. He must be *omni exceptione ma-*

juror. But this cannot mean that each juror shall be absolutely free from all preimpression with regard to the question upon which he is impaneled. To apply such a test would be to exclude from the jury list of the present day all men who read, or who are thrown in association with people who do read. It cannot mean more than that upon the trial of a criminal case the mind of every person chosen as a juror should at the time of his selection, with respect to the person and the particular matter under investigation, be, as between the state and the accused, in a condition of perfect neutrality. He may have a general knowledge, derived from newspapers or other sources, of all of the facts bearing upon both sides of the question; and if still his mind is in such state of neutrality, as between the respective parties to the issue, there is no reason why he is not a competent juror; and this test applies to each individual juror of the panel. If one of them does not measure up to this standard, and the verdict be objected to in due time upon that ground, it should be vacated, and a new trial awarded. As has been said before, the juror must stand indifferent. His mind should be in a state of neutrality, as respects the person and the matter to be tried. There should exist no bias for or against either party, in the mind of the juror, calculated to operate upon his mind. He should come to the trial uncommitted, and prepared to weigh the evidence in impartial scales. For if he be not thus indifferent, but come to the trial with a preconceived opinion of the guilt or innocence of the prisoner, it is adjudged that he is disqualified, upon the theory that such a prepossession of the mind is inconsistent with the exercise by the juror of a free and impartial judgment of the case upon the evidence; and the declaration of the juror that he believes he could decide the case uninfluenced by his previous opinion will not remove the objection, for the reason, as assigned by Chief Justice Marshall (1 Burr, Tr. 416), that "the law will not trust him." Well-considered opinions, pertinent to this subject, may be found in *Greenfield v. People*, 74 N. Y. 285; *Rothschild v. State*, 7 Tex. App. 519. The disqualifying bias or opinion must be such as affects the neutrality of the juror's mind. The existence of mere ephemeral impressions or opinions, either preconceived or produced upon the mind by reading newspaper reports, or from hearing rumors and statements, under oath or otherwise, as to the causes and circumstances attendant upon the commission of a homicide, is not necessarily inconsistent with such a state of mental neutrality as renders one legally competent to sit as a juror. Such impressions cannot properly be classed as opinions at all. By some kind of subtle influence, impressions of this character are unconsciously made upon the minds of those persons who are the most deliberate in reaching conclusions, or in forming opinions; and, so long as these

impressions remain in this nebulous state, they cannot be classed as disqualifying opinions, but whenever they so far crystallize upon the mind of the individual upon whom they are made that, in advance of hearing the evidence, they attain the dignity of mental convictions, however slight they may be, upon the question of guilt or innocence, then the juror is not impartial, in contemplation of law, and is incompetent. If they be such only as would readily yield to the evidence, they are impressions, merely, and not crystallized opinions. Upon the general subject of disqualifying opinions, see 1 *Thomp. Trials*, § 79, and cases there cited.

4. We come now to deal with the question as to whether the evidence was sufficient to establish the alleged disqualification of the juror. In determining this question, it is necessary to look to the probative value of the affidavits introduced upon the hearing, and which bear upon this point. The rule that proof by a single witness of the formation and expression of an opinion by a juror against the defendant will not be sufficient to impeach the verdict, the juror himself having previously denied the fact on oath in his examination before the trial, was first recognized and established by this court in the case of *Epps v. State*, 19 Ga. 102. Since then the doctrine of that case upon this point has been steadily adhered to (see *Hudgins v. State*, 61 Ga. 185; *Fogarty v. State*, 80 Ga. 464, 5 S. E. 782, and cases there cited), until it has now become established as one of the fixed rules of procedure of force in the courts of this state; and it rests on the theory that the oath of the juror in response to the affidavit thus filed, or the oath of the juror in response to the questions propounded on the voir dire in which he qualifies himself, being opposed to that of the witness against him, it is a case of oath against oath, and the presumption in favor of the verdict is sufficient to turn the scale, or at least to sustain the exercise of a discretion by the presiding judge in upholding the verdict. Ordinarily the question as to whether or not a verdict is sufficiently impeached by showing the disqualification of a juror is a question where, upon a conflict of evidence, the discretion of the presiding judge should prevail, unless the weight of the evidence be so overwhelming against the finding of the circuit judge upon that point as that it can be fairly stated that he did not properly exercise the discretion vested in him by law. Measured by this test, we are fully persuaded that in the present case the verdict should have been set aside. Four witnesses deposed to the expression of opinions on two occasions, the expressions upon each of which occasions would have disqualified the juror. They deposed upon each occasion to the language and manner of the juror, to time and place and the persons who were present, with direct circumstantiality, so that, if what was

deposed by them was not true, its falsity could have been easily established. To one of the affidavits made touching what transpired very soon after the homicide, the juror made an answer. As will be seen from reading it, the answer was not a direct, circumstantial denial of the improper conduct attributed to him; but it was evasive, referred to minor inaccuracies in the affidavit, and did not deny in terms the main, controlling fact, that he had formed and expressed an opinion prejudicial to the defendant, upon whose trial he was afterwards selected as a juror. Touching this transaction, the juror having answered that when he tried the case he reached his conclusion from the evidence, and not from these previous impressions, and the expressions themselves having been uttered so soon after the commission of the homicide that they might have been fairly attributable to excitement, and not to deliberate operations of the mind, there might have been such a conflict as that the circuit judge would have been authorized, though by no means required, to uphold the verdict. But, touching the transactions to which the other witnesses deposed, there is nothing opposed to the sworn statements of the impeaching witnesses, save only the response of the juror to the questions propounded on the voir dire. These witnesses testified that some time after the commission of the homicide and the apprehension of the accused, when cooling time was supposed to have elapsed; when the heat and fever of the public mind, generated by the atrocity of the crime committed, had had time, in some sense, to have abated,—this juror, in a vehement manner, earnest and apparently sincere, as though he meant what he said, expressed the deliberate purpose, in the event he was selected on the jury, to break the neck of the accused, if he had to sit there 50 years. No witness denied the truth of this statement, not even the juror himself, though he was accessible to the court, and had ample opportunity to do so; and yet, in the face of this testimony, the courts are asked to sustain a verdict returned by a jury of which such an individual was a member. It is impossible for us to conceive how an upright and intelligent man, such only as are entitled to sit upon a jury, could deliberately and in cold blood lie in wait, and avail himself of an opportunity to sit upon the jury for the purpose of convicting any man of any offense, however guilty or innocent, and thus pollute the very source from which the pure stream of justice is supposed to flow. We cannot, under our oaths, uphold such a verdict, and can excuse such an offense against society and against the public justice only upon the charitable supposition that the man thus chosen was too densely ignorant to understand or appreciate the nature of an oath, or his obligation to himself, to society, to his God. His very presence upon and partici-

pation in the deliberations of the jury is supposed in law to have inoculated the entire panel with the virus of his prejudice, and to have rendered the return of a legal verdict impossible. The law guarantees to every man, whether guilty or not, a legal trial; and when the state, in the exercise of its sovereign power, placed the accused on trial for his life, it guaranteed to him that no person should participate in his trial who was under such a disability as rendered it impossible for him to be acquitted. To permit this verdict to stand would be equivalent to permitting the state to say: "You are charged with the commission of an offense. You are to be tried for your life. If convicted, you will be executed. You cannot be acquitted." What a mockery is such a judicial trial! To its result we cannot give our assent, and accordingly direct, not that the defendant be retried, but that he be tried.

5. Upon the question of practice covered by the proposition announced in the fifth headnote, we do not deem it necessary to declare further than is therein stated, save only that such matters appertain largely to what has been aptly termed the "police power" of the circuit judge. If the crowds which assemble to witness the trial of any cause are so large as by their conduct to interfere with the due administration of the law, or to interfere with the parties, counsel, and jurors who are engaged in the trial of the case, the court should adopt proper measures of repression; and the trial is not the less public, within the meaning of that term as employed by the constitution, that some persons are necessarily excluded from the court room for the want of seating capacity. These matters are necessarily, to a great extent, in the discretion of the circuit judge; but a proper exercise of this discretion would relieve both court and counsel of much embarrassment in the trial of causes, and tend largely to promote the due administration of public justice.

6. Upon the trial a police officer was introduced, and testified that he had taken a pair of shoes which belonged to the defendant,—whether they were taken from his feet, and whether with or without his consent, does not appear,—and compared them with certain tracks which appeared at the scene of the homicide. He testified to a similarity of such tracks. At this point objection was made to the competency of this testimony, and pending the argument of this objection the jury was removed from the court room. The court ruled that the testimony was not legally competent, but when the jury returned he omitted to instruct them that they were not authorized to consider the testimony, and his counsel assigns as error the failure of the court so to instruct the jury. We do not think this omission was error, for the reason that the court erred in ruling the testimony inadmissible. Under authority of *Franklin v. State*,

(3) Ga. 36, and the cases cited in support of the text of the opinion of the court, which appear on page 43, the testimony offered was legally competent, and ought to have been admitted. It was the duty of the officer to have taken from the possession of the defendant any article which he might have that would throw any light upon the circumstances of his guilt or innocence, and preserve it for use at the trial. As was truly said by Chief Justice Jackson in the case cited, it was what the accused wore that witnessed against him, and not any act that he did under coercion. He was not forced to make any track, or to put his foot into any track. The officer simply took from him the article in his possession, which afterwards testified against him. If the testimony was legal and ought to have been admitted, there certainly can be no error in the omission of the court to formally withdraw it from the consideration of the jury. The error first committed by him was cured by his subsequent action. The latter action was simply, in effect, the reversal of an improper ruling. So that ultimately, with respect to the matter complained of, the proper and legal conclusion was reached.

7. It will be seen from reading the testimony of the witness M. Kaiser, which appears in the ground of the motion hereinbefore set out, that his testimony was based upon information solely derived from others, and from an inspection of books and papers, the verity of which he could not by personal knowledge possibly avouch. His testimony was hearsay, and should have been excluded.

8. We do not deem it necessary to deal with the various requests to charge, other than as indicated in the eighth headnote.

9. In the present case it appears from the record that certain confessions made by the accused were introduced in evidence, and without objection, though it appears that the circumstances under which they were made would, if objected to, have rendered them legally inadmissible. The alleged confessions contained a narrative of certain exculpatory, as well as inculpatory, facts. It appears that the statements contained in such confessions were made several days after the commission of the homicide. The court charged the jury upon the subject of confessions, and that the jury would not have a right to consider them in reaching a verdict. This charge was objected to upon the ground that, inasmuch as the entire confession was before the jury without objection, the accused was entitled to have the benefit of the exculpatory statements contained therein, he being willing to abide the consequences of having the improperly obtained inculpatory statements considered against him. He assigns error upon this action of the court. We think the court took the proper view of the transaction. A man should neither be convicted nor acquitted upon improper testimony. The inculpatory statements were not admissible as evidence, and, if objected to at any time by the accused, the court should

have excluded them; and he was justified, in the interest of public justice, in finally withdrawing, by his charge, such statements from the consideration of the jury. The accused was not entitled to have any exculpatory declarations made by him go to the jury, they not being a part of a confession which could be legally considered by the jury. Of course, if a confession is made under such circumstances as would authorize its admission, the entire confession, including any exculpatory statements which may be connected with it, should be considered. But, where none of it is legal, none of it should go to the jury for their consideration. The exculpatory statements made by the accused were declarations in his own favor. It is obvious that declarations made by the accused after the commission of the offense could never be admitted in his favor unless they be so intimately and closely associated with the perpetration of the offense as to take on the dignity and character of *res gestæ*. The length of time which elapsed between the commission of the homicide and the utterance of the declaration was so great as to utterly exclude their acceptance as a part of the *res gestæ*. For that reason the circuit judge pursued the only proper course, when, of his own motion, he withdrew from the consideration of the jury the entire statement.

10. It appears from the record that a reward had been offered for the apprehension of the accused. The fact that this reward had been offered had been widely advertised by the police officers of the city of Atlanta. The accused was apprehended by officers in a distant city, and they were brought here to testify against him. Upon the trial of the case, they being introduced as witnesses, the judge charged, among other things, as follows: "The mere fact that a reward was offered is not any evidence against the credit of the witnesses! There must be something in connection therewith to show that the witnesses testified in view of the reward." We think this charge was error. The fact that a reward had been offered for the apprehension and conviction of the accused, standing isolated and alone, is a circumstance which goes to the credit of any witness, who, being interested in the apprehension and conviction of the prisoner, might have an interest in the reward. Whether or not he testified with a view to the reward is another circumstance which may be proven to affect his credit. The weight and effect of the circumstance first above referred to may be completely destroyed by showing that the witness did not testify with a view to the reward, or did not know of the existence of the reward, but as to whether the one circumstance is overcome by proof of the other is at least a question for the jury; and therefore it was error to charge the jury that the mere circumstance that a reward had been offered was not any evidence to be considered by the jury. However slight might have been its bearing on the case, it was competent, and ought not,

by this instruction, to have been withdrawn from the consideration of the jury.

11. In the present case, in addition to the parol testimony of the witnesses introduced for the parties, there were certain printed documents and other physical objects introduced in evidence. The court, after instructing the jury that they would come to their conclusion from the evidence, immediately stated to them, "The evidence is what the witnesses testify before you from the stand." We think, upon authority of *McLean v. Clark*, 47 Ga. 24, and *Bowden v. Achor*, 95 Ga. 245-262, 22 S. E. 254, this instruction was erroneous. The omission of the circuit judge to refer to the evidence other than that to which the witnesses testified from the stand was doubtless wholly inadvertent, but the verdict should rest upon the entire evidence, of every character, whether oral or otherwise; and the court, in delivering its charge, should guard against such instruction as would withdraw from the consideration of the jury any evidence they were entitled to consider upon the trial of the cause.

12. There are a number of other questions made in the record, including a motion to continue, alleged improper conduct of counsel, and newly-discovered evidence; but all of them are of such character as that rulings thereon would not likely serve any purpose which would be of general utility to the public, and, inasmuch as they cannot arise again, we will refrain from discussing them. Inasmuch as, under the view we take of this case, the accused has not been tried according to law, whether under the evidence he be guilty or not, we are constrained to reverse the judgment denying him a new trial. Judgment reversed.

(99 Ga. 121)

#### WATSON v. HEMPHILL.

(Supreme Court of Georgia. May 23, 1896.)

PRACTICE—LOST STIPULATION—ESTABLISHMENT—ENFORCEMENT.

1. A written agreement between the parties to a pending case bearing upon and affecting the disposition to be made of the same, and duly filed with the other papers in the case, is an "office paper," of which a copy may be established instantaneously on a motion made by one of the parties, and supported by a proper showing. In such case, a formal rule nisi, with service upon the opposite party, is not essential, especially when that party is present, and offers no valid objection to the establishment of the lost paper.

2. There was no error in striking the defendant's special plea, as it set up nothing constituting a legal defense to the plaintiff's action.

3. The defendant in an action upon a conditional contract in writing having, at the May term, 1894, of the court, entered into a written agreement with the plaintiff stipulating that, in consideration of the latter's consent to a continuance until the next term of the court, the defendant would withdraw all pleas and defenses, and that the plaintiff might then take a judgment for the full amount sued for, there was no error, at the May term, 1895, in enforcing this agreement by directing a verdict in the plaintiff's favor, and permitting a judgment to be entered thereon; the defendant then showing no valid reason why his agreement should

not be enforced, and it appearing that he had already enjoyed six months' more indulgence than he had contracted for.

(Syllabus by the Court.)

Error from superior court, Douglas county: C. G. Janes, Judge.

Action by W. A. Hemphill against J. A. Watson. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

Hemphill sued Watson, alleging that Watson owed him \$500, besides interest, on an agreement dated March 31, 1890, and signed by Watson, to the following effect: Whereas Hemphill and Watson had that day bought of Minnie E. Owens a certain lot of land at Lithia Springs, Ga., described in deed executed that day, paying therefor \$1,000, \$500 each, if at the expiration of 12 months Hemphill was not satisfied with his purchase of half interest therein, Watson agreed to pay him back the \$500 purchase money, and interest thereon at 6 per cent. per annum from date. It was further alleged that the consideration of this agreement was the promise made to Hemphill by Watson, previous to said purchase, that the land purchase was a profitable and suitable investment for Watson and Hemphill at \$1,000, and that if Hemphill would join with Watson in the purchase, and furnish half of the purchase money, and at the expiration of 12 months thereafter should not be satisfied with the purchase, then Watson would pay Hemphill back said \$500, with interest at 6 per cent. from the date of purchase; that, relying on said inducement and promise of Watson, Hemphill paid \$500 on the purchase on or about March 31, 1890, and said agreement was written out and executed by Watson, and accepted in good faith by Hemphill, in accordance with said previous promise of Watson; that afterwards the purchase proved not to be a profitable or a suitable investment for Hemphill, and he became dissatisfied with it, and in good faith duly notified Watson, at the expiration of said 12 months, that he was not satisfied with said purchase, and demanded payment from Watson of the \$500, with interest, according to the agreement, and Watson failed to pay the same; and that Hemphill had been and is willing and offers to convey to Watson all Hemphill's half interest in the land, upon payment of the \$500, with the interest thereon. This suit was filed January 30, 1892: An unsworn plea of not indebted was filed. Upon the trial of the case, the judge below allowed to be established, under circumstances hereafter appearing, an agreement signed by Watson, May 1, 1894, and consented to by Hemphill by his attorneys, stating that, the case being ripe for trial, and defendant desiring further time, therefore, in consideration that plaintiff consents that the case be continued until the November term, 1894, of Douglas superior court, defendant agreed to withdraw all pleas and defenses and consented that plaintiff

might take judgment at said November term, for the full amount of principal, interest, and costs, as sued for in said case; also, an agreement signed by attorneys for plaintiff and defendant, dated May 1, 1894, stating that it is agreed by and between the parties to the suit that the case may be continued, with the consent of the court, until the November term, 1894, under an agreement signed by defendant "this day." Defendant pleaded, also: Before he and plaintiff purchased the land, it had derived its chief value because of the erection of the Piedmont Chataqua, which was located near the land, and of which plaintiff was president and a stockholder, and had agreed with defendant that he would continue his connection therewith, and aid the same in every possible way, he being at the time business manager of the Atlanta Constitution, a daily paper of wide circulation, and being a man of considerable influence, and his connection with the Chataqua Company and with said newspaper gave considerable increased value to the property, and his continued promise to defendant of his connection, influence, and the aid of his paper for the promotion of the Chataqua Company induced defendant to sign the contract sued upon, and but for these reasons he would not have signed it; that, since the signing of the contract, he has severed his connection entirely with the Chataqua Company, and has failed to meet the expectations, which were the chief inducements to defendant to sign the contract, and, because of such action on plaintiff's part, said property has greatly decreased in value, until the entire property would not sell for anything like as much as plaintiff's claim against defendant; that defendant prays a rescission of the contract, and offers to convey to plaintiff the entire interest in the property, rather than to litigate; and that if this is refused, and the contract cannot be rescinded, then he prays the court to inquire into the circumstances of the case; and that complete equity and justice may be had between the parties. This plea was stricken, and the court directed a verdict.

Defendant moved for a new trial, and, his motion being overruled, excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in granting the order establishing the agreement signed by defendant and by plaintiff, by his attorneys. The order establishing this agreement recited that it appeared that the original thereof had been lost from the files of the case in the court, after it was recorded. Movant insists that it was error to grant this order, on motion of plaintiff's counsel, without notice to defendant's counsel, and without any papers being filed for that purpose, on the mere statement of plaintiff's counsel that the paper was left of file in the clerk's office with the other papers, and could not be found by him. The clerk stated, also, that

the agreement was left of file in his office in this case, and he recorded it, but that it was not then in his office; and that he had searched for it, and could not find it, and did not know where it was. Defendant's counsel stated that he did not have it, and did not know where it was. The court then examined the record, and saw it on record. This was done over objection of defendant's counsel. Plaintiff's counsel stated to the court that he saw defendant sign the agreement on the day it bears date. This also was objected to by defendant's counsel. Similar assignment of error as to granting order establishing the agreement signed by plaintiff's counsel and defendant's counsel, above stated. Error in striking the plea, alleged to be error because the plea was a good and substantial defense, and presented issues which should have been submitted to a jury. Because the court directed the jury to find a verdict in the case in favor of plaintiff, or rather, instructed plaintiff's counsel to write the verdict, and have the jury sign it, alleged to be error because there was no evidence introduced by plaintiff to warrant a verdict, and, if the copies established had been tendered in evidence, defendant's counsel would have objected to the same, because they had not been legally established, and because a certified copy from the record would be better evidence than the established copy. Further, because the plea of general issue was filed in the case, and was undisposed of, and because a demurrer was also filed to the declaration, which was undisposed of. No demurrer appears in the record, and none is specified as material to be transmitted to this court. Error in not allowing defendant's counsel the right to strike a jury, and to have the case submitted to a jury, as required by law. The court permitted plaintiff to submit his case, and directed a verdict in it to a jury selected in another case, seven of whom belonged to panel No. 1, and five to panel No. 2, alleged to be error to allow plaintiff to select the jury before whom he took a verdict, and in not allowing defendant to strike a jury. The jury were not engaged in the trial of any other case at the time, and no other case was being tried at the time. Error in overruling defendant's motion to continue the case on statement of his counsel to the court that defendant was at home sick, and unable to attend court; that he was confined to his room under treatment of a physician; and that he could not go safely to trial without the presence of defendant. Counsel produced also affidavit of a physician that defendant was sick, and confined to his bed, and had been for several days; that he was suffering from a severe case of tonsillitis, and affiant considered it unsafe for him to leave his room; and that he was not able to attend court. Further, because defendant's counsel insisted that the contract examined by the court was not a court paper, and should have been proved and admitted to the jury as any

other fact in the case, which point was overruled by the court, which ruling was error.

James & Bell, W. T. Roberts, and W. A. James, for plaintiff in error. Lewis & Green, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 207)

WESTERN UNION TEL. CO. v. JACKSON.  
(Supreme Court of Georgia. March 23, 1896.)

WRITS OF ERROR FROM CITY COURTS.

Inasmuch as under paragraph 5, § 2, art. 6, of the constitution (Code, § 5133), writs of error to the supreme court lie only from the superior courts, the city courts of Atlanta and Savannah, and like courts established by law in other cities, writs of error do not lie from "city courts" established for counties upon the recommendation of grand juries under the provisions of the act of October 19, 1891, as amended by the act of December 23, 1892, for the reason that the courts put in operation under these acts, even if they are "like" courts, are not established in cities at all. These acts obviously contemplate the establishment of courts in counties in which there are no cities as well as counties in which there are cities, and the fact that there may be an incorporated city in a given county for which county such a court is established does not change the character of the court, or affect the class to which it belongs. Courts so established are good, statutory courts, but not the constitutional courts from which a writ of error lies.

(Syllabus by the Court.)

Error from city court, Spalding county; E. W. Beck, Judge.

Action by R. F. Jackson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Dismissed.

Dorsey, Brewster & Howell and H. M. Dorsey, for plaintiff in error. Hammond & Cleveland, for defendant in error.

ATKINSON, J. This case is here upon a writ of error from the city court of Spalding county. That court was organized under the general law providing for the establishment of city courts in counties having a certain population, the act authorizing the establishment of such courts being found in the acts of 1890-91, p. 96, and the amendment thereto to be found in the Acts of 1892, p. 107. These acts provide that the powers, jurisdiction, officers, and mode of selecting them, of courts so established shall be the same as are now prescribed by the act creating the city court of Macon, which was approved August 14, 1885, and is to be found in the Acts of 1884-85, p. 470; thus extending the provisions of the act organizing the city court of Macon, in the respects indicated, to the courts organized under the act of 1890-91, as amended by the act of 1892, supra. The question is whether this court has jurisdiction to determine writs of error from city courts established under the provi-

sions of the general law above mentioned. In our consideration of this question we will take judicial cognizance of the fact that the city of Griffin is an incorporated city within, and is the county site of, the county of Spalding. The supreme court is a court of limited jurisdiction. See *Carter v. Janes*, 96 Ga. 280, 23 S. E. 201. It is expressly provided by the constitution of this state that the supreme court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors from the superior courts, and from the city courts of Atlanta and Savannah, and from such other like courts as may be hereafter established in other cities, and shall sit at the seat of government at such times in each year as shall be prescribed by law for the trial and determination of writs of error from said superior and city courts. See paragraph 5, § 2, art. 6 (Code, § 5133). It will be seen that the first part of the paragraph of the constitution now under review deals exclusively with the jurisdiction of the supreme court. It has in broad and comprehensive language denied to the court all original jurisdiction, and this denial makes it impossible for any cause to originate in this court, and this is immediately followed by the declaration enumerating and describing the subjects of jurisdiction in the supreme court, and expressly excluding from its jurisdiction those subjects not embraced in this enumeration or description. Upon this latter subject it will be observed that the language employed is, "but shall be a court alone for the trial and correction of errors from the superior courts," and other courts there enumerated or described. It is thus made expressly a court for the trial and correction of errors from the courts enumerated or falling within the class of courts described by the constitution, and the use of the word "alone" further confines the jurisdiction of the supreme courts to the trial and correction of errors from those courts only. We think that the enumeration and classification by the constitution of the courts from which writs of error would lie to the supreme court was a denial of jurisdiction in the supreme court to determine writs of error from any courts other than those indicated; but, to prevent a reference of this subject to any rule of constitutional construction, the constitutional convention, by the use of the word "alone" in the connection in which it is there employed, set at rest all possible doubt as to its meaning. When the constitution of the state says that the jurisdiction of the supreme court shall extend alone to the determination of writs of error from a certain class of courts, this is an express denial to the legislature of the power to enlarge the jurisdiction of the court by extending it to others not embraced in the constitutional enumeration or classification. The court now under review was not one of the courts expressly named in the constitution. The only question, then, is, does it fall within the general descriptive terms, "such other like courts as may be hereafter established in other cities"? Two things are

essential to the establishment of a court which shall answer this description. One is that it shall be modeled substantially upon the same plan as the city courts of Atlanta and Savannah. The next is that it must, by the act creating it, be located within the corporate limits of a city. The former is as to the organization of the court; the latter is as to its location. It is indispensable to the establishment of a court within the class described by this constitutional provision that both requirements should be met, else this court cannot have jurisdiction by writ of error to review the judgment of such court. The act under which the court in question was organized was not entitled "An act to create courts within the limits of incorporated cities," nor is there any provision or requirement that the courts authorized to be created by that act should be located within the corporate limits of cities. The mere identical circumstance that there is an incorporated city within the limits of a given county cannot, of itself, give color and character to a court established under this general law. There is no requirement in the act that this court should sit at any particular place. The only provision touching its location at any particular place in the county is to be found in the forty-fourth section of the act organizing a city court of Macon to be found in the Acts of 1884-85, pp. 470-479, to the effect that the county commissioners of Bibb county shall provide a suitable place for the sitting of the court created by that act; this provision being so incorporated into the general law by the reference made in the latter to the act creating the city court of Macon as, with respect to the particular court now under review, to make it the duty of the commissioners of Spalding county to provide a suitable place for the sitting of the city court of that county. The court in question could not in name even be called "the city court" of any incorporated city. It could have as well been located outside the city of Griffin as within it, and therefore the mere fact that it was located by the county commissioners within the city of Griffin does not make it one of the like courts "established in other cities." The provision of the constitution, "and such other like courts as may hereafter be established in other cities," is mandatory in respect both to character and location, and when we come to ascertain whether these constitutional requirements have been met the act itself under which a given court is organized is the scope and limit of our inquiry. We are not to inquire whether, in point of fact, it is a like court in organization, nor whether, in point of fact, it is located within a city; but the essential inquiry is, does the act by and under which such court is created and organized require that it should be a like court, and located in a city? It is an institution of the law, its creation and existence inhere in the law, and its character must be defined and determined by that law.

The act does not require that courts established thereunder shall be located in cities. On the contrary, it permits their location at any point within the respective counties, whether within or without the corporate limits of cities, that the county commissioners may determine upon; and we do not think that the character of the courts in such an important respect should be left contingent upon the location which may be selected by the commissioners. With respect as well to the location as the character of the courts, the act creating them must be equally as mandatory as the constitutional requirement. To rule otherwise would bring about the anomaly of upholding, as meeting the constitutional requirement, such of the courts established under the general law as might be by the commissioners located within the corporate limits of cities, and condemning such, as falling short of the constitutional requirement so as to be entitled to a writ of error to this court, as might be located without the limits of incorporated cities, though all of such courts be established under the same act, and have generally the same jurisdiction and powers. We think, therefore, the act under which the courts are established is alone the true source from which to determine whether the courts organized thereunder measure up to the constitutional requirements in the respect that writs of error will lie therefrom to this court. The legislature has ample power under the constitution to establish a city court for the city of Griffin, giving it jurisdiction extending over the entire county of Spalding, and from such a court a writ of error would lie to the supreme court. But it has no power to establish a city court for Spalding county, and confer upon this court by that act jurisdiction to pass upon writs of error from such a court. Under the broad power of the general assembly conferred by paragraph 1, § 1, art. 6, of the constitution, the legislature may create courts. It may call them "city courts for counties." The judgments rendered by such courts within the jurisdiction conferred would be as binding as those of any other court, but the mere denomination of them as "city courts" does not make them such within the meaning of the constitutional provision. Their judgments, if called in question, must be reviewed by the writ of certiorari to the superior court. To confer upon this court jurisdiction to determine writs of error from such courts, it will not suffice that by the act of creation they are christened "city courts." They must possess the essence of such courts, and this quality they cannot acquire even if they be like courts with those of the cities of Atlanta and Savannah, unless they are established in cities. Inasmuch, then, as the court now in question does not fall within the class of courts from which, under the constitution, this court is authorized to entertain and determine writs of error, the other questions in the cause cannot be considered, but the writ of error will be dismissed.

(99 Ga. 159)

SEISEL et al. v. WELLS et al.

(Supreme Court of Georgia. June 12, 1896.)

PARTIES TO ACTION—WAIVER OF PROCESS—FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE.

1. Persons against whom there is no prayer for process are not parties defendant to an action, and the clerk has no authority to annex to a petition a process requiring their appearance.

2. A mere acknowledgment of service upon a petition, and a waiver of service of the same, is not a waiver of process, nor a waiver of a prayer for process. *Ross v. Jones*, 52 Ga. 22.

3. The present petition was, as to two of the persons named therein as defendants, rightly dismissed "for want of process and service."

4. As to the main defendant and his wife, against whom process was prayed, there was equity in the petition; and it was error to dismiss the same, so far as they were concerned. (Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

The following is the official report:

Selsel & Co. and four others, for themselves and such other creditors as might join them, brought their petition against A. Wells, Mollie E. Wells, Frances M. Wells, F. W. Dunton, J. W. Haygood, and M. B. Gilmore, sheriff. At the final trial, plaintiffs struck the name of Haygood as a party defendant. Defendants demurred to the petition, as amended, for want of equity, and for misjoinder of parties and causes of action. They also moved to dismiss the petition, as to F. M. Wells and F. W. Dunton, for want of process and service. Both the demurrer and motion were sustained, and plaintiffs excepted and bring error. Modified.

The petition alleges the following: A. Wells, who has lately been doing a general merchandise business at Montezuma, is indebted to the plaintiffs in stated amounts. Mollie E. Wells is his wife; Frances M. Wells, residing in Terrell county, is his sister-in-law; and F. W. Dunton is a resident of New York state. Wells began the business in which the debts herein complained of were contracted, in September, 1893, when there were no claims outstanding against him, of which the commercial world could have notice, except a mortgage to John F. Lewis & Sons, of Montezuma, for \$666.66, which was of record, and which appeared to be dated November 9, 1892, due September 26, 1893, on nine head of live stock, valued at \$1,150, which mortgage plaintiffs believe to be bona fide. At that time he returned for taxes \$7,330, of which \$6,000 was for real estate. In the year before he had returned \$7,000 in real estate, and other property at \$1,702. These returns procured him an exaggerated and fictitious commercial rating, which enabled him subsequently, as he intended and knew they would do, to buy from plaintiffs and other merchants large amounts of goods on credit, by reason of said large tax returns; and by reason thereof, coupled with the fact that he was, as he

still is, in possession of a large farm in Dooly county, he came to be rated at a fictitious value in the commercial world. By reason thereof the commercial agency of R. G. Dun & Co., to which plaintiffs are subscribers, rated him from five to ten thousand dollars, and in this way plaintiffs were induced to give him credit. When he made these large tax returns he had no title in this large property, title thereto being in F. W. Dunton, one of the new mortgagees, who is already secure, never having parted with title to said farm,—the large balance of purchase money due thereon having been used by Wells as a basis of the mortgage of \$2,015.05 on the stock of goods, as a double covering against his merchandise creditors; and a triple covering being the Dunton mortgage for the same debt, covering all the personalty, live stock, produce, etc., on the Dunton farm, in Dooly, the plantation on which he was farming. The title to said land was then, and still is, in Dunton. Plaintiffs desire to ascertain the exact interest of Wells, if any, in said property, and to subject the same to the payment of his debts. Said tract contains 1,600 acres, worth five or six dollars an acre at private sale, and about half, or less than half, that amount at public sale. With the commercial rating thus acquired, Wells began business early in September, 1893, apparently free from all incumbrances except the Lewis note. He began to buy from plaintiffs and others on credit, selling for cash. He kept up this practice, paying very few of his current creditors, and none of plaintiffs, until January 1, 1894, when he executed mortgages covering the stock in the store at Montezuma to Mollie E. Wells, Frances M. Wells, J. W. Haygood (the attorney for mortgagees), and F. W. Dunton. His wife's mortgage is for \$800 principal, \$236.32 interest, besides costs and additional interest; the alleged indebtedness being a note to her made on June 2, 1890, due one day after date. The sister-in-law's mortgage is for \$300 principal, and purports to secure a note due one day after date, December 26, 1893. Haygood's mortgage purports to secure an indebtedness by note of the same date, due one day after. The mortgage to Dunton appears to secure notes to the amount of \$2,015.05, made January 1, 1891, due January 1, 1894. These mortgages were duly recorded. Simultaneously with their execution, he proceeded to secure all the mortgagees, except Haygood, by mortgaging to them, to secure the same debts, about the same day, all his live stock on his plantation, in Dooly county (on which Lewis & Sons already had a first mortgage), except a horse. These latter mortgages also covered nine or ten other head of live stock, large quantities of fodder, corn, etc., cattle and pigs, a steam boiler and attachments, and practically everything he had on his farm. The mortgagees did not foreclose on the live

stock and other things necessary to run the farm, but on the stock of goods bought from plaintiffs and other creditors, and still unpaid for, which were obtained when Wells knew he was insolvent and could not pay for them. At the time of the foreclosure (January 5, 1894) the safe in the store had been emptied of all cash except a \$10 bill. The attorney for the mortgagees is shown by his own letters to be attorney for Wells in matters arising out of the same transaction, showing collusion to keep the property in the Wells family. Wells continued to buy until the last. He ordered goods from one of plaintiffs on December 20th, and said he would pay in a few days, well knowing at the time that he was insolvent and could not pay. He bought goods soon after he started his Montezuma business from another of plaintiffs, and has since paid him \$17, only to get indebted to him \$135.38. From the same plaintiff he bought goods on December 27th, the day after the notes to his kinfolks and others were made, and bought from the traveling salesman of the same plaintiff on Saturday, December 30th, and on the following Monday executed the mortgages. He knew he was insolvent when he bought these goods, and did not intend to pay for them. Some of plaintiffs' goods are still in stock, with their marks and brands on them. As to such they wish to rescind the contract of sale, for fraud, and be allowed to identify and take back their goods as credits upon their claims, or that they be separated and sold by a receiver in separate parcels, and credited upon the accounts; and, as to such as cannot be identified or traced, plaintiffs ask for judgment against Wells for such amounts as may appear to be due. All the mortgages on the goods were executed at the same time, and also those on the personalty on the farm, and none of them are in the line of business in which merchandise is bought and sold. Upon their face, each is disclosed to be of a series of equal dignity. They appear to have been filed for record, by preconcerted action, at or about the same time, and were given under one comprehensive plan to defeat the debts of plaintiffs and other merchandise creditors, and to hinder and delay all such just claims. The intention of them all was to use the alleged indebtedness to delay creditors against his just debts contracted in the merchandise business. They are, in fact and law, an assignment; and, having no schedule of creditors and no inventory as required by law, they are null and void. In addition to prayers for injunction and receiver, plaintiffs ask for judgment for their claims against Wells, and that the mortgages be canceled. By amendment they waive discovery, and charge M. E. Wells and F. M. Wells to be insolvent. They also allege demand for payment, of Wells, and refusal to pay; and that they are unsecured creditors. By further amendment they

pray (1) that if it appear that the mortgages on the stock of goods have been foreclosed, and the goods sold, they have judgment against the mortgagees and Wells for the amounts of their respective claims; (2) that if it appear that any of said goods are in the possession of the mortgagees, or of Wells, the title to be rescinded for fraud, and they be allowed to reclaim their goods. The petition prayed for process requiring A. Wells and M. E. Wells to be and appear, etc., but did not pray for process against any other of the defendants named therein. The two just mentioned were served, and there was an acknowledgment of service, signed by J. W. Haygood, as attorney at law for the other defendants (naming them), in these words: "Due and legal service acknowledged on the within petition and restraining order. Copy and service of the same waived." The clerk had attached a process directed to each and all of the defendants (naming them) to second originals for Macon and Terrell counties. The acknowledgment of service by Haygood was made on the second original for Macon county, while upon the second original for Terrell county was an entry of service "of the within process personally" on F. M. Wells, signed by the sheriff of Terrell county.

O. M. Smith and J. H. Blount, Jr., for plaintiffs in error. J. W. Haygood, for defendants in error.

PER CURIAM. Judgment affirmed in part, and in part reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 426)

#### KIRBY v. LIPPINCOTT et al.

(Supreme Court of Georgia. May 11, 1896.)

#### APPEAL—REVIEW OF EVIDENCE—SUFFICIENCY OF RECORD.

1. This being, a direct bill of exceptions, assigning as erroneous a judgment rendered by the trial judge without a jury, and certain rulings made by him during the trial, and the bill of exceptions neither containing, nor purporting to contain, all of the material evidence introduced at the trial, and no brief of the same having been made and approved by the judge, so as to become a part of the record, the evidence has not been brought to this court in the manner prescribed by law, and cannot be considered. The fact that the bill of exceptions sets forth, by recital and exhibit, some of the material evidence, will not suffice.

2. All of the errors assigned necessarily involving a consideration of the evidence, and it being impossible, without reference thereto, to determine whether there was error (if any at all) which would require or warrant a reversal of the judgment there is no question legally before this court for adjudication.

(Syllabus by the Court.)

Error from superior court, Hall county; J. J. Kimsey, Judge.

Action between Lippincott, Ogelsie & Co.

and others and J. T. Kirby. From the judgment, Kirby brings error. Dismissed.

B. H. & C. D. Hill and W. F. Findley, for plaintiff in error. Dean & Hobbs, J. B. Estes, W. L. Telford, S. C. Dunlap, Perry & Craig, M. L. Smith, and G. H. Prior, for defendants in error.

**LUMPKIN, J.** It appears from the bill of exceptions that this case was tried by the judge below, without the intervention of a jury. Error is assigned upon the judgment rendered, and also upon various rulings made during the trial. None of these can be intelligently passed upon without a consideration of the evidence, which is not brought to this court in the manner prescribed by law. The bill of exceptions neither contains, nor purports to contain, the evidence introduced at the trial. After specifying the material portions of the record, including the judgment of the court, it prays that "the following documentary evidence" be approved by the judge, made a part of the record, and sent up by the clerk as such, and thereupon designates certain notes, mortgages, petitions, a contract, receipt, the report of a master, and a brief of the oral evidence which had been made up at the hearing of a former motion for a new trial in this case before another judge, and which, under an agreement of counsel, was also used at the trial now under review. It nowhere appears that these various documents were ever approved, either separately or as a whole, as constituting a brief of the evidence introduced at the trial last mentioned. The bill of exceptions sets forth, by recital and by exhibit, other evidence which was introduced at the hearing. The clerk's certificate to the transcript of the record states that no brief of the evidence introduced at the last trial has been filed in his office, but that certain designated pages of the transcript contain a true copy of the oral evidence contained in a brief of the same introduced upon a former trial, and that certain other designated pages contain true copies "of the documentary evidence specified in the bill of exceptions, and furnished [him] by the attorneys for the plaintiff in error"; the clerk adding, however: "But I cannot certify to such record in the usual form, because no brief of evidence has been approved by the court and filed, and I have had to resort to such papers and documents as have been furnished me." Further comment for the purpose of showing that there has been a complete disregard of the law which provides how evidence shall be brought to this court is unnecessary. We are compelled to dismiss the writ of error, and deny the plaintiff in error a hearing upon the merits of his case. The practice to be observed in such cases has been settled by the decision of this court in *Mayor, etc., of Waycross v. Neal*, 94 Ga. 731, 19 S. E. 758. Writ of error dismissed.

(99 Ga. 210)

**REDD v. STATE.**

(Supreme Court of Georgia. June 8, 1896.)

**HOMICIDE—DYING DECLARATIONS—IMPEACHMENT  
—REASONABLE DOUBT—GOOD CHARACTER—  
SELF-DEFENSE.**

1. When, on a trial for murder, the dying declarations of the deceased have been introduced against the accused, it is competent for the latter to impeach these declarations by showing that the deceased, because of general bad character, was unworthy of belief. *Nesbit v. State*, 43 Ga. 239; 1 Bish. Cr. Proc. §§ 1209-1211; 3 Rice, Cr. Ev. § 340; *Whart. Cr. Ev.* §§ 298, 302; 6 Am. & Eng. Enc. Law, notes on pages 131-133. And see *Battle v. State*, 74 Ga. 101; *State v. Thomason*, 1 Jones (N. C.) 274; *People v. Lawrence*, 21 Cal. 368; *Com. v. Cooper*, 81 Am. Dec. 762; *Felder v. State* (Tex. App.) 5 S. W. 145.

2. The good character of one on trial for crime, if satisfactorily proved, may, of itself, in a case where guilt is not plainly established, be sufficient to generate in the minds of the jury a reasonable doubt of guilt. *Shropshire v. State*, 81 Ga. 589, 8 S. E. 450.

3. The right to kill another in self-defense is not restricted to instances where the accused was put in actual danger of life, or of the commission of a felony upon him by the deceased, but may be exercised when such danger is not actual, if the accused, in good faith, under the fears of a reasonable man, and under circumstances so authorizing, acted upon the belief that the danger was real.

4. The charge of the court was not entirely in accord with the law announced in the two preceding notes.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Wesley Redd was convicted of murder, and brings error. Reversed.

Albert A. Carson, for plaintiff in error. S. P. Gilbert, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

**PER CURIAM.** Judgment reversed.

**ATKINSON, J.,** providentially absent, and not presiding.

(99 Ga. 176)

**BRYAN v. WINDSOR.**

(Supreme Court of Georgia. June 12, 1896.)

**PAROL EVIDENCE—EXPLANATION OF BLANK INDORSEMENT—INJUNCTION—DEFENSE AT LAW.**

1. Blank indorsements of negotiable paper may always be explained as between the parties themselves, and accordingly parol evidence is, in any given instance, admissible to show that such an indorsement upon a promissory note was made simply to pass title, and not to create liability in the indorser. Code, § 3808, and cases there cited. See, also, *Galceran v. Noble*, 66 Ga. 367; *Bedell v. Scarlett*, 75 Ga. 56; *Neal v. Wilson*, 79 Ga. 736, 5 S. E. 54; *Eppens v. Forbes*, 82 Ga. 748, 9 S. E. 723.

2. It follows that there was no error in refusing to grant an injunction to restrain the further proceeding of actions pending on the appeal in the superior court which had been brought in a county court by an indorsee against an indorser of promissory notes upon the latter's indorsements of the same in blank, these indorsements, as alleged, having been made merely to pass title, and with a distinct

agreement that the indorser was not to be liable. While it is true that in such cases the superior court could administer in behalf of the defendant no relief other than such as he might obtain in the county court, he could in either of these courts make a complete defense at law by pleading and proving the facts as to the purpose for which the indorsements were made; and consequently there was no occasion for equitable interference.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

J. H. Bryan brought a petition against John Windsor to enjoin the further proceeding of suits brought by Windsor against him in the county court upon two promissory notes. The injunction was denied, and plaintiff brings error. Affirmed.

It appears from the petition that on February 2, 1894, Bryan, being the owner and holder of two promissory notes, indorsed them, and sold them to Windsor for \$60. One of them was for \$180, dated January 31, 1891, due December 1, 1891, signed by J. J. Davis, and payable to J. H. Bryan. The other was for \$234.20, dated February 11, 1892, due October 28, 1892, signed by C. O. Davis and J. J. Davis, and payable to J. H. Bryan. The indorsement on the first was, "Pay to John Windsor, Feb. 2nd, 1894," signed by Bryan. The indorsement on the other was simply the name of Bryan. The suits in the county court were commenced on December 28, 1894, and resulted in a verdict in favor of Bryan in August, 1895; whereupon Windsor entered appeals to the November term, 1895, of the superior court. The petition for injunction was brought on December 13, 1895. It is therein alleged that, at the time he sold the notes to Windsor, Bryan, being desirous of going to his home in Kentucky, asked Windsor what he would give for the notes, "and to be no hereafter" as to Bryan; that Windsor thereupon offered the amount for which they were sold to him, and, upon receiving them, requested Bryan to put his name on the back of the \$180 note, and Bryan replied that he would not put his name on the back of that paper, so as to hold him accountable for its payment; that Windsor assured him that it was necessary for his name to be on the note in order that Davis, the maker, might know that Windsor had purchased it, and further assured Bryan that it would never trouble him in the event Davis failed to pay it; and it was agreed between Bryan and Windsor, when the trade was made, that Bryan's name was to be put on said note simply for the purpose of transferring the same, and in no wise holding him accountable to Windsor. His name was put on the other note simply for the purpose of passing title, Windsor agreeing that Bryan should not in any event be bound for the payment of the same. It was delivered to Windsor with the express understanding that it was not to trouble Bryan, and there would be no re-

course on him, and his name was in no wise to be an indorsement for the repayment of the note. He did not know that Windsor looked to him for their repayment until the suits were brought. Windsor had never demanded such repayment, although Bryan had been in Americus two or three months before the suits were brought. He never put over his name the words which appear above it on the \$180 note, nor authorized any one else to do so, nor has he any recollection of their being there when he signed his name; and any entry other than his name, which would tend in any wise to hold him accountable to Windsor, is a fraud practiced upon him by Windsor, without his knowledge and consent. He remembers that he declined to sign his name on the note until Windsor had assured him that it in no wise held him accountable for any amount thereof. Windsor said at the time of the trade that he thought most of the money could be made out of Davis by giving him time and taking it by degrees; at least, he (Windsor) would take his chances. Bryan had previously done a good deal of business with Windsor, and always found him all right; and, owing to such relations, relied on him implicitly to deal frankly and honestly, having the utmost confidence in his statements; and Windsor took the notes with full knowledge of all the facts, and took advantage of the ignorance of Bryan as to the legal effect of the entry on the back of them, as well as of his misplaced confidence. There was no consideration for the indorsement, the \$60 paid being for the purchase money of the notes. In addition to the prayer for injunction, etc., Bryan asks that the contract of indorsement be so reformed as to speak the actual agreement already stated. By amendment, it is alleged that, soon after being sued, Bryan went to Windsor, and offered him \$90, which sum more than covered the \$60 paid, with interest and all costs; but Windsor refused to accept it. Bryan stands ready at all times to pay said sum, provided Windsor will surrender to him the note and judgment recovered thereon, waiving no right to insist on the contract made as before stated. Further, in order to convey title to the \$180 note, and to show Davis that Windsor had bought it, Windsor insisted that it was necessary for Bryan to sign his name on the back of the note as it appears; and Bryan, supposing this to be the law, agreed to sign for the purpose, provided he was in no way to be held liable on his indorsement. This both parties agreed to; and, Windsor assuring Bryan that he would in no wise be accountable for the repayment of the note, Bryan signed his name; and he brings this petition for the purpose of obtaining relief from the mistake as to the legal effect of the indorsement, and prays that the true contract may be set up and carried out, which was to write only such indorsement

as would convey the title without rendering the indorser liable.

W. P. Wallis, for plaintiff in error. Lumpkin & Nisbet, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 181)

**BURKS v. COMMISSIONERS OF DOUGHERTY COUNTY.**

(Supreme Court of Georgia. June 12, 1896.)  
COUNTY TREASURER — COMPENSATION — APPROVAL OF RETURNS.

The commissions allowed to county treasurers under section 8703 of the Code, viz. 2½ per cent. on all sums received and paid out up to \$10,000, and 1¼ per cent. on all sums in excess of that amount, are to be computed upon their annual receipts and disbursements. The fact that these officers are required by section 508a of the Code to make returns to the grand juries of their respective counties at each term of the superior court does not authorize a county treasurer to strike a balance at every such term, charge 2½ per cent. on all sums received and paid up to \$10,000, as shown by his account thus balanced, and then begin a new account, and charge the same rate of commissions on amounts included in it up to \$10,000, and in this manner realize that rate of commissions on amounts received and disbursed in the same year in excess of \$10,000. The fact that the grand juries have approved the treasurer's returns as submitted to them cannot affect the question as to the amount of his lawful compensation.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

The commissioners of roads and revenues of Dougherty county issues execution against W. P. Burks and sureties on his bond as county treasurer. Burks filed an affidavit of illegality. Affidavit overruled, and Burks brings error. Affirmed.

The following is the official report:

Burks for many years has been, and is now, clerk of the superior court and ex officio treasurer, and was in 1893, when it is claimed that he charged the county the \$141.09 too much for commissions as treasurer. He made all the reports required of him by law, and made semiannual reports to the grand juries as required, and made up a balance in each report to the grand jury, showing the exact condition of the county; and, if said balance exceeded \$10,000, he charged 2½ per cent. for receiving, and the same amount for paying out, up to the sum of \$10,000, and on the excess of \$10,000 he charged 1¼ per cent. for receiving, and a like sum for paying out, on all receipts and disbursements. The grand juries, at every term of the court for years back, examined his reports, as well as for the year 1893, and approved them and his commission charges. The difference between the amount of commissions to the treasurer charged on a semiannual balance would be in his favor

to the amount of the execution, \$141.09. The commissioners claim that he should pay this sum back into the treasury, because it was an excessive charge, and he claims that it is his money, and that he charged only legal and proper commissions; the true question desired settled being, is the annual balance the basis for commission charges, or is the semiannual balance to the grand juries the proper basis?

Jones & Bacon, for plaintiff in error. D. H. Pope, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 216)

**MASSEY v. BOWLES, Sheriff.**

(Supreme Court of Georgia. June 28, 1896.)  
CONSTITUTIONAL LAW — SPECIAL ACTS — JUDICIAL SALES — VALIDITY — INJUNCTION.

1. The act of December 13, 1866 (Acts 1866, p. 42), "to change the place of holding legal sales in the county of Muscogee," and the act to amend the same, approved October 10, 1868 (Acts 1868, p. 164), were valid and constitutional laws, under the constitutions of 1865 and 1868, there being nothing in either of these constitutions prohibiting the enactment of special laws in cases for which provision had been made by an existing general law. *Burks v. Morgan*, 84 Ga. 627, 10 S. E. 1096.

2. These special acts, not being inconsistent with the constitution of 1877, were kept of force by paragraph 4, § 1, art. 12, of that instrument. Code, § 5233; *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893.

3. Whether the act of September 19, 1883, relating to public sales in the county named (Acts 1882-83, p. 658), is constitutional or not, it contains nothing rendering it unlawful to hold sheriff's sales at any of the places designated in the two acts first above cited. The sale involved in the present case, having been held at one of the places specified in the act of 1866, was lawful, as to place.

4. The judge was authorized in finding as matter of fact that the bid which the sheriff declined to accept or cry was not authorized by the person as whose agent it was contended the bidder was acting, and hence there was no error in holding that this bid was properly rejected.

5. There was no abuse of discretion in denying the injunction.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Maggie E. Massey against A. C. Bowles, sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

An act of the legislature, approved December 13, 1866, provides "that, in the county of Muscogee, all sales by sheriffs, constables, executors, administrators, guardians and trustees, may be held at any of the street corners on Broad street, between Bryan and Crawford streets, in the city of Columbus, upon giving the legal notice designating the time and place of sale." Acts 1866, p. 42. By an act approved October 10, 1868, the

foregoing act was amended by inserting the words, "or at any regular auction house between said streets." Acts 1868, p. 164. In 1883 the legislature passed an act entitled "An act to change the place of holding legal sales in the county of Muscogee, so as to make the 'bell tower' a place for holding such sales, and for other purposes." It is enacted "that the place of holding legal sales (as contemplated by section thirty-six hundred and forty-six of the Code of Georgia) in the county of Muscogee shall be at the bell-tower on Broad street in the city of Columbus, as well as at such places as are now provided by law, it being the object of this act to make said bell-tower a place at which public sales may be held, without changing existing law as to holding such sales at other places; and such sales, when held at the bell-tower, are declared to be legal, so far as concerns the place of sale in said county, subject to the provisos contained in said section thirty-six hundred and forty-six of the Code of Georgia." That section of the Code is in these words: "No sales shall be made, by the sheriffs or coroners, of property taken under execution, but at the court-house of the county where such levy was made," etc.; the provisos of this section relating to levy and sale of certain kinds of personalty without carrying the same to the courthouse door, and as to the description and location of the same in the advertisement of sale.

On November 11, 1896, the Georgia Home Insurance Company obtained judgment against Mrs. Maggie Estelle Massey for about \$1,800, and the execution issuing therefrom was levied on certain realty in Columbus, which, after advertisement, was put up and exposed for sale on the first Tuesday in January, 1896, and was knocked off to Perry W. Massey, the husband of the defendant in execution, for \$1,650. He failed to comply with his bid, and the sheriff readvertised the property for sale at his risk on the first Tuesday in March, 1896, "at the usual place of holding sheriff's sales in and for said county, to wit, at the northwest corner of Broad and Eleventh streets in the city of Columbus, said state and county." At the time and place so advertised, the property was again put up and exposed for sale, and was knocked off to the Georgia Home Insurance Company for \$1,000. On March 21, Mrs. Massey brought her petition against the sheriff, praying for an order restraining him from making a deed to said company, that he be restrained from interfering with her possession of the premises sold, and that the sale be set aside and declared void. She contended that the place of sale was illegal, being more than one-fourth of a mile from the courthouse of Muscogee county, where she claimed the sale should have been held in accordance with law. It appears from the sheriff's answer (which is uncontradicted as to these allega-

tions) that for many years all sheriff's sales in Muscogee county have been held at the places mentioned in the legislative acts before set out; that the streets formerly known as Bryan and Crawford streets are now known as Thirteenth and Tenth streets, respectively, and Eleventh street is one of the streets between those two; that many years ago due and legal notice was published by defendant's predecessor in office, designating the corner of Broad and Eleventh streets as the place of sheriff's sales in said county, and ever since all sheriff's sales and all sales by administrators and executors in said county have been held on said corner; that the sale could not have been held in front of the courthouse door, for the reason that there was no courthouse then in the county, the same having been torn down in October, 1895, and not yet having been rebuilt; that the last session of the superior court was held in a building on Broad street a little over a block from where the sale was had, which place was rented temporarily by the county authorities, but no permanent place for holding court had been provided; and that the office of the clerk of the superior court was in a small building erected for the purpose on the courthouse square, but no sessions of court were held therein.

The plaintiff further contends that the property was illegally knocked off to the company, bidding \$1,000, when there was a bid of \$1,050 made by Perry W. Massey, as agent for Joseph King, an amply solvent and responsible person. It appears, from the answer and the evidence in support of it, that, before the sale, King had told Massey that he would give \$1,000 for the property, and would allow Massey one month's rent, and then authorized Massey to bid for him \$1,000 for the property. He did not authorize Massey to bid \$1,050, nor any other sum over \$1,000. He could have attended the sale, but did not want to do so. The sale was open and fair. A large number of people were present, and this property was not offered until several other pieces of property had been sold by the sheriff at the same place, in order that all persons who might desire to purchase it might have an opportunity to attend the sale. The sheriff cried the property a long time before there was any bid at all. Finally the company bid \$1,000, not desiring to buy the property, except for the purpose of protecting its debt, and hoping that others would bid, and that the property would bring enough to satisfy the execution. This bid was cried for a long time; no other bid was made; and the sheriff was about to knock off the property, when Massey bid \$1,050. The sheriff then called him, and reminded him that he had failed to comply with his previous bid; and Massey replied that he was bidding for Joseph King, but did not say he was authorized to bid so much for him. The sheriff

had seen and talked with King a short time before the sale commenced, and King had said nothing to him about buying the property. Knowing that Massey was utterly insolvent and unable to pay for the property, and believing the bid, under the facts, not to be bona fide, the sheriff cried the property for a long time after that, and finally knocked it off to the company for \$1,000. Immediately after the sale the sheriff went to see King, and asked him if he had authorized Massey to bid \$1,050 for the property for him, and King answered that he had not; that he had authorized Massey to bid \$1,000 for him, and had not authorized him to bid any more. Massey himself so admitted to the attorney of the company, at the sale.

Dodson & Son and J. B. Pillsbury, for plaintiff in error. McNeill & Levy, for defendant in error.

**PER CURIAM.** Judgment affirmed.

**ATKINSON, J.**, providentially absent, and not presiding.

(47 S. C. 375)

**STROTHER v. SOUTH CAROLINA & G. R. CO.**

(Supreme Court of South Carolina. July 29, 1896.)

**RAILROAD COMPANIES—ACCIDENTS AT CROSSING—  
STATUTORY LIABILITY—INSTRUCTIONS—  
PRESCRIPTIVE ROAD.**

1. A failure by the servants of a railroad company in charge of a train to give the statutory signals when approaching a crossing is negligence per se; and, where a person is injured at the crossing, the presumption is that such negligence was the cause.

2. The liability of a railroad company for an injury at a crossing where it omitted to give the statutory signals does not depend on whether or not such omission was the proximate cause of the injury, as, under Rev. St. § 1692, it is equally liable if it contributed thereto.

3. Under Rev. St. § 1692, prohibiting a recovery for the injury of a person at a railroad crossing where he was guilty of gross or willful negligence contributing to the injury, it is the province of the jury to determine the question of such contributory negligence.

4. Under Rev. St. § 2316, authorizing the recovery for a personal injury causing death of such damages as the jury may think proportioned to the injury resulting to the parties for whom and for whose benefit the action is brought, the measure of damages is not alone the pecuniary loss.

5. Where no signals were given at the approach of a train to a crossing, as required by Rev. St. § 1692, the railroad company under said section is liable for an injury caused or contributed to thereby, unless it is found that the person was guilty of gross or willful negligence contributing to such injury.

6. The use of a road crossing a railroad track for 20 years gives the public a prescriptive right therein, and makes the crossing a "traveled place," within the meaning of the statute.

Appeal from common pleas circuit court of Richland county; Witherspoon, Judge.

Action by Hester Strother, administratrix, against the South Carolina & Georgia Rail-

road Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Moore & Thomson and J. W. Barnwell, for appellant. Joseph W. Muller, for respondent.

**GARY, J.** This was an action for damages by Hester Strother, as administratrix of the estate of her deceased husband, Robert Strother, for the alleged negligent killing of said Robert Strother by the defendant, on the 29th day of July, 1895, while he was crossing its track at a place which, it is alleged, was a public road or traveled place. The third paragraph of the complaint is as follows: "(3) That on the 29th day of July, 1895, the intestate, Robert Strother, in the pursuit of his business, was crossing the track of the defendant company at a place on said track which was a traveled place, to wit, the road leading from the Garner's Ferry road to the Bluff road, known as 'Yates' Crossing,' in Richland county, used in common by the public, and which the public had a right to use, when the defendant carelessly, unexpectedly, and without proper warning and due reasonable precaution, and without giving the signal required by section 1685 of the General Statutes of South Carolina, and without ringing its bell or sounding its whistle, caused one of its locomotives, which was drawing a train of cars, to rapidly approach the said intestate, Robert Strother, and struck him, and so injured him that death ensued therefrom a few hours thereafter." The defendant, in its answer to the complaint, denied each and every allegation thereof, and set up the defense of gross negligence on the part of plaintiff's intestate. At the close of plaintiff's testimony, the defendant made a motion for a nonsuit, on the following grounds: "(1) That the plaintiff had failed to produce any evidence going to show that the road in question was such a 'traveled place,' as contemplated by the statute; and (2) that the plaintiff had failed to adduce any evidence going to show that the accident was caused by the negligence of the company." The motion was refused, and testimony was then introduced by the defendant. The jury rendered a verdict in favor of the plaintiff for \$5,000. The defendant made a motion for a new trial, on the ground, inter alia, that the verdict was excessive. The presiding judge signed an order granting the motion, unless the plaintiff would remit on the record all over and above the sum of \$2,500. The plaintiff did so remit, and judgment for \$2,500 was duly entered up against the defendant.

The defendant appealed, upon exceptions, the first of which is as follows: "Because his honor, the presiding judge, should have granted the nonsuit asked for by the defendant at the close of plaintiff's testimony, and it was error of law in him not to have done so."

The following testimony was introduced, relative to the first ground hereinbefore men-

tioned, upon which the motion was made for a nonsuit. Mrs. M. A. Yates: "I have been living here since 1870. This road has been open ever since I have been here. It is a mill road, and has been used by the public ever since I have been here." Henry Yates: "Q. In regard to that road, how long have you been living down there? A. Eighteen or twenty years. Q. How long has that road been open? A. Ever since I have been there. Q. Is that a private or a public road? A. I would consider it a public road. It is the road to the mill, the road to the church and the schoolhouse. It is the outlet from the Bluff road to the McCord's Ferry road; the 'Mill Creek Road,' they call it. Q. What is that mill? A. The Padgett Mill; the 'Mill Creek' is the name of the creek. Q. State to the court and jury, is there any one who has the right to stop that road up? A. I think not; we have not. Q. And it has been a public road? A. Tobacco wagons, and everybody that travels, travels through there. Q. And the circus sometimes? A. Yes; I suppose so. We can't stop anybody." Cross-examinations: John Yates: "Q. Who owns the land by Yates' crossing? A. My mother. Q. What is the extent of that plantation? A. I think three hundred and some odd acres in it. Q. About a year ago, did you run a fence across this road, turning it a little out of its regular course, fifty yards? A. No, sir; just the least bit; put the fence out the least bit; did not interrupt the road at all. Q. How far would you say the road was turned out of its old course? What is the greatest distance that it departs from this old course at present? A. It did not interfere with the road whatever. Q. It was turned from its old course about fifty yards? A. No, sir; not that far. I do not think more than three or four feet; not much more than that. I helped to put it up. Q. When was this done? About a year ago? A. Yes, sir; this fall, but we did not stop the road up, though. Q. You call that the 'Mill Road'? A. Yes, sir; that is the nearest way to Padgett's Mill for the people living in the swamp through there. Q. You have permitted people to pass through there without objection? A. Yes, sir; couldn't help ourselves. Didn't like the road being right there in front of the house. Q. Does the county work the road? A. No, sir. Q. It isn't claimed as a public highway? A. It isn't worked by the county, but considered a public highway. Q. What is this road used principally for? A. Everything. Q. Used largely for going to Padgett's Mill? A. Padgett's Mill. Tobacco wagons cross it, and people travel from the Bluff road, and people out of the swamp go after lumber when a freshet makes it impassable. They come through there, and come to Columbia. Q. The road is pretty faint at certain points between your house and the Bluff road? A. I am telling you the reason why. Last fall a tremendous storm blew down trees on the main road, and, rather than cut the trees out,

every man would suppose the next man that came along would cut them, and nobody cut them. Q. So indistinct, it is hard to find? A. No, sir; you can find it. Q. How long have you been living there? A. We moved there in 1870. I have not resided there all the time. Some years I have been away from there. Q. Have any members of your family? A. They have; mother has owned the place since 1870. I was never off the place more than two or three years at a time. Q. What road is this that crosses there? A. I live halfway between the Garner's Ferry road and Bluff road. Some people call it the 'Mill Creek Road,' but the right name is the 'Garner's Ferry Road.' The Bluff road leads to the swamp. The Garner's Ferry goes through under the tin bridge out here. It is used for mill purposes, and going to church, by both whites and blacks,—two churches, white and colored church, on the Mill Creek road,—and is used by the swamper during the freshets. For instance, if there's a freshet, and the Mill creek gets so high they cannot cross, they come to the railroad, come down a private road that I made, side of South Carolina road, and come to this road, into this road, to the Garner's Ferry road, and come to Columbia. Tobaccoists, sewing machinists, and even a circus, I have seen going through there. Q. How long has the road been open? A. I say since 1870; that is as far as I can say. Q. Don't that road lead to Padgett's Mill? A. Yes, sir. Q. Could any of the neighbors shut that road up? Suppose you wanted to shut it up, could you do it? A. No, sir; I don't think I could; that was tested. Q. It has been open for the last twenty-five years? A. Yes, sir; to my knowledge, I say since 1870. Q. Used in common by the public? A. Yes, sir." Ned Denley: "Q. Where do you live? A. I live on Mr. Jimmie Hopkins' place. Q. Do you know the road that leads from the Bluff road to the Garner's Ferry road? A. Yes, sir. Q. How old are you? A. Sixty-four. Q. How long has this road been open? A. Ever since I can recollect. I remember the road when I was about fifteen years old. I been traveling it backward and forward. Q. Where does the road lead from? A. From the Garner's Ferry road, just above Padgett's Mill, and leads out to the Bluff road, leads into the Bluff road. Q. Who uses that road? A. Everybody and anybody who have a call there." We cannot say, after reading the foregoing testimony, that there was not some evidence to be submitted to the jury that this was such a traveled place, as is contemplated by the statute.

We will next consider the second ground upon which the defendant based its motion for a nonsuit. The failure on the part of the defendant's servants to ring the bell or sound the whistle in the manner provided by statute was negligence per se. When the defendant violates the requirements of the statute as to ringing the bell or sounding the whistle, and a person is injured by its locomotion,

tive, while crossing a highway, street, or traveled place, it will be presumed that such negligence caused the injury, unless the testimony shows that the injury was caused in some other manner, which was not done in this case. The first exception is therefore overruled.

The second exception is as follows: "(2) Because his honor erred in refusing the request of the defendant to charge that the plaintiff must not only satisfy you by the preponderance of the evidence that there was a failure to give the statutory signals, but must go further, and show that such failure was the proximate cause of the accident. In order to prove that the failure to give the signals was the proximate cause of the accident, the plaintiff must show that the plaintiff's intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, the preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant." An exception erroneous in part will not be sustained, although some of the propositions of law therein stated are sound. The request to charge which is set out in the said exception is erroneous in respect to the proximate cause of the accident. This question is disposed of by the case of *Wragge v. Railroad Co.* (which has been decided recently by this court) 25 S. E. 76. This exception is also overruled.

The third exception is as follows: "(3) Because his honor erred in refusing the request of the defendant to charge that, if the evidence shows that Robert Strother heard or saw the train by which he was killed in time to have avoided the accident, you must find for the railroad company." The court said: "I cannot charge it as requested. I charge you, if you so find, and you conclude that it was gross negligence on his part, then he cannot recover. In other words, you are to take into consideration what opportunities Robert Strother had at the time he approached that railroad track, if he approached it, to discover whether the train was approaching or not. Then you are to determine whether or not, if you conclude that he heard it, whether or not it was such a reckless act, indifferent to his interests, as would amount to gross negligence. If you so conclude, I charge you that the plaintiff cannot recover under the circumstances, because, as I charged you, as I intimated to you at the outset, if you have your eyes, and go walk into obvious danger, and you get hurt, there is no law that will give you a remedy for it. I mean now, if you have eyes to see, and so on, and go willfully into obvious, patent danger, then there is no law which will give you remedy because of the effects of it." This request was erroneous, because it would have taken from the jury the question whether the plaintiff, in the language of section 1692 of the

Revised Statutes, "was, at the time of the collision, guilty of gross or willful negligence," and whether "such gross or willful negligence contributed to the injury." *Hankinson v. Railroad Co.*, 41 S. C. 19, 19 S. E. 206.

The fourth exception is as follows: "(4) Because his honor erred in refusing the request of the defendant to charge that the measure of damages in statutory actions for injuries causing death is compensation for the pecuniary loss to the survivors from the death of the deceased." The presiding judge said: "Now, I have been requested to charge you as to the measure of damages. What does the statute say? The statute says, if the party shows that he is entitled to recover judgment, what will the jury give? It says, such damages as they really think proportionate to the injury resulting from such death to the party for whom or whose benefit such action shall be brought. What injury she and her children have sustained you will have to give, if the plaintiff is entitled to recover at all. You are to be guided by the evidence. You cannot go outside of the evidence. You will not permit your judgment to be influenced. You cannot allow matters of sympathy or anything of that kind." The words of the statute (Rev. St. § 2316) are as follows: "In every such action the jury may give such damages as they may think proportioned to the injury, resulting from such death, to the parties, respectively, for whom and for whose benefit such action shall be brought." In the case of *Petrie v. Railroad*, 29 S. C. 303, 7 S. E. 515, Mr. Chief Justice McIver says: "Again, it will be noticed that our statute, unlike many others of a similar character, does not speak of a pecuniary loss or injury, which might possibly tend to show the injury for which damages are allowed was confined to the deprivation of some legal claim susceptible of measurement by a pecuniary standard, but its language is much broader, and gives to the jury the right to award such damages as they think proportionate to the injury resulting from such death; and, as it is quite certain that the beneficiaries of the action may sustain injury by the death of a relative over and above the loss of any legal claim which they may have upon such relative, it follows that the view contended for cannot be sustained." The request to charge is inconsistent with this ruling, and the fourth exception is also overruled.

The fifth exception is as follows: "(5) Because his honor erred in charging the jury to the effect that, if they found that the plaintiff's intestate saw or heard the train by which he was killed in time to have avoided the accident, such finding would not be sufficient to entitle defendant to a verdict; but that, before they could find for the defendant, they must conclude that there was gross negligence on the part of plaintiff's intestate." In connection with this request, his honor says: "I have been requested to charge you:

If the jury find that the deceased, Robert Strother, was injured at the place so described because of the neglect to give said signals, and such neglect contributed to his death, then the defendant is responsible for his death, unless the jury further find that the deceased was guilty of gross or willful negligence. I so charge you, as I understand the supreme court of this state has already passed upon that point." Section 1692 of the Revised Statutes is as follows: "If a person is injured in his person or property, by a collision with the engines or cars of a railroad corporation, at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, \* \* \* unless it is shown that in addition to a mere want of ordinary care, the person injured or the person having charge of his person or property was, at the time of the collision, guilty of gross or willful negligence, or was acting in the violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury." His honor's charge was in harmony with the provisions of this statute.

The sixth and seventh exceptions are as follows: "(6) Because his honor erred in charging, as requested by the plaintiff, that 'twenty years' use of a road [traveled place] by the public gives to the public the right to travel over same.' (7) Because his honor erred in charging the jury as follows: 'Now, if you allow a person to or if you open a road through your land leading from one public road to another, and you and those through whom you claim, or you alone, allow the public to use that, without any protest on your part, without exercising any right to stop it, for twenty years, then there is a prescriptive right upon the part of the public, by such long indulgence upon the part of the owners of the land and the public use of it. They have acquired the right to use it, and you can't stop them. If you do, you will violate the law. So that is the test to which I direct your attention.' His honor says: 'I have been requested to charge you: "By the term 'traveled place,' as used by the statute, is meant a way along which persons are not only accustomed, but have a right, to travel. And twenty years' use of a road by the public gives the public the right to travel over the same." I so charge you, gentlemen. Now, it is alleged in this complaint that this was known as "Yates' Crossing"; that it was used in common by the public, and which the public had a right to use, at the time it is alleged that this person was killed. It was a road leading, as alleged by the plaintiff, from Garner's Ferry road to Bluff road. Now, gentlemen, I have admitted testimony before you here; and if you believe that this road was not a public road, that it is not dedicated to the public, then this statute does not apply. It would not be necessary at such a

place to ring the bell or give the whistle; but if you believe from the evidence that the public have been using, or were using at the time of this 29th of July last, when it is alleged this deceased person was killed, if you conclude that the public generally did and had the right to travel that road in crossing the railroad, and that right had accrued to the public for the past twenty years, then I charge you that it is a public road, in contemplation of the statute, because the statute says the test is, had the public the right to use it? Now, if you allow a person to or if you open a road through your land, if a road is opened upon your land leading from one public road to another, and you and those through whom you claim, or you alone, allowed the public to use that without any protest on your part, without exercising any right to stop it, for twenty years, then there is a prescriptive right upon the part of the public by such long indulgence on the part of the owners of the land, and the public use of it; they have a right to use it, and you can't stop them. If you do, you will violate the law. So that is the test to which I direct your attention.'" When this part of his honor's charge is considered as a whole, it will be seen that he impressed upon the jury (1) that, if the road was not dedicated to the public, then the statute did not apply; (2) that, in order to make a road public, it must not only be used by the public generally, but there must have also been a right to use the road on the part of the public for twenty years. In this there was no error of which the defendant can complain. *Hankinson v. Railroad Co.*, 41 S. C. 1, 19 S. E. 206. Appellant's attorney, in his argument, admits that, where lands are inclosed, the mere user of a right of way over such inclosed lands for 20 years by the public will raise the presumption of a grant of a right of way thereover, but insists that this rule has no application where the lands are uninclosed. Admitting that this is correct, the appellant cannot derive any benefit from it in this case, because, as a general proposition, the charge of his honor was correct; and, if the appellant wished the jury to be charged specifically as to the difference in principle where the lands are inclosed or uninclosed, he should have presented requests to charge to that effect; especially since it does not appear that the appellant seriously contested the fact, when the case was tried on circuit, whether the lands surrounding the road were inclosed or uninclosed. It is the judgment of this court that the judgment of the circuit court be affirmed.

(47 S. C. 410)

TEAM v. BAUM et al.

(Supreme Court of South Carolina. July 31, 1896.)

MORTGAGES—SALE UNDER POWER—EFFECT.

An owner of land executed a mortgage with a power of sale on default. Subsequent

ly thereto, he conveyed the same land in satisfaction of a prior mortgage. *Held*, that the mortgage, containing a power of sale, did not pass the legal title until it was exercised, and the legal title passed by the subsequent conveyance of the mortgagor, subject to any lien which the trust deed may have given the holder thereof.

Appeal from common pleas circuit court of Kershaw county; Ernest Gary, Judge.

Action by T. H. Team against M. Baum as trustee, and H. F. Boykin, to recover possession of certain real estate. From a judgment for defendants, plaintiff appeals. Affirmed.

The decree below is as follows:

"The complaint in this action seeks to recover the possession of a certain tract of land situate in Kershaw county. By a consent order, 'the issues of law and fact were referred to T. J. Kirkland, Esq., as special master, to report thereon to the court.' After the plaintiff had developed his case, a motion was made to dismiss the complaint by defendants' counsel. The special master has filed his report, dismissing the complaint, in which his reasons are clearly and tersely stated. The case was heard by me at the February term (1896) of the court of common pleas for Kershaw county, upon exceptions to the report of the special master. The facts as found by the master are as follows: On the 16th day of November, 1893, J. B. Nelson executed to B. G. Team a mortgage of the premises described in the complaint, with a power in said mortgage authorizing and empowering the said B. G. Team to sell said premises in case of nonpayment of the debt secured by said mortgage after it matured. This mortgage was regularly recorded in the proper office on the 13th of December, 1893. On the 28th day of November, 1893 (subsequent to the execution of said mortgage), the said J. B. Nelson executed an absolute deed of conveyance, conveying the same tract of land to the defendant M. Baum, as trustee, in satisfaction of a prior mortgage debt thereon held by said Baum. On the first Monday in February, 1894, under the power contained in said mortgage, the said B. G. Team, at public outcry, sold the land in the regular way, at which sale the same was bid off by the plaintiff, Mrs. T. R. Team, for the sum of five dollars; and a conveyance thereof was executed to her in the name of the mortgagor, J. B. Nelson, by the mortgagee, B. G. Team, his attorney in fact, on the 7th day of February, 1894. It should have been stated that the defendant Baum, trustee, went into possession of the premises immediately upon the execution of the deed, and was in possession at the commencement of this action, and is still in possession of the same.

"The exceptions raised the question of law: In whom is the fee simple title to the land in dispute? Or, in other words, did the sale under the power contained in the mortgage, executed to B. G. Team, have the effect to convey such a title as would defeat the for-

mal deed of conveyance executed by the mortgagor, J. B. Nelson, prior to the sale under the power? I agree with the special master that it did not. It will not be questioned that in this state the execution of the mortgage to Team, even with the power of sale, did not have the effect of passing the title to the land out of Nelson. The fee was still in him, and, this being the case, he could convey the same by his deed, which he did in this case to defendant Baum. Baum then went into possession of the premises as the owner in fee, subject to the lien of Team's mortgage. Did the sale under the power have the effect of defeating this title? I think not. The point turns upon the principle of principal and agent. Team was the agent of Nelson, with no greater power than Nelson had. As long as the fee was in Nelson, his agent, Team, could convey. But, the moment the fee passed out of Nelson, there was nothing upon which the power could operate. As stated in the case of *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, if the mortgagor die before the sale is made under the power, the power becomes inoperative, for the reason that the title has passed out of the mortgagor by operation of law. The statute of distribution passes the title to his next of kin, heirs at law. At the death of the parties, the status of title is changed by operation of law; and in this instance the status is changed by the act of the party. He certainly would be permitted to do while alive that which the statute would do for him if dead. By his death, his heirs at law could acquire no greater interest than he had while living.

"It is contended, however, that this is a power coupled with an interest, and is not revocable by the act of the party creating the power. In *Johnson v. Johnson*, previously cited, the supreme court decided that such was not a power coupled with an interest. The power is not revoked by the deed, but, as was said above, there is nothing upon which it can operate, the fee having passed out of the mortgagor. Besides, the defendant Baum certainly has some equity in the case, and to hold that the mortgagee, by a sale under the power, could convey such a title as to defeat the rights of Baum, would be giving to such power more force than a decree in equity could give. Even the court of equity, if Team went into the court to have his rights determined, could not order a sale that would defeat Baum's equity, unless he was a party to the suit; and yet to sustain this title under the power would have that effect. It is therefore ordered that the report of the special master be confirmed, and the exceptions thereto overruled."

The exceptions are as follows:

"The plaintiff excepts to the decree of his honor Ernest Gary herein, dated March 6, 1896, on the following grounds: (1) That his honor erred in holding that the sale and conveyance under the power of sale in the mort-

gage did not vest such title in the plaintiff as would sustain this action. (2) That his honor erred in holding that such sale and conveyance did not divest the title of M. Baum, trustee, derived from J. B. Nelson, the mortgagor. (3) That his honor erred in holding that if the conveyance by Nelson to Baum, trustee, operated to defeat the power to sell, the same was not a revocation of the power. (4) That his honor erred in holding that what is done by operation of law can be done by the act of the parties. (5) That his honor erred in overruling the exceptions of plaintiff, and sustaining the report of the special master."

J. T. Hay and B. B. Clarke, for appellant.  
J. D. Kennedy, for respondents.

McIVER, C. J. This was an action to recover possession of real estate, and, by a consent order, it was referred to T. J. Kirkland, Esq., as special master, to hear and determine all the issues in the action. The special master took the testimony, which is set out in the "case," and made his report, finding that the complaint should be dismissed. To this report the plaintiff excepted, and the case was heard by his honor, Judge Ernest Gary, upon this report and the exceptions thereto, who rendered a decree overruling the exceptions, and confirming the report of the special master. From this judgment, plaintiff appeals, upon the several grounds set out in the record, which decree, with the exceptions thereto, should be incorporated in the report of this case.

The facts of the case are undisputed, and may be briefly stated as follows: On the 16th of November, 1893, one J. B. Nelson, then being the owner of the land in controversy, executed a mortgage on the same to one B. G. Team, which mortgage was duly recorded on the 13th of December, 1893. This mortgage contained the usual power of sale, authorizing the said B. G. Team to sell the mortgaged premises upon default in payment of the debt secured thereby. In the exercise of this power, the said B. G. Team, on the 7th day of February, 1894, offered the premises for sale at public outcry, and the same were bid off by Mrs. T. R. Team, the plaintiff, for the sum of five dollars; and, she having complied with the terms of the sale, the property, on the same day, was conveyed to her by the mortgagor, Nelson, through his attorney in fact, B. G. Team. In the meantime, however, to wit, on the 28th of November, 1893, the land in question was duly conveyed to the defendant Baum, as trustee, by said J. B. Nelson, in satisfaction of a prior mortgage held by said Baum; and the said Baum, through his tenant, immediately went into possession of the said premises, and still retains the same.

From this state of facts, the question arises: In whom was the legal title to the land at the time of the commencement of this ac-

tion? Or, as the circuit judge expresses it, the practical inquiry is: "Did the sale under the power contained in the mortgage executed to B. G. Team have the effect to convey such a title as would defeat the formal deed of conveyance executed by the mortgagor, J. B. Nelson, prior to the sale under the power?" We agree entirely with the view taken both by the special master and the circuit judge, that the legal title was, and still is, in the defendant Baum, and hence there was no error in dismissing the complaint.

It is somewhat difficult to add anything to what has been so well said by the circuit judge in vindication of his conclusion. It is conceded by both parties that the legal title was originally in J. B. Nelson, and the test is to inquire when and to whom did such legal title first pass from Nelson. Since the act of 1791, which has been construed in so many cases (among the more recent of which are the cases of *Simons v. Bryce*, 10 S. C. 354, and *Warren v. Raymond*, 12 S. C. 9), it is quite certain that the legal title did not pass from Nelson by his mortgage to B. G. Team, even though that mortgage contained a power of sale; for, as was said in *Warren v. Raymond*, at page 25, in considering the question when a mortgage on real estate would operate as an alienation: "The fact that the mortgage contains a power of sale in case of default is unimportant. It must appear that such power of sale has been effectually exercised in order to produce that result." From this it follows that a mortgage, even though it contains a power of sale, does not pass legal title until such power is exercised; and, as the undisputed fact in this case is that the power of sale was not exercised until after the legal title had passed from Nelson into Baum by his absolute conveyance, the inevitable consequence is that the legal title to the premises in question is in Baum, subject, of course, to any lien thereon which the mortgage to B. G. Team may give to the holder thereof; and hence B. G. Team's remedy, if he has any, is by a proceeding to foreclose his mortgage, and not by any attempted sale of all the right, title, and interest of said Nelson in the premises, on the 7th of February, 1894, after all such right, title, and interest had previously passed out of Nelson into Baum, by the absolute conveyance thereof to Baum by Nelson, on the 28th of November, 1893. There can be no doubt that if a mortgagor, while still retaining the legal title, as he unquestionably does under the act of 1791, should make an absolute conveyance of the mortgaged premises to a third person, and afterwards undertake to convey the premises to another, the title of the latter would be subordinate to that of the former. If so, we are unable to perceive why the result should be different where the second conveyance, instead of being made directly by the mortgagor, is made by his attorney in fact, under a power of sale contained in the mortgage; for to so hold would be to attribute to the agent

greater power than that possessed by the principal.

These views, in addition to those presented by the circuit judge in his decree, which need not be repeated here, are, as it seems to us, conclusive of the question we are called upon to determine.

It only remains to consider the cases cited by appellant's counsel. The first of these cases is *Mitchell v. Bogan*, 11 Rich. Law, 686, in which a remark made by O'Neill, J., in his report of the trial on circuit, is cited, for the purpose of showing that that great judge would have sustained the title of the plaintiff in this case. But, besides the fact that such remark was made by the circuit judge in his report of the case for the appeal court, and could not, therefore, have the force of law, it is very obvious from the language used by Judge O'Neill in the paragraph immediately preceding that from which the quotation relied upon is taken that he did not intend to express any such idea as that attributed to him by counsel for appellant. His entire language was as follows: "I thought, as the mortgagor was out of possession, and a third person was in possession, that the mortgagee might maintain trespass to try titles. I did not rely at all on the plaintiff's sale and purchase, inasmuch as he bought himself. But if he had sold and conveyed to a third person, under the power in his mortgage, I should have held such sale and conveyance good." Inasmuch as it did not appear when the deed to Williams was delivered, whether before or after the sale to Bogan under the power contained in the mortgage, it is manifest that Judge O'Neill could not have intended, even by passing remark, to convey the idea attributed to him by counsel for appellant. But inasmuch as it did appear that the deed was not delivered until after the mortgage was executed, and inasmuch as, under the law as it then stood, a mortgage operated as a transfer of the legal title where the mortgagor was out of possession, as was the fact in that case, it was held not only by Judge O'Neill, but by the court of appeals also, that the mortgagee held the superior legal title. It is clear, from an examination of that case, that no such question as that presented here was either decided or considered in that case. So, also, in the case of *Dendy v. Waite*, 36 S. C. 569, 15 S. E. 712, no such question as that presented here was either decided or considered. The case seems to have been cited for the purpose of introducing a quotation from certain language used in that opinion, which is itself a quotation from the previous case of *Robinson v. Association*, 14 S. C. 152. The language quoted is as follows: "A sale under such a power is equivalent to a sale and purchase under a decree in equity, and will cut off all right of redemption, provided the mortgagee faithfully discharge, in all respects, the duties imposed upon him as donee of the power." The purpose of this language, as used in both of

those cases, was simply to recognize the right of a mortgagee to sell lands under a power contained in a mortgage, provided he follows strictly the duties imposed upon him as the donee of such a power. The object in creating such a power is to enable the mortgagee to sell all the right, title, and interest of the mortgagor in the mortgaged premises; but if the mortgagor, before such power is exercised, divests himself, by a legal conveyance, of all his right, title, and interest in the mortgaged premises, as he unquestionably has a right to do, there is nothing left upon which such power can be exercised, and any attempted exercise of it becomes utterly nugatory. In such a case the only remedy left for the mortgagee is to invoke the aid of the court of equity, which, by bringing in the purchaser from the mortgagor as a party, may enforce the lien of the mortgage by a sale of the mortgaged premises, and protect the rights of all parties concerned. It seems to us, therefore, that in no view of this case was there any error on the part of the circuit judge. The judgment of this court is that the judgment of the circuit court be affirmed.

(47 S. C. 397)

#### TURNER et al. v. INTERSTATE BUILDING & LOAN ASS'N.

(Supreme Court of South Carolina. July 31, 1896.)

#### BUILDING AND LOAN ASSOCIATIONS—USURY—PENALTIES AND FORFEITURES.

1. A contract for repayment in installments of a sum borrowed from a building association by a shareholder therein is not usurious on its face if it stipulates that on final settlement the amounts to be retained by the association shall not exceed the sum actually loaned, with interest thereon at 8 per cent. per annum, the legal rate.

2. Where a member of a building association who has borrowed money from it, giving a bond and mortgage, assigns his shares in the association to one who assumes payment of the loan, as provided in the contract between the original parties, the assignee, if charged more than the legal rate of interest, may sue the association under Rev. St. § 1391, which provides that any person or corporation who shall receive illegal interest shall forfeit double the sum so received, to be collected by a separate action, or allowed as a counterclaim to an action to recover the principal sum. *McIver, C. J.*, dissenting.

Appeal from common pleas circuit court of Edgefield county; Witherspoon, Judge.

Action by Wiley H. Turner and another against the Interstate Building & Loan Association to recover, under Rev. St. § 1391, double the amount alleged to have been received by defendant as illegal interest on a loan. From an order sustaining a demurrer to the complaint, both parties appeal. Reversed.

The complaint, decree, and exceptions referred to in the opinion are as follows:

"The complaint of the above-named plaintiffs respectfully shows unto this court:

"(1) That the defendants, the Interstate Building and Loan Association, are now, and

were at the times hereinafter mentioned, a body politic and corporate, under and by virtue of the laws of the state of Georgia, and carried on the business of loaning money, with its principal business office in the city of Columbus, in said state of Georgia; and that said defendants, at the times hereinafter mentioned, also carried on the business of loaning money in the county of Edgefield, in the state of South Carolina.

"(2) That on or about the twentieth day of January, 1890, one Rebecca M. Jones, at Edgefield, in the state of South Carolina, subscribed for twenty shares of the capital stock in said defendant association, and thereupon became a regular shareholder in said corporation, and thereafter paid monthly installments of twelve dollars per month upon twenty shares of stock subscribed by her as aforesaid, which amount she continued to pay out up to the 15th day of May, 1890; and on said day the said defendant loaned to Mrs. Rebecca M. Jones the sum of one thousand dollars, upon interest at the rate of 6% per annum, for which the said Rebecca M. Jones did execute her bond to the defendant, the same bearing date May 15, 1890, and conditioned to pay unto them \$1,000 in installments upon said capital stock, and \$5 per month as interest upon said loan; it being further stipulated in said bond that, in final settlement of the same, the amounts to be retained by defendant should not exceed the sum actually loaned, with interest thereon at the rate of 8% per annum. That, on the same day said bond was given to the defendant, the said Rebecca M. Jones, for the purpose of securing the payment of said bond, also executed to the defendant a mortgage, covering the following described real estate, to wit: One lot or parcel of land, situate, lying, and being in the county of Edgefield and state of South Carolina, within the corporate limits of Edgefield village, formerly occupied by Smith & Jones, as coach-makers, with all the workshops, stables, and buildings thereon, bounded by lands of Mrs. M. B. Cartledge, Mrs. Whitaker, and the road leading in rear of courthouse, known as the 'Cheatham Plank Road,' containing one acre, more or less; also another lot or parcel of land in the same county and state, upon which there was formerly a workshop occupied by M. A. Markert, and bounded by lands formerly owned by Mrs. H. Tillman, lands of J. H. Hollinsworth and others, running fifty-seven feet on Spann street, and running back south fifty feet, together with the livery stables now standing thereupon; and also another lot of land in the county and state, upon which there is a brick blacksmith shop, bounded by lands of J. L. Addison, W. D. Penn, and others, and by Spann street, containing fifty-eight feet east and west, and forty-four feet north and south.

"(3) That thereupon the said Mrs. Rebecca M. Jones continued to pay unto the defendants the monthly installments as called for by the conditions in said bond until the 12th day of

November, 1892, at which time she conveyed said premises by deed of conveyance to the plaintiffs, who are residents of this state, and at the same time assigned to them all of her rights, title, and interest in the said twenty shares of capital stock in the defendant company; the plaintiffs assuming the payment of said bond and mortgage, by agreeing to pay the monthly installments of subscription to said capital stock and interest therein stipulated, and the defendants on their part consenting to such transfer of capital stock, and did thereafter recognize and deal with the plaintiffs as the owners of said capital stock and payees of said bond, and did thenceforward receive from them the monthly installments upon the said stock and interest upon said loan, which two amounts the plaintiffs continued to pay up to and including the installment which fell due in the month of March, 1895, at which time the plaintiffs proposed to pay off the balance then due upon said bond and mortgage, which proposition was duly accepted by the defendants; and they thereupon demanded, as the balance due upon the bond and mortgage, the sum of five hundred and ninety-one dollars and ninety cents, which the plaintiffs alleged was unjust and usurious, but the defendants refused to cancel and deliver up said bond and mortgage unless the amount demanded by them as aforesaid was fully paid; and the plaintiffs thereupon paid the same under protest, and received from the defendants the said bond and mortgage of Mrs. Rebecca M. Jones, duly satisfied.

"(4) The plaintiffs, further complaining of the defendants, allege that the legal amount due upon said bond and mortgage at the settling of the same amounted to only one hundred and eighty-two dollars and forty-four cents, and not five hundred and ninety-one dollars and ninety cents, as demanded and received by the defendants; and the plaintiffs further charge that the defendants, by receiving said sum of five hundred and ninety-one dollars and ninety cents in settlement of said bond and mortgage, have exacted and received upon their said loan interest at the rate of 12<sup>0</sup>/<sub>10</sub> per cent. per annum, and are thereby guilty of receiving usurious interest to the amount of three hundred and nine dollars and forty-six cents, and, under the laws of this state, have forfeited and are liable to the plaintiffs in the sum of six hundred and eighteen dollars and ninety-two cents, with interest thereon from the 15th day of March, 1895.

"Wherefore the plaintiffs demand judgment against the defendants for the sum of six hundred and eighteen dollars and ninety-two cents, with interest thereon from the 15th day of March, 1895, and the cost of this action; for such other relief as may be just."

#### Decree.

"The above-entitled cause was heard upon a demurrer to the complaint, interposed by the defendant. The complaint alleges in sub-

stance: (1) That the defendant, a body corporate under the laws of the state of Georgia, was engaged in loaning money in the county of Edgefield. (2) That on the 20th day of January, 1890, at Edgefield, S. C., one Rebecca M. Jones subscribed for twenty shares of the capital stock in defendant's association, and thereafter, and up to 15th of May, 1890, paid defendant association twelve dollars per month on said stock. That on the 20th of May, 1890, the defendant association loaned the said Mrs. Rebecca M. Jones one thousand dollars, with interest at the rate of 6% per annum, for which amount Mrs. Jones executed to said defendant her bond conditioned to pay said defendant in installments upon said stock the amount so loaned, and five dollars per month as interest upon said loan. It was stipulated in said bond that, in a final settlement, the amount to be retained by defendant should not exceed the amount actually loaned, with interest thereon at the rate of 8% per annum. On the same day, the said Mrs. Rebecca M. Jones executed to said defendant a mortgage of certain real estate described in the complaint, for the purpose of securing the payment of said bond. (3) That Mrs. Rebecca M. Jones continued to pay the monthly installments according to the condition of her bond until the 12th of November, 1892, when she conveyed by deed to plaintiffs the real estate embraced in the mortgage to the defendant, and also assigned to the plaintiffs all of her right, title, and interest in the twenty shares of stock in defendant association; the plaintiffs assuming the payment of Rebecca M. Jones' bond and mortgage, by agreeing to pay the monthly installments and interest, the defendant consenting to such transfer, and thereafter recognized and dealt with plaintiffs as the owners of said capital stock, and thereafter received from said plaintiffs the monthly installments and interests on said loan to Mrs. Jones, up to November, 1895, when plaintiffs proposed to defendant to pay the balance then due on said bond and mortgage. That defendant demanded of plaintiffs the sum of five hundred and ninety-one dollars and ninety cents, as the balance due November, 1895, on said bond and mortgage, and refused to cancel and deliver up same until said sum was paid. The plaintiffs contended that the balance as claimed by defendant was unjust and usurious. The plaintiffs paid said balance under protest, and received from defendant the bond and mortgage of Mrs. Rebecca M. Jones, marked 'Satisfied.' (4) Plaintiffs allege that the amount due on said bond and mortgage of Mrs. Rebecca M. Jones at the date of settlement was only one hundred and eighty-two dollars and forty-four cents, and that the defendant has exacted of and received from plaintiffs usurious interest on said loan at the rate of 12 <sup>1</sup>/<sub>10</sub> per cent. per annum, amounting to three hundred and nine dollars and forty cents, and plaintiffs demand judgment against the defendant for double said

amount, as usurious. The defendant urges the demurrer to plaintiffs' complaint upon two (2) grounds: (1) Because it appears upon the face of the complaint that the contract therein mentioned was not usurious. (2) Because, even if the contract was usurious as between the defendant and Mrs. Rebecca M. Jones, the plaintiffs cannot take advantage of a plea of usury.

"I conclude that the defendant's demurrer cannot be sustained upon the first ground above mentioned. *Association v. Dorsey*, 15 S. C. 463. The first ground is overruled.

"The second ground urged in support of the demurrer presents a question which has never been before the court of this state, so far as I am advised: 'Can the plaintiffs, as transferees of the rights of Mrs. Rebecca M. Jones, maintain this action against defendant, under the amendatory act of 1882, for double the amount of usurious interest alleged to have been received by defendants?' The act of 1877 (section 1390, Rev. St. 1893) provides a penalty for charging unlawful interest on money loaned. The amendatory act of 1882 (section 1391, Rev. St. 1893) merely provides an additional penalty for receiving unlawful interest upon a loan. Both of these acts were intended to protect the borrower from the unlawful exacting of interest by the lender upon money loaned or advanced. As the relief to be afforded under the sections of said acts referred to is in the nature of a penalty, the acts must be strictly construed. In the case of *Jeffries v. Allen*, 29 S. C. 508, 7 S. E. 828, the general rule is stated to be that no one but the borrower, his sureties, heirs, devisees, or personal representatives, can set up a plea of usury. See, also, *Tyler, Usury*, p. 403. In section 8, p. 949, 27 Am. & Eng. Enc. Law, it is stated to be settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor; that the defense has been compared to that of infancy. In section 937, 2 Pom. Eq. Jur., it is stated that the right to complain of usury is a personal one, belonging only to the borrower and his representatives. No other party is entitled to relief, defensive or affirmative. It appears on the face of the complaint that the plaintiffs assumed the payment of Mrs. Rebecca M. Jones' bond and mortgage to the defendant, as part of the consideration of the conveyance of the mortgaged premises by Mrs. Rebecca M. Jones to plaintiffs. The doctrine is generally settled that, when land subject to a usurious mortgage is conveyed to a grantee who assumes the payment thereof as a part of the consideration of the conveyance, he cannot set up the usury section as a defense to a foreclosure suit, or as a ground for the cancellation of the security. The same is true of any transferee of property who, as part of the consideration, assumes the payment of the usurious debt. 2 Pom. Eq. Jur. 937; 2 Jones, Mortg. § 1494; in *Hardin v. Trimmer*, 80 S. C. 395, 9 S. E. 342. In considering the section of the usury

act under which this action is instituted, the court seems to intimate that said section was intended for the benefit of the borrower. Under the authorities above cited, I conclude that the defendant's demurrer must be sustained upon the second ground above stated, it appearing upon the face of the complaint that this action cannot be maintained by the plaintiffs, as transferees of the rights of Mrs. Rebecca M. Jones under the contract set forth in the complaint. It is therefore ordered and adjudged that the plaintiffs' complaint be dismissed, with costs."

#### Plaintiffs' Exceptions.

"Take notice that the plaintiffs except to the decree of his honor, Judge Witherspoon, herein, and will move the supreme court of this state to reverse the same on the following grounds: (1) Because the contract between the defendants and Mrs. Rebecca M. Jones was not usurious on its face; and his honor, the circuit judge, erred in not so deciding. (2) Because, the defendants having consented to the transfer of the stock in their company to plaintiffs, and also the transfer of the real estate of Mrs. Rebecca M. Jones to the plaintiffs, and having also consented to and received the payments on said stock and on the money borrowed from the plaintiffs in the place of the said Rebecca M. Jones, the plaintiffs have the same rights under the law as the said Rebecca M. Jones would have had to enforce the penalties against the defendants for violating the usury law of this state; and the circuit judge erred in not so deciding. (3) Because it appears under the pleadings herein and the bond given by Mrs. Rebecca M. Jones to the defendants that the contract made by the defendants was not by its terms usurious, but that the defendants have violated the usury law of this state in having received a greater rate of interest than is allowed by law; and, having exacted such illegal payment of interest from the plaintiffs, they are entitled to recover of the defendants the amount of the penalties allowed by law for such violations of the usury laws; and his honor, the circuit judge, erred in not so deciding. (4) Because it appears from the pleadings and the bond of Mrs. Rebecca M. Jones that the plaintiffs have paid more to the defendants than was due upon said bond; and, without reference to the usury laws, the plaintiffs have the right to recover of the defendants the amount of such overpayment on said bond, and his honor, the circuit judge, erred in not so deciding. (5) Because the circuit judge erred in sustaining the demurrer herein."

#### Defendants' Exceptions.

"You will please take notice that the defendants herein except to the judgment of his honor, Judge Witherspoon, herein dated December 12, 1895, upon the ground that his honor erred in overruling the first ground of

defendants' demurrer to the complaint herein. You will further take notice that upon the argument of this case in the supreme court, if the supreme court should fail to sustain the judgment of the circuit judge dismissing the complaint upon the ground upon which the circuit judge relies, then we will ask the supreme court to sustain the judgment dismissing the complaint, upon the ground above stated, to wit, that the circuit judge erred in overruling the defendants' first ground of demurrer."

Croft & Tillman, for plaintiffs. Sheppard Bros., for defendant.

GARY, J. The appeal herein is from an order sustaining a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The specific objections to the complaint are set out in the order sustaining the demurrer and dismissing the complaint, which, together with the complaint and plaintiffs' and defendant's exceptions, will be incorporated in the report of the case. Both the plaintiffs and the defendant appeal from the order of his honor, Judge Witherspoon, in so far as it decides that the contract upon its face is usurious.

The complaint alleges that, upon final settlement, the amounts to be retained by the defendant were not to exceed the sum actually loaned, with interest thereon at the rate of 8 per cent. per annum. Such a stipulation prevents the contract from being illegal, which otherwise would be usurious. *Buist v. Bryan* (S. C.) 21 S. E. 537; *Thompson v. Gillison*, 28 S. C. 542, 6 S. E. 333. There was error therefore on the part of his honor in holding that the contract upon its face is usurious.

The plaintiffs' other exceptions allege error on the part of the circuit judge in sustaining the demurrer upon the second objection urged against the complaint. Section 1390 of the Revised Statutes is as follows: "No greater rate of interest than seven per cent. per annum shall be charged, taken, agreed upon, or allowed upon any contract arising in this state, for the hiring, lending, or use of money or other commodity except upon written contracts, wherein, by express agreement, a rate of interest not exceeding eight per cent. may be charged. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover, in any court of this state, any portion of the interest so unlawfully charged; and the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt or measure of damages, to all intents and purposes whatsoever, to be recovered without costs. \* \* \*" Section 1391 of the Revised Statutes is as follows: "Any person or corporation who

shall receive as interest any greater amount than is provided for in the preceding section shall, in addition to the forfeiture therein provided for, forfeit also double the sum so received, to be collected by a separate action, or allowed as a counterclaim to any action brought to recover the principal sum." The allegations of the complaint are to the effect that, at the time the usurious interest was received, Mrs. Rebecca M. Jones, the mortgagor, had no interest whatever either in the shares of stock or the mortgaged property; that the defendant consented to the transfer of Mrs. Jones' shares of stock, and thereafter recognized and dealt with the plaintiffs as owners of the stock and payers of said bond; and that the defendant thereafter bonded to the plaintiffs the monthly installments upon said stock and interest upon said loan, which amounted to a greater rate of interest than 8 per cent. per annum. The defendant's attorneys, in their argument, contend that the complaint does not allege that the payments were made on account of interest other than the five dollars per month, and that, therefore, the complaint is insufficient in form. Paragraph 4 of the complaint contains the allegations as to the receipt of usurious interest, and, that they are sufficient for that purpose, it is only necessary to refer to *Harrell v. Parrott* (S. C.) 23 S. E. 946.

It is contended that, the defense of usury being personal, in its nature, to the debtor, the plaintiffs herein cannot maintain this action. If the alleged usurious interest had been received from Mrs. Rebecca M. Jones, quite a different question would be presented from the one now before the court. The test as to the right of a party to bring an action under section 1391, Rev. St., is, to whom did the cause of action accrue? If the usurious interest was received from the person bringing the action, he is the one who has suffered damage, and he is the one to bring action for such damage. At the time the usurious interest is alleged to have been received, it was a matter of indifference to Mrs. Jones what amount was required by way of interest; but it was a matter of concern to the plaintiffs, who were compelled to pay it. Being the parties alleged to have been wronged, they are the proper parties to bring action to redress such wrong. It is therefore the judgment of this court that the order of the circuit court be reversed.

JONES, J. I concur. Appellants, respondent, and the court are unanimous that the contract referred to in this case is not usurious. Therefore this is not a case wherein the borrower's assignee sets up the plea of usury against a usurious contract; hence authorities to sustain the proposition that the plea of usury is personal to the borrower are not applicable. The question is one of statutory construction: Is the remedy pro-

vided in the usury statutes of this state confined alone to the borrower on a usurious contract, or are the terms of the statutes, in view of the mischief sought to be prevented, broad enough to give the assignee of the borrower's contract, which is not usurious, a remedy against the lender, who exacts and receives of the assignee unlawful interest thereon? I think the complaint in this case is sustainable under the statutes quoted in the opinion of Mr. Justice GARY, and I agree with him in his construction thereof.

POPE, J. I am induced to concur generally in the opinion of Mr. Justice GARY for these reasons, thus briefly expressed:

1. I hold that, as the certificates of shares in the defendant's association are choses in action, such shares, when assigned to the plaintiffs, carried with them to the assignees all the rights and liabilities of the original holder thereof.

2. While I still believe, as expressed in *Association v. Winn* (S. C.) 23 S. E. 29, that the shareholders in such association are in equity estopped from charging usury upon the association as long as they hold shares in such an association, which shares are enhanced in value by usurious interest collected from brother stockholders, yet I bow to the decision of the majority of the court, as expressed in the decision just quoted above.

McIVER, C. J. (dissenting). While I agree with the view taken by Mr. Justice GARY as to the first ground of the demurrer, and do not deem it necessary to add anything to what he has said on that point, I cannot concur with him in the view which he has taken as to the second ground of the demurrer. On the contrary, I agree with the circuit judge as to that point. The rights growing out of usury in a contract brought before the court for adjudication are solely the creatures of statutes, which, in my judgment, were enacted solely for the benefit of borrowers, and were designed to protect that unfortunate class of persons from the greed and extortion of the money lender, who might otherwise be tempted to impose upon the necessities of the borrower. Hence I do not think the plaintiffs, who cannot, in any sense, be regarded as borrowers, can be permitted to avail themselves of any rights conferred by special statutory provisions upon a class of persons to which they do not belong. Hence, while Mrs. Jones, who was unquestionably the borrower of the money, might, if she had been required to pay more than lawful interest on the money which she borrowed, have maintained an action like this to recover back double the sum which she had paid in excess of the lawful interest, I am unable to perceive how these plaintiffs, who voluntarily assumed the payment of an obligation incurred by Mrs. Jones, which, as we have seen, was not on its face tainted with usury, can maintain any such action. These views

I find fully supported by authority. In 2 Pom. Eq. Jur. § 937, the rule is laid down in the following language, and supported by numerous cases cited in the notes: "Since the illegality of usury is wholly the creature of legislation, the provision of the statute must furnish the rule determining the extent, limits, and occasion of relief. It results from a just interpretation of the legislation that the right to complain is a personal one, belonging only to the borrower and his representatives. No other party is entitled to relief, defensive or affirmative. The doctrine is therefore generally settled that where land subject to a usurious mortgage is conveyed to a grantor, who assumes the payment thereof as a part of the consideration of the conveyance, he cannot set up the usury either as a defense to a foreclosure, or as a ground for a cancellation of the security. The same is true of any transferee of property who, as a part of the transaction, assumes payment of a usurious debt." One of the cases cited to sustain this doctrine is *De Wolf v. Johnson*, 10 Wheat. 367, where it was held by the supreme court of the United States that the assignee of an equity of redemption cannot allege usury in the loan to the mortgagor to defeat a foreclosure by the mortgagee; and this was upon the ground that the plea of usury was personal to the borrower. So, in 27 Am. & Eng. Enc. Law, at page 949, I find the following language: "It is settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor. The defense has been compared to that of infancy." And, again, at page 956 of the same volume, it is said: "If a third person, either for accommodation or in payment of his own debt, contracts to pay the usurious debt of another, he cannot avoid the contract on the ground of such usury." This doctrine has been distinctly recognized by this court, as may be seen by reference to the case of *Jeffries v. Allen*, 29 S. C. 508, 7 S. E. 828, where the late Chief Justice Simpson, in delivering the opinion of the court, used this language: "It seems to be the law, as a general rule, that no one but the borrower, his sureties, heirs, devisees, or personal representatives, can set up the plea of usury. See *Tyler on Usury*, and the numerous cases which he cites in his chapter on the defense of usury (page 403 et seq.)." Accordingly, in that case, Mrs. Allen was denied the right to set up the usury claimed, upon the ground that she was not the borrower.

It is contended, however, by the plaintiffs, that, they having paid more than the amount actually due on the bond of Mrs. Jones, they are entitled, without reference to the usury laws, to recover back the amount so overpaid. A sufficient answer to this position is that no such question, so far as the "case" shows, was ever presented to the circuit judge; and certainly no such point was considered or passed upon in his decree, a copy of which is set out in the "case"; and, under the well-

settled rule, no such point can be considered here. Besides, it is very obvious that there is nothing in the complaint upon which to base any such position. The allegation in the fourth paragraph of the complaint, "that the legal amount due upon said bond and mortgage" was much less than the amount exacted by defendant, is a mere assertion of a legal conclusion, and not the allegation of any fact, which alone can be considered under a demurrer. There is no allegation that anything more than the stipulated interest (6 per cent.) had been paid as interest, and what amount, if any, had been paid on the principal is left wholly uncertain; for it certainly cannot be claimed that the whole amount paid as monthly installments on the stock would operate as payments on the bond. Surely, a part, at least, of those payments, would justly go towards the expenses incident to the business of the company, and making good any losses that may have been incurred. Indeed, I do not see how it would be possible to ascertain the amount with which the bond should be credited at the date of the settlement, except by ascertaining the value of the stock at that time, and crediting the amount so ascertained on the bond. To do this would require the allegation of facts which I do not find mentioned or alluded to in the complaint. It seems to me, therefore, that, even if the point raised by plaintiffs' fourth exception were properly before us, it could not be sustained. While, therefore, I think the circuit judge erred in overruling the first ground of the demurrer, yet, as there was no error in sustaining the demurrer on the second ground, the judgment of this court should be that the judgment of the circuit court be affirmed.

(47 S. C. 387)

TOBIN v. CHESTER & L. NARROW-GAUGE R. CO.

(Supreme Court of South Carolina. July 30, 1896.)

INJURY TO PERSONAL PROPERTY—RAILROAD COMPANY—PLACE OF RESIDENCE—VENUE.

Rev. St. 1893, § 1543, providing that a railroad corporation may sue and be sued "in any court of law or equity in this state," does not refer to the place of trial; and within Code, § 146, which provides that actions for injuries to personal property shall be tried in the county in which defendant resides at the time of the commencement of the action, a railroad corporation is a resident of a county where its line is located, and where it maintains a public office, and an agent upon whom process may be served.

Appeal from common pleas circuit court of Barnwell county; Aldrich, Judge.

Action by Laura C. Tobin against the Chester & Lenoir Narrow-Gauge Railroad Company for damages for an alleged injury to plaintiff's cow while in course of transportation by defendant. From an order transferring the case from Barnwell county to Chester county, plaintiff appeals. Affirmed.

Bellinger, Townsend & O'Bannon, for appellant. A. G. Brice, for respondent.

JONES, J. This is an appeal from an order transferring this case from the court of common pleas for Barnwell county to that of Chester county. The action was commenced in Barnwell by service of summons and complaint on the defendant, at Chester, S. C., for damages for alleged injury to plaintiff's cow while in course of transportation over the line of the defendant company, and connecting lines from Guthrie'sville, in York county, to Barnwell, S. C. The defendant is a domestic railway corporation, under the laws of this state, its only line of railroad in this state lying in Chester and York counties, where its agencies are established and its business carried on, having its principal office in Chester county. It has no property and no agency in Barnwell county. His honor, James Aldrich, the presiding judge, held that the court was without jurisdiction to try the action, for the reason that the defendant was not a resident of the county of Barnwell, within the meaning of section 146 of the Code of Civil Procedure, and therefore transferred the case for trial to Chester county. Appellant appeals, upon the following ground: "That his honor, the presiding judge, erred in holding that the court of common pleas for Barnwell county was without jurisdiction to try this cause, for the reason that the defendant was not a resident of the county of Barnwell, whereas he should have held that, the defendant being a domestic railway corporation, organized under the laws of this state, its residence was only limited by the limits of the jurisdiction of the state creating it, and that said defendant was liable to be sued as a resident of any county within this state."

Section 146 of our Code provides that actions of this character—injury to personal property—shall be tried in the county in which the defendant resides at the time of the commencement of the action. We have no statute expressly providing for the place of trial of such actions against domestic corporations. Section 1543 of the Revised Statutes of 1893, providing that a railroad corporation incorporated in this state "may sue and be sued," etc., "in any court of law or equity in this state," etc., has no reference to the place of trial. Where, then, is the residence of a domestic railroad corporation in this state? The case of *Bristol v. Railroad Co.*, 15 Ill. 437, very strongly states the answer, as follows: "The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road or exercises corporate powers and privileges. In le-

gal contemplation, it resides in the counties through which its road passes, and in which it transacts its business." To the same effect, see *Davis v. Banking Co.*, 17 Ga. 323; *Slavens v. Railroad Co.*, 51 Mo. 303. This last-named case decides that "the residence of a railroad corporation is in any county through which its line of road passes, and in which it has an agent, upon whom process of case can be served." There is another line of cases which hold that, in the absence of statutory regulation, the residence of a railroad corporation is where its principal office is located. *Railroad Co. v. Cooper*, 30 Vt. 476; *Thorn v. Railroad Co.*, 26 N. J. Law, 121; *Transportation Co. v. Schen*, 19 N. Y. 408; *Pelton v. Transportation Co.*, 37 Ohio St. 450; *Jenkins v. Stage Co.*, 22 Cal. 537; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401. In the case of *Cromwell v. Trust Co.*, 2 Rich. Law, 512, it was held that a corporation has its place of legal residence wherever its corporate business is done. Judge Butler, delivering the opinion of the court, said: "I take it that 'residence' is a place of legal abode, in its legislative meaning. A corporation must have some abiding place of local definiteness. Is there anything out of the way in saying where a bank 'resides'? We all understand the import of the words, 'Where is a bank or other corporation situated?' It is situated where it is in the habit of doing its business." In the case of *Glaze v. Railroad Co.*, 1 Strob. 70, the court held that the legal residence of a corporation is not confined to the locality of its principal office of business. Accordingly, the court refused to set aside a writ in assumpsit served upon the president of the company at Columbia, and returnable, notwithstanding the president resided in Charleston, and the company had its principal office in Charleston. The company had no office in Columbia, and a part of its line was in Richland county. The court, among other things, said: "The residence of the company, if a local residence can be affirmed of it, is, most obviously, where it is actively present in the operations of its enterprise." There are some expressions in the opinion that seem to sustain the appellant's contention, but they were not necessary to a decision of the point before the court. The contest was whether the service of a writ should be set aside because the service was made and the writ was returnable in Richland, where the company did business and held an office, instead of in Charleston county, where the principal office was located. Our conclusion is that a railroad corporation organized under the laws of this state is, within the meaning of section 146 of the Code, a resident of the county or counties where its line is located, and where it maintains a public office for the transaction of its business, and an agent upon whom process may be served. The judgment of the circuit court is affirmed.

(47 S. C. 393)

## Ex parte JONES.

**ALMA LUMBER CO. v. BEECHAM et al.**  
(Supreme Court of South Carolina. July 30,  
1896.)

**FORECLOSURE OF MORTGAGES—CONSENT DECREE—  
SETTING ASIDE—MISTAKE.**

1. In an action to foreclose a mortgage, where several lienholders were defendants, upon reference the attorneys agreed upon the order of priority. A mechanic's lien claimed by petitioner, but which was disputable, was admitted as a lien on the whole property, and given fifth place, though legally it was a second lien upon a portion of the property; the attorney for petitioner believing that the property would sell for enough to cover the liens. The master's report was confirmed, and the property sold. Petitioner made no objection, and did not attend the sale. The property did not sell for enough to satisfy petitioner's lien. *Held*, that the belief of the attorney for petitioner that the property would sell for enough to pay the petitioner's lien was not a mistake, within Code, § 195, authorizing the setting aside of the decree and sale.

2. The petitioner cannot, after sale, object that the attorney had no power to substitute for a second lien on a portion of the property a fifth lien on the whole property; there being, under the circumstances, nothing in such substitution indicating fraud on the part of the attorneys.

Appeal from common pleas circuit court of Abbeville county; Joseph H. Earle, Judge.

Action by Alma Lumber Company against Hessie A. Beecham and others to foreclose a mortgage. The case was referred to a master to determine the priority of liens, and, upon confirmation of his report, the property was ordered sold. Benton W. Jones petitioned for an order setting aside the judgment of foreclosure, which was refused, and the petitioner appeals. Affirmed.

Sam'l. C. Cason, for appellant. Haynsworth & Parker, for respondents.

JONES, J. The petitioner (appellant), at the January term of court for Abbeville county, on petition, affidavits, and notice to respondents, moved Judge Earle for an order setting aside, so far as a petitioner was concerned, a judgment of foreclosure rendered in the above-stated case at the June term, 1895. Relief was sought upon the ground of "the unauthorized act and mistake of Messrs. Graydon & Graydon, petitioner's attorneys in said suit, by which the petitioner's mechanic's lien on certain property described in the petition and affidavit herein was subordinated to certain junior liens of F. T. Miles and the Piedmont Savings and Investment Company, in the distribution of said property ordered to be sold by the said judgment of foreclosure." The Alma Lumber Company had foreclosed a mortgage on the property of Hessie A. Beacham, and the appellant and respondents were all made parties defendant, they claiming liens on the property. The respondents here answered in that case, setting up their liens, and claiming priority over the lien of the plaintiff, of the said defendant Jones, and of the

other defendants; while the defendant Jones alleged that his mechanic's lien was second only to the lien of Parker & Haynesworth. The petition in fact states that the suit was begun "for the purpose of settling priorities of various liens on the property described in the complaint, and for the purpose of selling it to satisfy the liens." The petition also states that Messrs. Graydon & Graydon were the attorneys for the petitioner, the defendant Jones in that suit. The issues of the foreclosure suit were referred to a referee. All parties, in person or by attorneys, were present before the referee, the petitioner being represented by Messrs. Graydon; and a report was agreed on by all parties, after concessions were made by some of the parties. This agreement and report ranked the liens upon the whole property as follows: First, mortgage of F. T. Miles; second and third, mortgages of the Piedmont Savings & Investment Company; fourth, mortgage of Parker & Haynesworth; fifth, mechanic's lien of petitioner; seventh and eighth, two other mortgages. By this arrangement, the defendant Jones, claiming a lien on a part of the premises sought to be foreclosed, second to the lien of Parker & Haynesworth, was allowed a lien on the whole property, next to Parker & Haynesworth, but fifth in order. Furthermore, no contest was made as to the defendant Jones' claim of mechanic's lien by this arrangement, whereas it was a disputed matter, or disputable matter, since B. K. Beacham, the husband of Hessie A. Beacham, and her agent and manager in the construction of the houses upon which the lien was claimed, submitted an affidavit on the motion before Judge Earle to the effect that the mechanic's lien had not been filed on time, as required by law, to constitute it a lien. It appears from the affidavit of Mr. Lewis W. Parker that the terms of this agreement were communicated to the petitioner on the day it was consummated, and no objection was made thereto. It appears also in the petition that the petitioner was informed by his attorneys that matters had been satisfactorily adjusted. The referee's report was confirmed by the circuit court; judgment of foreclosure rendered; the property sold; but, contrary to the expectation of all parties, the property brought sufficient to pay only the liens prior to the petitioner's. The petitioner did not attend the sale, and expressed dissatisfaction with the arrangement made for the first time after the sale. The mistake of the attorneys alleged as ground to set aside the consent decree was that the attorneys thought the amount of the lien placed ahead of petitioner's lien was \$3,500, whereas they are now found to be \$3,700, and, further, because the attorneys for petitioner thought the property would bring enough to pay the mortgages and petitioner's lien. No doubt, all parties thought the Alma Lumber Company, largely inter-

ested, and holding liens junior to that of appellant and respondents, would make the property bring enough to satisfy its own and prior liens. Upon this showing, Judge Earle refused the motion to set aside the judgment foreclosure, and petitioner now alleges error in his so refusing, "because of the unauthorized act and mistake of the attorneys subordinating petitioner's lien to junior liens."

The circuit judge was clearly right. The alleged mistake of petitioner's attorneys is not such a mistake as would warrant a court to relieve from a judgment, under section 195 of the Code. "That section of the Code was intended only for the relief of parties who by some mistake, inadvertence, etc., may have lost the opportunity to be present at the trial, or to be represented there." *Steele v. Railroad Co.*, 14 S. C. 331. Throughout the whole proceeding the petitioner was represented by able and honorable counsel, and a party represented at the trial by counsel can only obtain relief from a judgment by the mode of procedure provided for obtaining new trials. *Freem. Judgm.* § 105; *Steele v. Railroad Co.*, supra; and a number of cases subsequently decided, as well as previously decided. There was not even neglect of counsel in this case, for the circumstances seemed to justify the conduct of counsel, as prudent opposition to petitioner's claim of lien was avoided, and the lien was established without contest; and, while the alleged lien was second on a part of the property, it was made a fifth lien on the whole property, under circumstances justifying the belief that the property would sell for sufficient to pay the petitioner's lien and all prior liens. But, even if counsel had been negligent in the arrangement complained of, the judgment could not be set aside (*Sullivan v. Shell*, 36 S. C. 532, 15 S. E. 722), except for fraud (*Irby v. Henry*, 16 S. C. 617); and there is no hint of fraud on part of counsel in the case.

Counsel for appellant argues that an attorney has no power to release a lien, or substitute one security for another, without express authority from the client, and cites such cases as *Gilliland v. Gasque*, 6 S. C. 409, *Mayer v. Blease*, 4 S. C. 11, and *Music House v. Sumter* (S. C.) 22 S. E. 738. But such cases do not apply. It is true that attorneys, under their general authority as such, have no such powers; but there is a wide and clear distinction between the acts of attorneys under their general authority in matters not in court, and the acts of attorneys in the conduct and progress of a suit in court. This distinction is made in other cases cited by appellant. Take the case of *Smith v. Bossard*, 2 McCord, Eq. 406, for instance. That case holds that while a reference to arbitration of a client's cause by an attorney is not within the general power of an attorney, yet the appointment of an attorney to prosecute or defend a case

confers on him all the powers necessary to the forms and usages of the court. Therefore the attorney's consent to a reference to special accountants, and his assent to the confirmation of the report, is obligatory on his client. In *Markley v. Amos*, 8 Rich. Law, 468 (another case cited by appellant), the distinction is pointed out. Judge Harper, in that case, quoting from *Kyd, Awards*, 246, said: "The reason of the difference seems to be this: that in the first case the general character of an attorney does not imply a commission from the principal to do anything so much out of the ordinary course of a general attorney as to refer a matter to arbitration; and the employment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause." Upon this distinction, in large measure, rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud. In this case the suit in foreclosure was to settle the priority of liens on the mortgaged property, and to sell the property for the payment thereof. This has been done in this case, with the consent of petitioner's attorneys, in a matter in which they were fully authorized to act; indeed, with the full knowledge and acquiescence of the petitioner himself, until it was too late to alter or remedy, and therefore is final. The judgment of the circuit court is affirmed.

(47 S. C. 78)

AVERY et al. v. WILSON et al.

(Supreme Court of South Carolina. July 11, 1896.)

APPEAL—REVIEW—RULINGS ON EVIDENCE—SUPPLEMENTAL ANSWER—PRACTICE—CHATTEL MORTGAGES—WHERE RECORDED.

1. The exclusion of a judgment as evidence cannot be reviewed where the judgment is not set out in the case.

2. Under Code, § 198, providing that defendant may be allowed, "on motion," to make a supplemental answer, it is not error to refuse a supplemental answer, where defendant does not give the required four-days notice of such motion.

3. Rev. St. § 1968, provides that chattel mortgages shall be valid so as to affect subsequent creditors, or purchasers without notice, only when recorded within 40 days after delivery or execution in the county where the mortgagor resides, if he resides in the state, or, if he resides out of the state, in the county where the property is situated at the time the mortgage is delivered or executed; and that, if recorded after 40 days, they shall be so valid only from the date of such record. Held that, where mortgaged chattels were not in the county in which the mortgagor resided when the mortgage was executed and delivered, and he removed to the county in which the property was situated before the mortgage was recorded, it was properly recorded in the latter county.

4. The fact that the words "goods and chattels" have been omitted from the statutes of Elizabeth as revised does not render such stat-

utes inapplicable to transfers of personal property.

Appeal from common pleas circuit court of York county; Townsend, Judge.

Action by B. F. Avery & Sons and others against W. B. Wilson, Jr., assignee for benefit of creditors of John Gelzer and others. From the judgment, defendants appeal. Affirmed in part and reversed in part.

The following is so much of Judge Townsend's decree as is necessary to understand the questions involved:

"From all the evidence I conclude as matter of fact:

"(1) That John Gelzer was a resident of Charleston county, state of South Carolina, when he gave the mortgage to J. J. Wescoat, trustee, on the 17th day of August, A. D. 1892, and had been a resident of said county of Charleston continuously for about ten years prior to the date of the execution of said mortgage. John Gelzer was insolvent when he executed this mortgage, and he knew it; and in the light of all the testimony I am constrained to find that J. J. Wescoat was also, at the date of the execution of this mortgage, aware of John Gelzer's insolvency. The mortgage was taken in the sum of \$700, when, according to the testimony of J. J. Wescoat himself, only the sum of \$300 was advanced to Gelzer to enable him to buy the claim of his partner, Jenkins, in the business of Jenkins & Gelzer; and I find as a fact that the said mortgage was taken for \$400 in excess of the true amount of money loaned to Gelzer. This mortgage covered the entire tangible property of John Gelzer, has never been recorded in Charleston county, and was not recorded in York county until the 10th day of January, A. D. 1894. After maturity of the mortgage, the mortgagor was allowed to retain and use the mortgaged property as his own, and thereby to deceive his creditors into selling him goods they otherwise would not have done. The real reason for not recording the mortgage sooner, I find, was an understanding between the mortgagor and the mortgagee to that effect, in the form of a request from the mortgagor and an acquiescence on the part of the mortgagee.

"(2) At the date of the execution of the mortgage by John Gelzer to John L. Ancrum on the 1st day of September, 1892, Gelzer was insolvent, and a resident of Charleston, in the county of Charleston, S. C., and had been continuously prior to said date for a period of nearly ten years. The mortgage covered the entire tangible property of John Gelzer, has never been recorded in Charleston county, and was not recorded in York county until the 31st day of January, 1894. The money for which this mortgage was given was actually advanced at the time of its execution, and I am not satisfied that John L. Ancrum was then aware of the insolvency of Gelzer. He was, undoubtedly, careless and negligent about making proper inquiry into the financial condition of John Gelzer, and allowed Gelzer to induce him to agree to withhold the mortgage from record.

One of the motives that induced Ancrum to enter into an agreement with Gelzer not to record the mortgage appears on the face of the mortgage itself, wherein it was provided that John Gelzer 'is to continue his present business of buying, selling, and delivering goods to the purchasers thereof, provided that the sales, moneys, notes, accounts, and choses in action given in payment of said goods shall be held by John Gelzer as trustee for the said John L. Ancrum.' With this arrangement, Ancrum became careless and indifferent as to the rights of others, and, by failing to record, and permitting Gelzer to remain in possession of the stock of goods, and to hold them out to the world as his own, from September 1, 1892, to January 31, 1894, when he recorded the mortgage in an improper county, shows that he felt no concern about having enabled Gelzer to deceive the plaintiffs into becoming his creditors.

"(3) On the 21st day of January, 1893, when John Gelzer executed the mortgage in the sum of \$2,000 to the Savings Bank of Rock Hill, S. C., he possessed nothing in the world but his stock of goods at Rock Hill. Gelzer himself swore, 'I had everything I possessed then in my store at Rock Hill.' The mortgage, as matter of fact, covered his entire property, and was intended not only to operate as security for such advances as the bank might make, but, knowing himself to be insolvent, John Gelzer, by means of this mortgage, which became due only one day after its date, intended to prefer the savings bank in a manner forbidden by law. He intended to evade the assignment law of the state of South Carolina by the device of a mortgage, thereby hoping to accomplish by this means what he could not possibly do by a formal deed of assignment. The officers of the bank swear that they were not aware of Gelzer's insolvency. They are truthful and reliable gentlemen, and I must accept what they say as the truth, but the testimony forces me to the conclusion that they should have known of his insolvency, and had reasonable cause to believe that he was insolvent. There was sufficient evidence in their possession, considering Gelzer's proximity to them, and the claims they had against him for collection through their bank, to put them on their guard, and to invoke inquiry, which would have disclosed to them Gelzer's insolvency. There are also additional circumstances surrounding this mortgage which should have sounded the alarm in the ears of the officers of the bank. The mortgage matured in one day,—that is, the bank was put in a position to step in at once and seize the mortgaged property, if a crash came in Gelzer's affairs. The mortgage was withheld from record for nearly one year, and in the meantime Gelzer was suffered to use the mortgaged goods as his own, and, by holding them out to the world as his unincumbered property, to obtain credit upon them, and to deceive and defraud each of the plaintiffs to this action into becoming his creditors, which they would not have other-

wise done. Gelzer requested the officers of the bank not to record the mortgage. He particularly desired it to be withheld from record, because he desired to hold out to the world that the goods were his own, free of incumbrance, and thereby get credit from others who would know nothing of the mortgage. The bank acquiesced in this, and thereby enabled Gelzer to deceive and defraud the plaintiffs and his other unsecured creditors to the aggregate amount of \$9,000. Another significant act on the part of the bank was the conduct of its cashier, Mr. J. M. Cherry, on the 5th day of January, 1894. On the 2d day of January, 1894, one of the plaintiffs wrote to the cashier, inquiring into the financial condition, responsibility, and character of John Gelzer. On the 5th day of said month and year the cashier replied to said letter: 'Mr. G. is an energetic, live young business man; has a very nice hardware store, and has been doing a very nice business, considering the times. On account of the dull trade he is asking indulgence on some of his paper at present.' On the very day that the bank rendered this report of John Gelzer, in which the mortgaged indebtedness to the bank was studiously suppressed, the bank caused the two mortgages executed by Gelzer to the bank, aggregating the sum of \$5,100, to be recorded in the office of the register of mesne conveyance for York county. Even at this late date the bank was willing to allow Gelzer to still hold himself out to the world as the owner of the stock of goods in his possession, and to obtain further credit on the strength of such appearances. Knowing, however, that the inquiring creditor would, no doubt, act upon his report, the cashier deemed it prudent to record the mortgages he was careful not to mention in his report of the condition of Gelzer. That secrecy, deep and profound, was the object of both the bank and John Gelzer, when both of the mortgages by Gelzer to the bank were executed, is apparent from the fact that, although J. M. Cherry represented the bank on both occasions, and was the officer to whom the mortgage, when signed and sealed, was delivered, he was also the sole and only subscribing witness to each of said mortgages.

"(4) All that has been said and found concerning the mortgage to the bank dated January 21, 1893, is of equal application to the mortgage to the said savings bank dated December 2, 1893. All the facts found concerning the motives and the intentions of the said bank and Gelzer appear with emphasized force and clearness in this latter transaction. On the 2d day of December, A. D. 1893, when John Gelzer executed the mortgage to the Savings Bank of Rock Hill, S. C., in the sum of \$3,100, ostensibly to secure notes, mostly past due, aggregating said amount, he possessed no other property but his stock of goods. This mortgage, therefore, like the previous one, dated January 21, 1893, covered the entire property of John Gelzer. John Gelzer, being insolvent from

some time before the 17th day of August, 1892, had become hopelessly insolvent on the 2d day of December, 1893, and clearly saw that there was no hope for him, although, by means of representations made in his letters to his creditors, written shortly before and about this time, he had induced them to accept his worthless notes in settlement of their claims, and thus, for a time, tided over the inevitable crash. All this time John Gelzer was preparing to prefer the bank in some manner that he hoped would not be obnoxious to the laws of this state. Accordingly, on the 2d day of December, 1893, he executed to the Savings Bank of Rock Hill, S. C., not a renewal mortgage, but an additional mortgage, in the sum of \$3,100. Thus, while John Gelzer never did owe the bank but \$3,100, he executed two mortgages, aggregating \$5,100, which was \$2,000 more than the true amount the bank could possibly claim. The bank retained both of the mortgages. The mortgage executed on the 2d day of December, 1893, in the sum of \$3,100, was not intended as a renewal of the original mortgage in the sum of \$2,000, dated the 21st day of January, 1893, but was made by Gelzer, and received by the bank, as an additional mortgage. Next follow the two crowning acts of forbidden preference,—one by the Savings Bank of Rock Hill, S. C., and the other by Gelzer. One, the spreading of these two mortgages on the records of York county for public inspection, on the 5th day of January, 1894, with a deceptive statement on their face as to the amount actually due on them; and the other the execution by Gelzer of the deed of assignment for the benefit of creditors, on the 8th day of February, 1894, only sixty-eight days from the date of the execution of the last mortgage, on the 2d day of December, 1893. On the 7th day of February, 1894, the day immediately preceding the execution of the deed of assignment, Gelzer made a payment to the Savings Bank of Rock Hill in the sum of \$565, which was credited on his mortgage debt, and on the 8th day of February, 1894, the same day on which his deed of assignment was executed, Gelzer paid on the mortgage debt of John L. Ancrum, through Willson & Willson, the latter's attorneys, the sum of \$215; thus to the very last moment endeavoring to give substance to the preferences he intended to give said mortgagees from the moment that each of the mortgages was executed.

"(5) At the time of the execution of the several mortgages to J. J. Wescoat, trustee, John L. Ancrum, and the two mortgages to the Savings Bank of Rock Hill, S. C., on the 17th day of August, 1892, 1st day of September, 1892, 21st day of January, 1893, and the 2d day of December, 1893, respectively, John Gelzer was insolvent, and each of the said mortgagees either knew, or had good reason to know, that he was insolvent, and each of these transactions was had and made in pursuance of an original design and

intent of the said John Gelzer and each of the mortgagees above mentioned, determined on by them at the inception of each transaction, to transfer and assign all of the tangible property of the said John Gelzer to the said mortgagees, to the exclusion of all the other creditors of the said John Gelzer.

"(6) The conduct of all the mortgagees shows that they, each and every one of them, colluded with the mortgagor; that they used the indebtedness of John Gelzer to themselves to draw up notes (in the instances of J. J. Wescoat, trustee, and of the savings bank, for more than the true amounts), and mortgages that were intended not as security, pure and simple, for the repayment of the money due by John Gelzer, but also for the ulterior purpose of benefiting John Gelzer, who, pursuant to the original scheme, was to continue in possession of the stock of goods after maturity; to continue to do business just as if no mortgages were in existence; to hold out the stock of goods to the world as his own property, and thereby to obtain a corresponding credit. John Gelzer, in effect, made the following proposition to each of the mortgagees: 'I will give you a preference, and will assign to you all of my tangible property, provided you will allow me to have the use of it indefinitely, or until I can pay off the debt.' Each of the mortgagees assented to this proposition, and did suffer Gelzer to remain in possession of the stock of merchandise, which constituted the whole of his tangible property, indefinitely, to hold out the said stock to the world as his own property, and do business at his old stand, and in his own name, and for his own benefit, until a few days preceding the execution of the formal deed of assignment, on the 8th of February, 1894. The conduct of all the mortgagees, as thus shown, deceived plaintiffs, misled them, and caused them to extend credit to John Gelzer, which they would otherwise not have done.

"(7) At the date of the execution of the formal deed of assignment by Gelzer, on the 8th day of February, 1894, Gelzer's assets consisted of his stock of merchandise at Rock Hill, S. C., of the value, according to the estimates of experts and sworn appraisers, of \$6,637, and some accounts of doubtful value, which accounts, by reason of the stipulations in the mortgage to John L. Ancrum, had to be held in trust by Gelzer for Ancrum. His total liabilities amounted to \$13,500, and of this amount \$4,500 represented his mortgage indebtedness to J. J. Wescoat, trustee, John L. Ancrum, and the Savings Bank of Rock Hill, leaving a balance, amounting to \$9,000, representing the amount of his indebtedness to his unsecured creditors. The notes and accounts above mentioned were estimated by Gelzer to be worth from \$700 to \$1,000, but the assignee had failed to realize on them, when he testified in November; and I find that said accounts are not worth the esti-

mate placed upon them by Gelzer, and are of doubtful value.

"As a matter of law I find: That the mortgages executed by John Gelzer to J. J. Wescoat, trustee, on the 17th day of August, 1892, and a mortgage executed by him to John L. Ancrum on the 1st day of September, 1892, in the sum of \$1,500, having each been made and delivered while John Gelzer was a resident of Charleston county, in this state, and having never been recorded in said county of Charleston, as required by law, each of said mortgages is, as to the plaintiffs in this action and all other subsequent creditors and purchasers without notice, null and void, and of no effect. Gen. St. S. C. 1882, §§ 1776, 2346; Rev. St. S. C. 1893, § 1968; Gregory v. Ducker, 31 S. C. 141, 9 S. E. 780; London v. Youmans, 31 S. C. 147, 9 S. E. 775.

"It was contended before me by the defendants that the plaintiff the Tabb & Jenkins Hardware Company was affected with notice of these two mortgages, and the affidavit of Charles T. Jenkins, representative of said company, and the deposition of said Jenkins made in this cause, were relied upon as furnishing the proof. I have critically examined both papers, and find both barren of any evidence of notice to take the place of registration. Such notice must be full, explicit, and clearly proven. City Council v. Page, Speer, Eq. 211, 212; London v. Youmans, 31 S. C. 151, 9 S. E. 775. The communications of Gelzer to Jenkins, the representative of the aforesaid corporation, furnished ample grounds for basing an attachment upon Gelzer's stock of merchandise, as the supreme court of this state has held. Hardware Co. v. Gelzer (S. C.) 21 S. E. 261. But they are lacking in every essential to constitute such notice as would take the place of registration of the mortgages in the proper county. Each of the said mortgages is clearly obnoxious to the statutes of Elizabeth. Both of them, by force of the stipulations in them contained, became, after maturity, bills of sale at the option of the mortgagees. After the conditions were broken, each of the mortgagees was empowered to take the stock of merchandise into their respective possession, as his own proper goods and chattels, and for his own benefit, henceforth and forever. Nevertheless, the mortgagor was suffered by each of said mortgagees to remain in possession of the mortgaged chattels (the stock of merchandise) for considerably more than one year, holding out the stock to the world as his own property. The invalidity of the mortgages was dependent upon the fact whether the retention of possession of the stock of merchandise, after breach of condition, was for the benefit of the mortgagor, or the price of preference given to the mortgagees. Having found as a matter of fact that the mortgages were executed not as security, pure and simple, but for the ulterior purpose of benefiting John

Gelzer, they are, as to the plaintiffs in this action, null and void. *Pregnall v. Miller*, 21 S. C. 391; *Younger v. Massey*, 39 S. C. 119-121, 17 S. E. 711; *Smith v. Henry*, 1 Hill (S. C.) 16; *Gist v. Pressley*, 2 Hill, Eq. 328; *Maples v. Maples, Rice*, Eq. 310; *Bank v. Gourdin, Speer*, Eq. 439; *Lowry v. Pinson*, 2 Bailey, 328. As an additional ground why the statute of Elizabeth is fatal to the mortgage executed to J. J. Wescoat, trustee, it must be borne in mind that this mortgage was taken for \$400 in excess of the true amount of money loaned to Gelzer by Wescoat. For this reason, if for no other, its lien cannot be preserved, even for the true amount of money loaned. *Bowie v. Free*, 3 Rich. Eq. 403; *Dickinson v. Way*, Id. 413; *Hipp v. Sawyer*, Rich. Eq. Cas. 410; *Younger v. Massey*, 39 S. C. 120, 17 S. E. 711; *Lowry v. Pinson*, 2 Bailey, 328. The mortgage executed to John L. Ancrum was also further obnoxious to the statute of Elizabeth in that it stipulated that all sales of the stock of merchandise, or any part thereof, all moneys, notes, choses in action, taken from purchasers in payment thereof, should be held by John Gelzer in trust for John L. Ancrum. Considering this stipulation, method appears in John L. Ancrum's apparent madness and recklessness. John L. Ancrum actually agreed with Gelzer not to place his mortgage on record. The reason is now evident. As long as the plaintiffs and other unsecured creditors supplied Gelzer with goods to keep up the stock of merchandise, John L. Ancrum, under the stipulations in his mortgage, became a direct beneficiary of the fraud of Gelzer, as all the proceeds of sales had to be held by Gelzer in trust for Ancrum. *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65; *Robinson v. Elliott*, 22 Wall. 524. Each of the mortgages executed by John Gelzer to the Savings Bank of Rock Hill, dated January 21, 1893, and December 2, 1893, respectively, is null and void under the statute of Elizabeth. Each of them was executed not only to secure the amount of money that Gelzer was indebted to the bank, but also with the ulterior purpose of benefiting Gelzer himself. For this purpose, and with a view to screening Gelzer from his creditors, the savings bank took mortgages aggregating \$5,100, whereas John Gelzer never did owe the bank but \$3,100, and spread these mortgages, with the deceptive statement of the amount secured, on the records of York county. *Lowry v. Pinson*, 2 Bailey, 328; *Bowie v. Free*, 3 Rich. Eq. 403; *Younger v. Massey*, 39 S. C. 120, 17 S. E. 711. The mortgages, having been executed for \$2,000 in excess of the true amount in which John Gelzer was indebted to the bank, were not only intended to secure the amounts actually advanced, but also to enable John Gelzer to defeat, delay, hinder, and defraud his creditors. They are, therefore, null and void as to the plaintiffs, and will not be allowed to retain their lien even for the amount of mon-

ey actually loaned by the bank to Gelzer. All of the mortgages complained of by the plaintiffs in their complaint, namely, the mortgage to J. J. Wescoat, trustee, dated August 17, 1892, the mortgage to John L. Ancrum, dated September 1, 1892, mortgage to Savings Bank of Rock Hill, dated January 21, 1893, and the mortgage to the Savings Bank of Rock Hill, dated December 2, 1893, are null and void under the assignment act of the state. They each cover all the tangible property that John Gelzer possessed at their respective dates, and, considered seriatim, each one in itself operates as an assignment with preferences. The mortgages are mere evasions of the law of a formal deed of assignment under the assignment act, and seek to accomplish what could not be done through the instrumentality of a formal deed of assignment. The object of the assignment act was to cut off preferences, root and branch, to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more of his creditors to the exclusion of all others; and whether this object is sought to be effected by a formal deed of assignment or in any other mode can make no difference. 'Any other view, it seems to us, would sacrifice substance to mere form, and enable insolvent debtors, by evasion, to effect a purpose declared by statute to be unlawful.' *Wilks v. Walker*, 22 S. C. 111; *Austin v. Morris*, 23 S. C. 393. It is immaterial whether one instrument or several were used by the insolvent debtor as the means of transferring the whole of his tangible property to one or more of his creditors to the exclusion of all others. *Mann v. Poole*, 40 S. C. 1, 18 S. E. 145, 889; *Mitchell v. Mitchell*, 42 S. C. 475, 20 S. E. 405; *Meinhard v. Youngblood*, 41 S. C. 312, 19 S. E. 675; *Putney v. Friesleben*, 32 S. C. 496, 11 S. E. 337; *Austin v. Morris*, 23 S. C. 393; *Wilks v. Walker*, 22 S. C. 111. The mortgage executed by John Gelzer to the Savings Bank of Rock Hill, S. C., on the 2d day of December, 1893,—only sixty-eight days in advance of the execution by him of his formal deed of assignment to W. B. Wilson, Jr., on the 8th day of February, 1894,—was a part of the original scheme to prefer the bank, and to transfer to it all the tangible property of Gelzer, to the exclusion of his other creditors. It must be construed together with the formal deed of assignment, and, so construed, constitutes a deed of assignment with preferences, forbidden by law. *Mann v. Poole*, 40 S. C. 1, 18 S. E. 145, 889; *Mitchell v. Mitchell*, 42 S. C. 475, 20 S. E. 405; *Putney v. Friesleben*, 32 S. C. 496, 11 S. E. 337; *White v. Cotzhausen*, 129 U. S. 330, 9 Sup. Ct. 809. The invalidity of an assignment, such as is contemplated by the assignment act, does not depend upon the fact whether or not the preferred creditor has knowledge of the fraudulent intention of the debtor. The statute denounces the preference, and declares the assignment inoperative, and that is its charac-

ter, regardless of the bona or mala fides of the preferred creditor. *Austin v. Morris*, 23 S. C. 401; *Putney v. Friesleben*, 32 S. C. 494, 11 S. E. 337. The several plaintiffs in this action being the only creditors of John Gelzer who, at the date of the commencement of this action, had reduced their claims to judgment, and had obtained returns of nulla bona upon the several executions issued to enforce each of said judgments, have, by reason of their diligence, obtained a just and legal preference. In fact, at the hearing of this cause before me, it was not questioned that such would be the result if the plaintiffs succeeded in vacating the mortgages and the deed of assignment. *Ryttenberg v. Keels*, 39 S. C. 213, 214, 17 S. E. 441; *Trust Co. v. Earle*, 110 U. S. 716, 717, 4 Sup. Ct. 226; *McDermutt v. Strong*, 4 Johns. Ch. 691; *Pom. Rem.* (2d Ed.) § 267. It is therefore ordered, adjudged, and decreed that each of the mortgages executed by John Gelzer to J. J. Westcoat, trustee, John L. Ancrum, and the two mortgages executed by him to the Savings Bank of Rock Hill, S. C., dated respectively the 17th day of August, 1892, 1st day of September, 1892, 21st day of January, 1893, and 2d day of December, 1893, as also the deed of assignment for the benefit of creditors, executed by the said John Gelzer to the defendant W. B. Wilson, Jr., on the 8th day of February, 1894 (all of which are specifically set forth in the complaint), be, and they are hereby, vacated and set aside as fraudulent and void; that Harry McCaw and William C. Gist, of the county of York and state aforesaid, be, and they are hereby, appointed receivers of all the property and assets of John Gelzer, of every kind and description whatsoever not exempt by law from levy and sale, with all the powers and duties, and subject to all the liabilities, of such receivers, upon their entering into bond in the usual form. \* \* \*

Defendants' exceptions are as follows:

First, as to the introduction of evidence. "(1) For error in allowing the judgment roll of Tabb & Jenkins Hardware Co. v. John Gelzer to be introduced over defendants' objection. (2) For error in excluding the judgment roll of Marshall, Westcoat & Co. v. E. A. Crawford, offered by the defendant; and, in this connection, for error in refusing to allow the defendants leave to file their supplemental answer, pleading the said judgment. (3) For error in not excluding, and again for error in not ruling upon, certain of the testimony offered by the plaintiffs; and again for error in not admitting certain of it offered by the defendants, upon the various grounds noted at the hearing, to wit: (a) Not excluding, and not ruling upon, the testimony of the witness Watt as to declarations of Welling on appraisal and value; (b) not excluding, and not ruling upon, all the declarations of John Gelzer after the execution of the mortgages in issue, whether made by himself on the witness stand or

made to others by letter or word of mouth, and sought to be proved by such letters, or by other witnesses."

Second, as to findings in decree: "(1) For error in finding as matter of fact, in reference to each of the mortgages set aside (Marshall, Westcoat & Co., J. L. Ancrum, the Savings Bank of Rock Hill, first and second), that at the time of its execution, severally: (a) John Gelzer was a resident of Charleston county; (b) John Gelzer was insolvent; (c) John Gelzer knew himself to be insolvent; (d) each mortgagee knew John Gelzer to be insolvent; (e) each mortgagee had reasonable cause to believe John Gelzer insolvent; (f) each of the mortgages covered all John Gelzer's property; (g) each of the mortgages covered all John Gelzer's tangible property; (h) each mortgagee agreed with John Gelzer not to record his mortgage; (i) each mortgagee so agreed with the purpose of aiding John Gelzer to deceive his creditors; (k) each mortgage was given and taken, not for security to the mortgagee simply, but for the ulterior purpose of benefiting John Gelzer, and of aiding him to hinder, delay, defraud, and deceive his creditors, and especially the plaintiffs; (l) each mortgage was made by Gelzer with intent thereby—and also with intent, in connection with his anticipated deed of assignment—to make an assignment of all his property with a preference to the mortgagee, in fraud of the assignment act; (m) each mortgagee accepted his mortgage, knowing of the intention of John Gelzer as aforesaid. (2) For error in finding as matters of fact: (a) In reference to the Marshall, Westcoat & Co. mortgage, that it was taken for \$400 more than was actually due, with intent to deceive his creditors; and, in this connection, for failing to find that the part of the mortgage in excess of \$400 was made to Westcoat as trustee for another person; and for failing to find that at that time John Gelzer was not indebted to any other persons. (b) In reference to the savings bank's second mortgage, that it was taken for \$2,000 more than was actually due, with like intent; and, in this connection, for failing to find that the savings bank's second mortgage was taken in furtherance of an agreement made at the time of the taking of the \$2,000 mortgage that an additional mortgage would be given to cover such advances as might be made beyond the \$2,000, after allowing all proper credits, and as collateral security to the first mortgage; and for failing to find that the bank or its assignees ever claimed that any debt ever existed in excess of \$3,100; and for failing to find that the savings bank's first mortgage was not for money then loaned, but was given as security for further advances, to aid John Gelzer in conducting his mercantile business. (3) For error of law in finding: (a) That the want of record of the Marshall, Westcoat & Co. and J. L. Ancrum mortgages in Charles-

ten county rendered each of them void as to all subsequent creditors with or without liens; (b) that the facts recited in the affidavit upon which the Tabb & Jenkins attachment was issued, and in deposition of the witness Charles T. Jenkins, were and are wholly insufficient proof of notice of the existence of the mortgages referred to therein, so as to supply the place of record; (c) that each of the mortgages is void under the act of Elizabeth and, in this connection, that each mortgage shows on its face an ulterior purpose to benefit the mortgagor, as the price of the mortgagee's preference; (d) and as to the John L. Ancrum mortgage, that its terms, requiring the proceeds of sale to be held in trust, made the mortgagee a conscious beneficiary of John Gelzer's fraudulent purpose to deceive his creditors; (e) that each of the mortgages is void under the assignment act, as a disposition of all the mortgagor's property with preference to the mortgage creditors, and, in this connection, that it is immaterial whether the mortgagee knew that such was his intention; (f) that the savings bank's second mortgage was void, because made within ninety days of the deed of assignment; (g) that because the Marshall, Wescoat & Co. and the savings bank's second mortgage were taken, each of them, for more than due, neither of them could stand as security for the real amount due. (4) For error of law and fact in each of the findings made in the following language: 'At the time of the execution of the several mortgages to J. J. Wescoat, trustee, John L. Ancrum, and the two mortgages to the Savings Bank of Rock Hill, S. C., on the 17th day of August, 1892, 1st day of September, 1892, 21st day of January, 1893, and the 2d day of December, 1893, respectively, John Gelzer was insolvent, and each of the said mortgagees either knew, or had good reason to know, that he was insolvent, and each of these transactions was had and made in pursuance of an original design and intent of the said John Gelzer and each of the mortgagees above mentioned, determined on by them at the inception of each transaction, to transfer and assign all of the tangible property of the said John Gelzer to the said mortgagees, to the exclusion of all the other creditors of the said John Gelzer. The conduct of all the mortgagees shows that they, each and every one of them, colluded with the mortgagor; that they used the indebtedness of John Gelzer to themselves, to draw up notes (in the instances of J. J. Wescoat, trustee, and of the savings bank for more than the true amounts), and mortgages that were intended not as security, pure and simple, for the repayment of the money due by John Gelzer, but also for the ulterior purpose of benefiting John Gelzer, who, pursuant to the original scheme, was to continue in possession of the stock of goods, after maturity, to continue to do business just as if no mortgages were in existence, to hold out

the stock of goods to the world as his own property, and thereby to obtain a corresponding credit. John Gelzer, in effect, made the following proposition to each of the mortgagees: "I will give you a preference, and will assign to you all of my tangible property, provided you will allow me to have the use of it indefinitely, or until I can pay off the debt." Each of the mortgagees assented to this proposition, and did suffer Gelzer to remain in possession of the stock of merchandise, which constituted the whole of his tangible property, indefinitely, to hold out the said stock to the world as his own property, and to do business at his old stand, and in his own name, and for his own benefit, until a few days preceding the execution of the formal deed of assignment on the 8th of February, 1894. The conduct of all the mortgagees as thus shown deceived plaintiffs, misled them, and caused them to extend credit to John Gelzer, which they would otherwise not have done.' (5) Error in requiring each of the mortgagees to account for the goods at their ex parte appraised value. (6) For error of law and fact in holding that John Gelzer made his deed of assignment with intent to hinder, delay, and defraud his creditors."

Hart & Cherry, C. E. Spencer, and Willson & Wilson, for appellants. Wm. B. McCaw, Finley & Brice, and T. F. McDow, for respondents.

GARY, J. The above-entitled action was commenced in the court of common pleas for York county on the 4th day of May, 1894, and was heard by his honor, Judge Townsend, at the November, 1895, term of said court. All the testimony except that of John L. Ancrum had been taken before his honor, Judge Aldrich, at the November, 1894, term of said court, and it was published before his honor, Judge Townsend, subject to admissibility under the exceptions made before both judges. On the 16th of January, 1896, Judge Townsend filed his decree, which, together with appellants' exceptions, will be set out in the report of the case. The respondents gave notice of additional grounds upon which they would ask that said decree be sustained, but withdrew such notice. It is admitted that the decree properly and sufficiently sets out the issues presented by the pleadings, and that it correctly states the judgment claims of the plaintiffs. Paragraph 1 of the first exception was withdrawn. The other parts of said exception will now be considered.

The first question arising under paragraph 2 of the first exception is whether it was error on the part of the circuit judge in excluding the judgment roll of Marshall, Wescoat & Co. v. E. A. Crawford, offered by the defendants. The following memorandum of agreement appears in the "case": "At the conclusion of defendants' testimony offered at the hearing before Judge Townsend, de-

fendants closed, reserving the right to take and offer additional testimony at any time within 30 days from to-day. Plaintiffs consented to the additional testimony being taken and offered, but reserved the right to reply to such additional testimony at any time within 15 days from the expiration of said 30 days. November 15, 1895. The above testimony offered by defendants at the hearing embraced the judgment roll of Marshall, Wescoat & Co. v. E. A. Crawford, Sheriff, to which plaintiffs objected as irrelevant; and the testimony offered by the plaintiffs included the judgment roll in Tabb & Jenkins Hardware Co. v. John Gelzer, to which defendants objected as irrelevant. Defendants also asked for leave to file a supplemental answer to set up the matter of title adjudicated by the judgment, as per the judgment roll in Marshall v. Crawford aforesaid." His honor, in his decree, says: "As the judgment roll in Marshall, Wescoat & Co. v. Edward A. Crawford is a record between other parties than the parties to this action, it is deemed irrelevant, and is ruled out; and, as a consequence, the defendants' motion made at the hearing, without previous notice for leave to file a supplemental answer to set up the alleged matter of title adjudicated in the aforesaid case of Marshall, Wescoat & Co. v. Crawford must be denied." The said judgment is not set out in the "case," and therefore cannot be considered by this court in determining its relevancy. It is incumbent on the appellants to show error on the part of the presiding judge, which they have failed to do.

The other question arising under paragraph 2 of the first exception is whether there was error in refusing to allow the defendants leave to file their supplemental answer. Section 198 of the Code provides that a defendant may be allowed, on motion, to make a supplemental answer. Before making such motion, the defendants were required to give four days' notice thereof to the opposite party, which was not done in this case. Failure to give the proper notice of said motion was, of itself, sufficient ground for the refusal to grant the same by the circuit judge. *Ex parte Apeler*, 35 S. C. 421, 14 S. E. 931; *Wagener v. Booker*, 31 S. C. 377, 9 S. E. 1055; *Dulany v. Elford*, 22 S. C. 804.

Paragraph 3 of the first section, embracing subdivisions a and b, is too general for consideration by this court. *Floyd v. Floyd*, 46 S. C. —, 24 S. E. 100; *Sims v. Jones*, 43 S. C. 90, 20 S. E. 905; *Adler v. Clound*, 42 S. C. 281, 20 S. E. 393; *Talbott v. Padgett*, 30 S. C. 167, 8 S. E. 845.

The other exceptions principally complain of error on the part of the circuit judge in his findings of fact. Instead of considering them *seriatim*, this court thinks it best to make a connected statement of the facts established by the testimony, as follows: John Gelzer, in August, 1892, bought the interest of Jenkins, his partner, in the hard-

ware business at Rock Hill, S. C. He did not have on hand money sufficient to complete the arrangement with Jenkins, and borrowed from J. J. Wescoat, of the firm of Marshall, Wescoat & Co., with which firm and its predecessor Gelzer had for years been employed as bookkeeper. In order to secure the payment of this sum, John Gelzer, on the 17th day of August, 1892, executed a note in the sum of \$700, payable 40 days after date; also a mortgage on his stock of goods at Rock Hill, S. C., to J. J. Wescoat, trustee. The evidence fails to satisfy us that more than the sum of \$300 was advanced under said mortgage; and, as more than the amount advanced under said mortgage has been paid towards its extinguishment, the facts connected with it will be eliminated from the further consideration of the case, except in so far as they may throw light upon the other questions involved. On the 1st day of September, 1892, John Gelzer executed a mortgage on his stock of goods at Rock Hill, S. C., to John L. Annum, to secure a bond or obligation of even date with said mortgage, and payable one year after date. At the time this mortgage was executed, Gelzer was solvent, and a resident of Charleston county, but was then contemplating a change of residence to Rock Hill, S. C. On the 20th of September, 1892, he made an actual change of domicile to Rock Hill, S. C. Two things are necessary to effect a change of residence: (1) There must be an intention to make such change, and (2) the intention must be carried into effect by an actual change of domicile. John Gelzer therefore became a resident of Rock Hill, S. C., on the 20th of September, 1892. The said mortgage was recorded in York county on the 31st of January, 1894. It is contended that this was not the proper county. Section 1963 of the Revised Statutes provides that: "All mortgages and instruments in writing in the nature of a mortgage of any property real or personal \* \* \* shall be valid so as to effect from the time of such delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution in the office of register of mesne conveyance of the county where the property affected thereby is situated in the case of real estate; and in the case of personal property of the county where the owner of said property resides, if he resides within the state; or if he resides without the state, of the county where such personal property is situated at the time of the delivery or execution of said deeds or instruments: Provided, nevertheless, that the above mentioned deeds or instruments in writing if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only

from the date of such record." The intention of this section is that a mortgage of personal property shall be recorded in the county within which the mortgagor resides. While John Gelzer was a resident of Charleston county, there is where the mortgage should have been recorded; but when he became a resident of Rock Hill, then York county was where it should have been recorded. John Gelzer was a resident of Rock Hill at the time the mortgage was recorded in York county, and therefore it was recorded within the proper county, and was notice to the public from the time of such record. As the plaintiffs had notice of this mortgage before acquiring a lien on the property therein mentioned, they do not occupy the position of subsequent creditors for valuable consideration without notice. *King v. Fraser*, 23 S. C. 543. The mortgage executed to John L. Ancrum was for money actually advanced at the time of its execution. The delay in recording said mortgage was not caused by an intention to aid Gelzer in any respect to hinder, delay, or defeat his creditors. In short, the testimony of Dr. John L. Ancrum explains to our satisfaction every circumstance urged against the validity of his mortgage. At the time the first mortgage to the Savings Bank of Rock Hill was executed (21st January, 1893), and at the time of the agreement to execute a mortgage to secure such further advances as the bank might make Gelzer (29th June, 1893), the said bank thought Gelzer was solvent. The agreement to give the mortgage created a lien on the property to be mortgaged, and when the mortgage was executed in pursuance of such agreement it had relation back to the time of the agreement. *Dow v. Ker, Speer*, Eq. 413. *Jones, Liens*, § 77; 3 Pom. Eq. Jur. § 1235. We are satisfied that it was not the intention of the Bank of Rock Hill to aid Gelzer in delaying, hindering, or defeating his creditors in any manner. The circuit judge, in his decree, speaks of the officers of the bank as reliable and truthful gentlemen, and accepts what they say as the truth. The validity of said mortgages is to be determined by the facts and circumstances surrounding the execution of the first mortgage, and the agreement to give the second mortgage, rather than by what took place thereafter. The assignment made by Gelzer for the benefit of his creditors is not assailed on account of any vice apparent upon the face of the deed of assignment, nor do the facts and circumstances brought out in evidence show its invalidity. The appellants raised the question in argument that the statutes of 13 & 27 Eliz., as now revised, do not apply to transfers of personal property because the words "goods and chattels" have been left out of the statutes. The views which we have hereinbefore expressed render a decision of such question immaterial in this case. The court, however, takes this opportunity to settle a question of so great

importance. The statutes of Elizabeth are but affirmations of the common law, and therefore the omission from said statutes of the words "goods and chattels" did not enable debtors to practice frauds as to "goods and chattels" any more than they could as to any other property.

The conclusions of this court on the foregoing questions of fact render a detailed discussion unnecessary as to other questions argued by counsel. It is the judgment of this court that the judgment of the circuit court, in so far as it denies that the mortgage executed in favor of J. J. Weacoat, trustee, is no longer a subsisting claim, be affirmed, but that it be reversed in all other respects, both as to the other mortgages and also as to the deed of assignment.

(47 S. C. 460)

PHILLIPS v. ANTHONY et al.

(Supreme Court of South Carolina. Aug. 10, 1896.)

MORTGAGE — FORECLOSURE — PRACTICE — ANSWER TREATED AS CROSS BILL.

Under Code Civ. Proc. § 296 (providing that a court may render judgment for or against one or more of several plaintiffs, and for or against one or more of several defendants, and may grant the defendant any affirmative relief to which he may be entitled), the answer of a defendant in foreclosure, who is a second mortgagee, when duly served on the defendant mortgagor, against whom affirmative relief is desired, may be made a cross bill; and a foreclosure of a mortgage therein pleaded may be decreed, not only against the lands described in plaintiff's complaint, but also against other lands included in said mortgage, and a judgment rendered for a deficiency, where such relief will not prejudice the rights of the plaintiff.

Appeal from common pleas circuit court of Spartanburg county: D. A. Townsend, Judge.

Action by William Phillips against Daniel Anthony and others. From a decree foreclosing a mortgage set up in the answer of O. D. Turner and J. A. Carroll, defendant Anthony appeals. Affirmed.

Nicholls & Jones, for appellant. Bomar & Simpson, for respondents.

JONES, J. The question in this case is whether, in a suit for foreclosure of a mortgage on one tract described in the complaint, a defendant, having a mortgage on that and also on another tract, may have affirmative relief against his co-defendant, the mortgagor, by a decree for the sale also of the tract described in the complaint, and a judgment for deficiency. The facts out of which the question arose are as follows: Plaintiff brought suit to foreclose a mortgage on a tract in Spartanburg county, executed by defendant Anthony to T. G. McCraw, and by the latter assigned to the plaintiff. The complaint, among other things, alleged that the defendants Thomas Spencer, R. D. Odom, Mrs. Lena Odom, C. P. Turner, and J. A. Carroll claim an interest in the land subsequent to plaintiff's claim. Lena Odom answered, alleging that she purchased of An-

thony a part of the lands mortgaged to plaintiff, subject to the mortgages to R. D. Odom and Thomas Spencer, and asked that the part of the mortgaged lands embraced in their mortgages, and not sold to her, be first sold in satisfaction of their mortgages, before falling upon the part conveyed to her. Thomas Spencer and R. D. Odom answered, setting up their mortgages on the tract described in the complaint as liens junior to plaintiff's. Turner and Carroll answered, denying generally the allegations of the complaint, except that they had a lien on the property described in the complaint, and set up their mortgage, with allegations appropriate for foreclosure, on 76 acres, a part of the land described in the complaint; also, on 3 acres near Limestone Springs, known as the "Homestead Place"; also on a tract of 497 acres, known as the "Lipscomb Land." The Lipscomb land, it seems, had been already sold to satisfy a prior lien, and may be dismissed out of the case. They asked for a sale of the premises described in their answer, except the Lipscomb land. They further alleged that there were other parties claiming an interest in certain land described in their mortgage, who should be made parties. This last allegation seems not to have been sustained, and may be dismissed now as irrelevant. This answer of Turner and Carroll was duly served on defendant, Anthony, as well as on plaintiff. He made no answer, demurrer, or reply thereto. On the reference before the master to whom the case was referred, Turner and Carroll proved and introduced in evidence their claim and mortgage, asked a report from the master that they were entitled to have both tracts sold, and to have judgment against Anthony for any deficiency. The master so reported, and the circuit judge confirmed this report, and decreed for sale of both tracts and application of proceeds, and for judgment against Anthony for any deficiency. The plaintiff makes no question here, and, it is to be assumed, is satisfied with the decree of the circuit court. Anthony's controversy is with Turner and Carroll alone. There are a number of exceptions, some of which are abandoned, but they raise practically the question stated at the outset of this opinion.

The affirmative of the proposition stated is true, and there was therefore no error in the decree granting the affirmative relief prayed for in favor of Turner and Carroll, against their co-defendant, Anthony. Section 296 of the Code provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side or between themselves. (2) And it may grant the defendant any affirmative relief to which he may be entitled." In *Beattie v. Latimer*, 42 S. C. 319, 20 S. E. 56, this court said: "Under this section, we see no reason why the court, having all the parties before it, may not proceed to adjudicate the rights of one co-defendant against his co-defendants, provided the same

can be done without prejudice to the rights of the plaintiff, and provided the pleadings and evidence furnish a proper basis for such adjudication. Such seems to be the construction adopted by the New York courts, as shown by the authorities cited by respondent's counsel in his arguments. And such seems to be in accordance with the rule prevailing in the old court of equity in this state. See *Motte v. Schult*, 1 Hill, Eq. 146, and *Moss v. Bratton*, 5 Rich. Eq. 1."

Was the relief granted in this case without prejudice to the right of the plaintiff? He does not complain, and it may be inferred he has not been prejudiced. Do the pleadings and the evidence in this case furnish a proper basis for the proper adjudication of the rights of the defendants among themselves? We think so. Under the old equity practice, a defendant desiring affirmative relief against his co-defendant, growing out of the subject-matter of the original bill, but not apparent on the face of the bill, was required to file a cross bill, upon which process issued and relief was granted. Under the Code, the answer may be made to subserve the purpose of the cross bill; and, if it is duly served upon the defendant upon whom affirmative relief is desired, the object of process, which is noticed, is accomplished. It is one of the excellencies of equity practice to render full and complete relief, and the purpose of the Code renders this duty even more imperative, for it expressly authorizes the courts to determine the ultimate rights of all the parties before it. Even if there should be found an omission to supply forms of procedure to meet every phase which a case may assume, under the spirit of the Code, the great court of equity would not be balked in rendering complete relief within its jurisdiction. It would seize first upon analogous principles in the pleadings and practice in the old court of chancery; and, if these were insufficient, it would invent a mode of relief. As expressed by Mr. Bliss in his work on Code Pleading (section 167): "If the equity court would refuse to do justice by halves,—if, in favor of complete justice, it would go beyond its ordinary jurisdiction,—how much more, under the reform system, will a court having complete jurisdiction give a suitor full and complete relief?" In the case at bar, Turner and Carroll were proper parties as junior lienholders on the premises sought to be foreclosed. Their mortgage was properly set up in their answer, which set forth fully the grounds for the affirmative relief for which they prayed. All parties concerned were before the court with due notice. The mortgage debt and the mortgage were established by evidence offered within the scope of the complaint, to say nothing of the answer. The same evidence required to establish the mortgage and mortgage debt with respect to the tract or premises described in the complaint established also all that was necessary for the court's information with regard to the affirmative relief prayed for. If Turner and Carroll

had brought an action first to foreclose their mortgage, the same parties, issues, and evidence would have been before the court as in this case. Why compel them now to a second action? Their ultimate right necessarily included the sale of the property pledged for the payment of the debt they were called on to establish, as well as a judgment for deficiency. Anthony does not contest the right of Turner and Carroll to a judgment for deficiency after exhausting only the premises described in the complaint. This is common practice. But this right presupposes that the mortgaged property has been exhausted, since there is no deficiency until then. The right to a judgment for deficiency includes the right to do what is necessary to ascertain the deficiency. Why should a court of equity split the mortgage of Turner and Carroll in two and do justice by halves? The judgment of the circuit court is affirmed.

(47 S. C. 446)

**McCLENAGHAN et al. v. McEACHERN et al.**  
(Supreme Court of South Carolina. Aug. 10, 1896.)

**HOMESTEAD—LAND APPURTENANT TO DWELLING HOUSE—ABANDONMENT.**

1. The homestead law in force when a debt is contracted governs as to the question of exemption from such debt, and not the one in force when collection is attempted to be enforced.

2. Under Const. 1868, art. 2, § 32, defining the family homestead as consisting of the "dwelling house, outbuildings and land appurtenant," where the dwelling house was situated on lands of the wife, a tract adjoining, owned by the husband, which was not separated from the wife's, all being cultivated together for the support of the family, cannot be said, as a matter of law, not to be appurtenant to the dwelling house. The fact that it was rented for a year after the husband's death does not necessarily constitute its abandonment, in the absence of evidence of the circumstances or intention of the family. McIver, C. J., dissenting.

Appeal from common pleas circuit court of Florence county; Buchanan, Judge.

Action by John C. McClenaghan, Richard H. McClenaghan, and Mary A. McClenaghan against Leah McEachern, H. H. McClenaghan, Charles E. McClenaghan, J. Boyd Brunson, Sr., J. Boyd Brunson, Jr., Bessie Brunson, and Marie Brunson. From an order of nonsuit, plaintiffs appeal. Reversed.

H. L. B. Wells, for appellants. Woods & Shipp, for respondents.

**JONES, J.** This is an appeal from an order of nonsuit on an issue of title to 30 acres of land in Florence county, submitted to a jury in a suit for the partition thereof among the parties above named. The order of nonsuit does not contain the ground upon which it is based, nor does the record before us disclose the ground, except such as might be inferred from the evidence offered on the trial, which is set out in the case. Appellants allege several grounds of error, but as

the record discloses no ruling of the circuit court, other than the order of nonsuit, the sole question that we can consider is whether there was error in granting the order of nonsuit, upon the evidence submitted. The evidence offered tended to show the following as the facts: In 1873 H. H. McClenaghan, the father of the plaintiffs and the three first-named defendants, became seised in fee of the tract of 30 acres in question. At this time he was the head of a family, and, with his wife and children then born, was living on a tract of land belonging to his wife, containing 320 acres, contiguous to the said 30-acre tract. He died in September, 1880, still seised of this tract, leaving surviving him his widow, Mrs. A. L. McClenaghan, and six children, the plaintiffs and the three first-named defendants; these last being minors over the age of 14 years at the commencement of this suit for partition, August 31, 1895. From 1873 up to the time of his death, he used this land in connection with the place where he resided with his family, cultivating it in connection with the said home place to make a support for the family; the two places, according to one witness, being so connected as that a person could not tell the difference between the two places. This 30-acre tract was all the real estate owned by H. H. McClenaghan, and its value was less than \$1,000. There was no dwelling house on it. In 1881 the land in question was rented to one Samuel Melton for \$50 or \$60 annual rent. In 1876 McClenaghan became indebted to W. H. Bethea on a note for \$237.36, due November, 1876. This claim was put in judgment March 30, 1877, which was renewed, and a new execution issued thereon October 20, 1881. This tract was then levied on, November 1, 1881, and sold to W. H. Bethea for \$190, who took a sheriff's deed, December 15, 1881. Thereafter W. H. Bethea brought an action against Mrs. A. L. McClenaghan and Samuel Melton, the tenant in possession, for the recovery of this land, but without making the children of H. H. McClenaghan parties. Judgment went against Mrs. McClenaghan, by default. W. H. Bethea, on 23d November, conveyed the premises to Mrs. Lella C. Brunson, who died December 30, 1885, leaving surviving her the defendant J. Boyd Brunson, Sr., her husband, and the other named Brunsons, defendants, as her children. The Brunsons claimed the land under the sheriff's deed in 1881. The McClenaghans concede that the Brunsons owned one-third of the land, by reason of the judgment against Mrs. McClenaghan for the recovery of the land. But they claim that the sale under the judgment in 1881 was void, because the widow and children of H. H. McClenaghan were then entitled to a homestead in this land; it being of less value than \$1,000, and being all the real estate owned by H. H. McClenaghan. If the sale of the land in 1881 was a valid sale, then the nonsuit was proper, since under that sale all

the title of the McClenaghans would pass to the grantor of the Brittons. On the other hand, if at the time of the sale, in 1881, the widow and children of McClenaghan were entitled to have this land exempt from sale, as a homestead, the sale was void, and the nonsuit was improper. *Cantrell v. Fowler*, 24 S. C. 426; *Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099.

The right to homestead in this case must be determined by the constitution of 1868, as it was previous to the amendment of 1880, since the debt upon which the judgment was based was contracted in 1876. *Gunn v. Barry*, 15 Wall. 610; *Cochran v. Darcy*, 5 S. C. 125. Article 2, § 32, then declared that "the family homestead of the head of each family residing in this state, such homestead consisting of dwelling house, out buildings and lands appurtenant, not to exceed the value of \$1,000," etc., "shall be exempt," etc. Under this provision the family homestead was the thing designed to be exempted, and it was defined as consisting of certain things. The use to which the real estate was put was one of the conditions upon which the right of homestead therein depended. The amendment of 1880 changed this, and allowed a homestead in lands without regard to the use made of the land claimed as exempt. This enlargement of the homestead privilege, however, under the principle decided in *Gunn v. Barry*, supra, could not be made to apply in this case, notwithstanding that the judgment was not attempted to be enforced until 1881, when the amendment of 1880 was in force.

Under the contention in this case, it became necessary to determine two questions: First, whether the 30-acre tract was appurtenant to the family homestead when the debt was contracted; second, whether, if appurtenant then, it had ceased to be so in 1881, when the land was sold under the judgment. On the first question, while, under a very strict and technical definition of the word "appurtenant," there is room for contention that one tract of land could not be appurtenant to another tract, or the family homestead thereon, when the tracts are owned by different persons (there being no question in this case relating to easements or servitude), yet, under the broad and liberal construction which should be given to the words used in the constitution to define the right and extent of the homestead exemption, we do not think it could be said, as matter of law, upon the evidence, that the 30-acre tract belonging to the head of the family could not be appurtenant to the "family homestead," even though the dwelling house might be situated on an adjoining tract belonging to the wife of the head of the family. This conclusion is justified by the principle decided in *Norton v. Bradham*, 21 S. C. 375; *Riley v. Gaines*, 14 S. C. 454; *Harrell v. Kea*, 37 S. C. 376, 16 S. E. 42. The evidence in this case tended to show that the 30-acre tract was culti-

vated, in connection with the dwelling-house tract, for the support of the family; and it should have been left to the jury, under proper instructions, to determine whether the evidence established that the 30-acre tract came within the definition of "lands appurtenant" to the family homestead.

It should also have been left to the jury, under proper instructions, to determine whether there was evidence sufficient to warrant the conclusion that the 30-acre tract had at the time of the sale, in 1881, ceased to be used as land appurtenant to the family homestead. It cannot be said, as matter of law, that the mere renting for a year of this 30-acre tract constituted an abandonment of the tract of land appurtenant to the family homestead. In *Jeffries v. Allen*, 29 S. C. 508, 7 S. E. 832, this court said, "Nor do we know of any principle which would prevent the widow from claiming a homestead because of the fact that, until an effort has been made to enforce a collection of the debt against the land, she has enjoyed the rents and profits of the land out of which the homestead is claimed." This language is strikingly appropriate in this case. In *Harrell v. Kea*, 37 S. C. 377, 16 S. E. 44, the court does use the following language, quoted by respondents' attorneys: "What little evidence there is upon the subject would seem to show that it was not appurtenant, but was rented out to another, and was not used in connection with the family homestead, at the time the deed was made." But this is very far from saying that, because the land was rented to another, therefore it ceased to be appurtenant to the family homestead. In the case of rural homesteads, especially in view of our system of utilizing farm lands, it would be a very dangerous doctrine to assert that the moment either necessity or convenience caused the head of a family, or his widow and children after his death, to rent out the family homestead, or any portion of it, instead of directly cultivating it, that moment it ceased to be exempt as lands appurtenant to the family homestead. Undoubtedly, under the provision of the constitution of 1868, which we are considering, there may have been such an abandonment of, or change in the use of, land or real estate, as would prevent the head of a family, or his widow and children, from claiming it as exempt as a family homestead; but the evidence of the intent to abandon such use should be clear and satisfactory before the tribunal trying the issue should declare that the family whose protection is sought by the constitution has forfeited its right to that protection. Especially is this true where minors, as in this case, are claiming the right of homestead.

There being some evidence on the issue of title involved in this case, under the well-settled rule the case should have been submitted to the jury, and it was error to nonsuit the plaintiffs. The order of nonsuit, appealed

from, is reversed, and the case is remanded to the circuit court for a new trial.

McIVER, C. J. This being an action for partition,—a case of equitable cognizance,—in which an issue of title was raised by the pleadings, it seems to me that under the case of *Woolfolk v. Manufacturing Co.*, 22 S. C. 332, the motion for a nonsuit was improperly granted. That, also, was an action for partition of certain real estate, in which the plaintiffs claimed that they were entitled to certain interests as tenants in common with the defendants. The answer of the defendants denied the alleged tenancy in common, and alleged that defendants had the absolute title, in fee, to the premises sought to be partitioned. The case being on calendar 2, the attorneys for plaintiffs moved for an order submitting the issue of title to the jury, which was granted. On the trial of such issue the circuit judge made certain rulings as to the admissibility of some of the testimony offered by plaintiffs, which induced the plaintiffs to move for leave to have a nonsuit entered, with leave to move to set it aside in the supreme court. This motion was refused by the circuit judge upon the ground that he had neither the power nor discretion to grant a nonsuit in such a case. This was made one of the grounds of appeal, and the supreme court, in disposing of that ground, used the following language: "We do not understand that the plaintiffs asked leave to discontinue their whole case, but that they might have an order of nonsuit as to the issue ordered, leaving the proceeding in equity still standing. We do not see how the judge could have granted a nonsuit as to the issue, which was not an independent action, but 'an issue from chancery,' ordered at the instance of the plaintiffs themselves, to determine (in a manner they had a right to demand) a question which had arisen in the progress of the cause. We suppose the plaintiffs might have brought an original action at law, or possibly might have obtained an order in their case that an action at law should be brought; but, probably for some good reason, they chose not to do so. They instituted on the equity side of the court an action for partition, and obtained an order out of chancery for the issue. This being the case, the officer who tried that issue, sitting as a law judge, could not grant a nonsuit, for that would have been precisely equivalent to revoking the order. He had no right to do that, or refuse to try the issue, or to grant a new trial or nonsuit. He had no option but to try the case and report back the result." In addition to this, it may be said that a judgment of nonsuit, in such a case, does not finally determine the rights of the parties. The object of the action is to obtain partition, and that object is sought to be defeated by the allegation in the answer that the plaintiffs had no title. This raises an issue which

must be tried by a jury, unless that mode of trial is waived; and, until such issue is tried and finally determined, the court of equity is powerless to determine whether the plaintiffs are entitled to the relief demanded. It seems to me, therefore, that the nonsuit was improperly granted, for the reason indicated, and that the proper course was to let the issue of title be determined by the verdict of the jury, under proper instructions from the circuit judge as to the law. And, when the issue of title was thus determined, it was for the circuit judge to grant or refuse the relief demanded, according as the rights of the parties might appear. This was the course pursued in the case above cited, which I am unable to distinguish, in principle, from this case.

I am not prepared, however, to assent to the doctrine laid down in the leading opinion as to the question whether the 30-acre tract of land, upon which the judgment debtor never resided, can, in the sense of the term "appurtenant" as used in the constitution of 1868 (which, it is conceded, must govern this controversy), be regarded as appurtenant to another tract of land, which he never owned, but upon which he resided with his family. Indeed, it seems to me premature to consider that question now, as the case falls to show that any such question was ever considered or passed upon by the circuit judge. I think, therefore, that the judgment appealed from, which, as I understand it, is nothing but a judgment of nonsuit as to the issue of title, should be reversed, and the case remanded to the circuit court for a new trial, in which the issue of title should be determined by the verdict of the jury (unless that mode of trial be waived), under appropriate instructions as to the law; and when that issue is determined the circuit judge should render judgment upon the whole case according to the rights of the parties as thus made to appear.

(47 S. C. 430)

#### MILLWEE v. JAY et al.

(Supreme Court of South Carolina. Aug. 1, 1896.)

LIMITATION OF ACTIONS—NEW PROMISE—NOTE OF PARTNERSHIP UNDER SEAL — POWER OF EXECUTOR TO BIND ESTATE — PART PAYMENT OF CLAIM.

1. Under the settled rule in South Carolina, that where the statutory period for bringing action, counting from the original accrual of the cause of action, has expired by limitation, a new promise is itself the true cause of action, the original obligation being material only to show the consideration, such an action is governed, as to limitation, by the statute in force and applicable to the new promise, and not by one in force and applicable to the original obligation.

2. Where the original obligation was under seal, a new promise, arising by implication from a partial payment thereon, creates a cause of action not under seal, and an action resting thereon is governed by the statute applicable to simple contract debts, although such statute may

have been enacted after the original cause of action arose.

3. A note executed in the name of a partnership, under seal, is not legally binding on a partner who did not sign the firm name, unless it is shown that he had previously authorized or subsequently ratified such signature.

4. An executor or administrator cannot, by a payment on or an acknowledgment of a claim for which his decedent was not in fact liable, create an obligation for its payment on the part of his estate.

5. The provision of Code Civ. Proc. § 131, being a part of the statute of limitations, that "payment of any part of principal or interest is equivalent to a promise in writing," is to be construed as applicable for the purposes of limitation only, and does not render such a payment a written promise under the statute of frauds; and neither a part payment by an administrator of a claim against the estate of his decedent, nor a verbal promise to pay it, will bind him individually for its payment.

6. A statement in a letter by the maker of a note that "I hope we can agree on a settlement of the note soon," does not constitute an acknowledgment or new promise, within the provisions of the statute of limitations.

Appeal from common pleas circuit court of Abbeville county; Benet, Judge.

Action by M. C. Millwee against David W. Jay, in his own right, and as surviving partner of the firm of Bradley & Jay, and John E. Bradley and others, as executors of the will of William K. Bradley, deceased. Judgment of nonsuit, from which plaintiff appeals. Affirmed.

The following order sets out the grounds on which a motion for nonsuit was granted by Judge Benet: "This is an action upon a sealed note signed 'Bradley & Jay,' dated July 31, 1873, due one day after date, for \$250, with interest at 12 per cent. per annum. Upon it various payments are alleged to have been made, viz.: July 7, 1874, \$25; May 11, 1890, \$5; January 8, 1883, \$400; and January 7, 1889, \$5. The first two payments are alleged to have been made by Bradley & Jay; the third, by D. W. Jay and the executors of W. K. Bradley, deceased; the fourth, by the executors. The only witness offered by plaintiff was Dr. W. B. Millwee, husband of plaintiff, who testified that J. E. Bradley, one of the executors, made the payment of \$400 January 8, 1883, and also that of January 7, 1889. No other evidence than the indorsements on the note was offered as to the first two payments. The defendants, in their answer, admit that the first two payments were made by D. W. Jay, allege that the third payment was also made by Jay, and deny the alleged payment of January 7, 1889. The action on the sealed note being barred at the time this action was commenced, January 6, 1895, it is sought to be sustained on the new promise evidenced by the several payments above stated, and certain acknowledgments by the defendants. These alleged acknowledgments are contained in letters written by the defendants to plaintiff, or her agent, Dr. Millwee. The first is a letter from W. T. Bradley, one of the executors, dated in November, 1893, ur-

ging Mrs. Millwee to enforce collection against the business of Bradley & Jay. Next is a letter of December 5, 1893, from Jay to Dr. Millwee, acknowledging that he made the first three payments above stated, and closing with the expression, 'I hope we can agree on settlement of note soon.' Next is a letter of January 4, 1894, from D. W. Jay to Millwee, repudiating his liability on the note, by reason of the statute of limitations. I will consider first what statute is applicable to the several alleged new promises,—the twenty-year limitation in force at the date of sealed note, or the six-year limitation fixed by the act of November 25, 1873? If the action had been upon the sealed note, I should have no hesitation in saying that the twenty-year limitation would apply, for the Code expressly excepts cases where the right of action has already accrued. But the action upon the note is barred, and it can be sustained, if at all, only upon the new promise as an original, substantive, independent contract. The original note, so far as this action is concerned, simply furnishes evidence of consideration for the new promise. The cause of action, the breach of the new promise, having arisen subsequent to the act of November, 1873, the right of action necessarily had not accrued at the time of its passage, and consequently the action upon the new promises are not within the exceptions stated in the Code. The statute of limitations is no part of the contract; it is the *lex fori*, a part of the remedy, and as such within the control of the legislature, and applicable as well to antecedent contracts as to subsequent ones. I hold, therefore, that each of the alleged new promises is subject to the six-year limitation prescribed by the act of 1873. This being the case, the action is barred as to each of the new promises evidenced by payments except as to the payment made by J. E. Bradley of January 7, 1889. There is nothing in the letters introduced in evidence to cause me serious concern as to their effect in repelling the bar of the statute except the letter of D. W. Jay of December 5, 1893. It will be observed that this alleged acknowledgment was made after the bar was complete, both as to the action upon the last payment made by Jay, of January 8, 1883, and upon the note. It has been uniformly held ever since *Young v. Monpoe*, 2 Bailey, 278, that after the bar is complete, an acknowledgment to toll the statute must be a distinct, unequivocal, unqualified acknowledgment of the debt as a subsisting obligation on the part of the debtor. While this letter acknowledges that the defendant Jay made the payments stated, it is qualified by the expression, 'I hope we can agree upon settlement of the note soon.' So far from being an acknowledgment of a definite and determinable debt, the expression imports the contrary,—a want of agreement as to the amount to be paid, and hence does not repel

the bar of the statute. There is nothing else in the testimony that can repel the bar of the statute so far as D. W. Jay is concerned. As to the executors, the letters introduced are insufficient to repel the bar of the statute. The witness Millwee testifies that he held two notes,—one against J. E. Bradley, individually, and the one in this suit; that he met J. E. Bradley on the street, and told him that he wanted a payment on the note his wife held against Bradley & Jay, to keep it from going out of date, whereupon J. E. Bradley handed him five dollars. This was on 7th January, 1889. I think, when it is sought to create a new promise, or to make a contract to bind an estate by an executor, it must be shown that the payment was made by him as executor, and upon a debt of the testator, which he was bound as executor to pay. This the plaintiff has failed to show. Even if it should appear positively that on January 7, 1889, J. E. Bradley, as executor, made this payment of five dollars on the Bradley & Jay note, I should hold that it would be insufficient to toll the statute. An executor has no power to create an obligation against his testator's estate. The nonsuit should therefore be granted, and it is so ordered."

To such order plaintiff excepted:

"(1) Because there was sufficient testimony to go to the jury, and it was error to grant the nonsuit. (2) Because it was error to hold that the act of 1873 governed the case, when it is respectfully submitted that the case is controlled by the statute of limitations of 1870. (3) Because it was error to hold that the letters introduced in evidence by the plaintiff were not sufficient to charge the defendants under a new promise. (4) Because it was error to hold that the payment of five dollars by one of the executors of January 7, 1889, was not sufficient evidence of a new promise to go to the jury. (5) Because it was error to hold that an executor could not charge his testator's estate by making a payment on a note of said testator. (6) Because it was error not to hold that by making the payment of January 7, 1889, the executors bound themselves personally even if it was not sufficient to bind the estate. (7) Because it was error in his honor to hold that the plaintiff had failed to prove that the payment was made by J. E. Bradley as executor, and upon a debt of his testator which he was bound as executor to pay; there being sufficient evidence on all of those points to go to the jury. (8) Because his honor erred in holding that the letter of D. W. Jay of December 5, 1893, was not a sufficient acknowledgment to take the case out of the statute of limitations."

Graydon & Graydon, for appellant. Cothran, Perrin & Cothran, for respondents.

McIVER, C. J. For a proper understanding of the questions raised by this appeal it will be necessary to make a somewhat fuller state-

ment of the pleadings in this action, which was commenced on the 15th of January, than is usual in cases like this. The plaintiff, in the first paragraph of her complaint, alleges that on the 31st of July, 1875 (which is manifestly a misprint for 1873), the testator, William K. Bradley, and the defendant David W. Jay were doing business as partners in trade under the firm name of Bradley & Jay. In the second paragraph the allegation is that on the 31st day of July, 1875 (again manifestly a misprint for 1873), the said Bradley & Jay made and delivered to one A. L. McCaslan their note under seal whereby they promised to pay said A. L. McCaslan or bearer, one day after said date, the sum of \$250, interest at the rate of 12 per centum per annum. In the third paragraph plaintiff alleges that on the 7th day of July, 1874, the said Bradley & Jay made a promise to pay the amount specified in said note by paying to the plaintiff the sum of \$25, and having the same credited on said note. In the fourth paragraph the allegation is that on the 11th of May, 1880, the said Bradley & Jay made a new promise to pay what was due on said note by paying to the plaintiff the sum of five dollars, and having the same credited on said note. In the fifth paragraph the allegation is that the said William K. Bradley, some time during the year 1882, died, leaving a will, by which the defendants named as such were appointed the executors thereof; and in the sixth paragraph it is alleged that the persons named as such duly qualified as executors of the will of the said William K. Bradley. In the seventh paragraph it is alleged that on the 8th of January, 1888, the said defendants made a new promise to pay to the plaintiff the amount due on said note by paying to the plaintiff the sum of \$400, and having the same credited on the said note. The allegation in the eighth paragraph is that on the 7th day of January, 1889, the defendants named as executors of the will of William K. Bradley made a new promise to pay what was due on said note to the plaintiff by paying to the plaintiff the sum of five dollars, and having the same credited on the said note. In the ninth paragraph it is alleged that the defendant David W. Jay, on the 5th of December, 1893, made an acknowledgment in writing that the debt evidenced by said note was due. In the tenth paragraph the allegation is that said David W. Jay, on the 4th of January, 1894, made a similar acknowledgment in writing. In the eleventh paragraph it is alleged that on the 24th day of November, 1893, the defendants named as executors made a similar acknowledgment in writing. In the twelfth paragraph it is alleged that the plaintiff is now the legal owner and holder of said note, and that no part thereof has been paid, except as above stated. To this complaint the defendant David W. Jay and the executors of William K. Bradley filed separate answers, but, as they set up the same defenses, the answer of Jay is the only one

set out in the "case." In that answer the allegations made in the first, fifth, and sixth paragraphs of the complaint are admitted, but, as those allegations relate only to the partnership formerly existing between W. K. Bradley and David W. Jay, to the death of Bradley, and the appointment and qualification of his executors, they have no bearing upon the points raised by this appeal. In the second paragraph of the answer all the other allegations of the complaint are distinctly denied. The third paragraph of Jay's answer is in these words: "That the note referred to in the complaint was a sealed note, signed in the firm name by the defendant D. W. Jay, without previous authority or subsequent ratification on the part of W. K. Bradley, and was at no time binding upon any one but the defendant D. W. Jay in his individual capacity." In the fourth paragraph of the answer it is alleged that the payment on said note referred to in the third paragraph of the complaint was made by the defendant D. W. Jay. In the fifth paragraph of the answer the same allegation is made as to the payment referred to in the fourth paragraph of the complaint. In the sixth paragraph of the answer a similar allegation is made as to the payment referred to in the seventh paragraph of the complaint. The answer set up as a defense to each and all of plaintiff's alleged causes of action the statute of limitations. The answer also set up as a defense by way of counterclaim, certain demands in the form of open accounts existing in favor of Bradley & Jay against A. J. McCaslan, the payee of the note above referred to, before and at the time he transferred said note to plaintiff; but, as these matters do not seem to affect the points raised by this appeal, they need not be further referred to.

The note above referred to, upon which the several payments referred to in the complaint were indorsed, was offered in evidence, but there was no testimony tending to show who signed the name of Bradley & Jay to that note, nor was there any testimony adduced tending to show that W. K. Bradley had ever in any way either recognized or affirmed or ratified the contract purporting to have been made by said note, nor to show that the proceeds of such note ever inured to the benefit of W. K. Bradley, of Bradley & Jay. What such note was given for, or by whom it was made, is not disclosed by the testimony, except that Jay, in his answer, says that he signed the name of Bradley & Jay to the note; but at the same time he says that he did so "without previous authority or subsequent ratification on the part of W. K. Bradley, and was at no time binding upon any one but the defendant D. W. Jay in his individual capacity." The only witness introduced by the plaintiff was Dr. W. B. Milwee, the husband of the plaintiff, and his testimony is set out at length in the "case," but it is too long for insertion here; and, indeed, under the view which we take of the case, we do not regard his testimony as

material. Plaintiff introduced certain letters of D. W. Jay and W. K. Bradley as evidence of the several acknowledgments referred to in the ninth, tenth, and eleventh paragraphs of the complaint, and for the same purpose, against the objection of defendants, was permitted to introduce a letter of J. E. Bradley, which was not referred to in the complaint. The case was heard by his honor, Judge Benet, who, at the close of the testimony in behalf of the plaintiff, granted a motion for a nonsuit by an order which is set out in the "case," which should be incorporated in the report of this case. From this order the plaintiff appeals upon the several grounds set out in the record, which should likewise be incorporated in the report of this case.

We do not propose to consider these grounds seriatim, but will rather proceed to consider and determine what we regard as the controlling questions presented by the appeal. If the plaintiff's cause of action in this case should be regarded as the breach of a promise evidenced by the note under seal, then the action would be clearly barred by the statute of limitations; for, as the law stood at the time when such promise was made,—31st of July, 1873,—an action for the breach of a promise, evidenced by a note under seal, was barred if not commenced within 20 years after the right of action accrued. Code 1870. Now, in this case the right of action for the breach of the promise evidenced by the note manifestly accrued in August, 1873, the amount mentioned in the note being payable one day after the date thereof (31st July, 1873), and such an action was barred in August, 1893,—more than a year before this action was commenced,—and hence beyond all question the plea of the statute of limitations was a bar to the action for the breach of the promise evidenced by the note. If, however, this action should be regarded, as was doubtless intended, as an action on the new promises implied by the several payments set out in the complaint, or by the alleged acknowledgments therein set out, then it becomes necessary to inquire whether the action was barred by the statute on any or all of the new promises implied by such payments or acknowledgments. First, as to the payments, it will be observed that all of these payments were made after the amendment of the original Code of 1870 by the act of 25th November, 1873 (the first of these payments having been made on the 7th of July, 1874), whereby the period within which an action for a breach of promise evidenced by a note under seal was reduced from 20 to 6 years; and as none of these payments except the last are alleged to have been made within six years before the commencement of this action, it is quite manifest that the action, if regarded as based upon any of the new promises except the last, which will hereinafter be separately considered, would be barred by the statute of limitations. It is quite true that under some of the former decisions in this state which have been cited by counsel for ap-

pellants, in which, as was afterwards shown, an incorrect view of the statute of limitations had been taken, the result above announced might have been doubted; but since the leading case of *Smith v. Caldwell*, 15 Rich. Law, 365, in which the law upon the subject was reviewed, and certain definite principles were distinctly laid down, followed by *Walters v. Kraft*, 23 S. C. 578, *Fleming v. Fleming*, 33 S. C. 505, 12 S. E. 257, *Sepaugh v. Smith*, 35 S. C. 613, 14 S. E. 939, and *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, and recognized in many other cases, it must be regarded as the settled law of this state "that where the statutory period, counting from the original accrual of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute is itself the true cause of action; and this whether such promise was made before or after the expiration of the period just mentioned. If before, the legal ability was its consideration; if after, the moral obligation." This later and more correct view of the statute of limitations was not only in strict conformity to the express language of the statute as found in the old statute as well as in our Code, but was imperatively demanded by the express terms of the statute as shown in *Walters v. Kraft*, supra, at pages 580, 581. If, then, the action must be regarded as an action for the breach of the new promise implied from the payment, without any reference whatever to the original promise evidenced by the note, except for the purpose of finding a consideration for the new promise (*Hayes v. Clinkscales*, 9 S. C. 450; *Fleming v. Fleming*, supra), then the inquiry would be, when did the right of action accrue for the breach of such new promise? And if the action was not commenced within six years thereafter (as it was not), it would be barred by the statute, for two reasons: (1) Because, by the express terms of the act of 25th November, 1873, passed before such new promise was made, and, of course, before any breach thereof, and hence before the right of action accrued, the statutory limit was reduced to six years, even if the new promise had been made under seal; (2) because such new promise was not under seal, but a mere simple contract, upon which the action would be barred in six years, even under the original Code of 1870. From these views it follows that if the action be considered as an action upon either one of the new promises implied by the first of three payments, it must be held barred by the statute of limitations which was pleaded in each one of those causes of action, as against all of the defendants.

We come next to the consideration of the effect of the payment alleged to have been made by the executors of William K. Bradley on the 7th of January, 1889, which stands upon a different footing, as that payment was alleged to have been made within six years before the commencement of this action,—the action having been commenced on the 5th of January, 1895, two days before the ex-

piration of the six years. As we have seen, the allegation in the complaint in respect to this payment was distinctly denied in the answer, and the only evidence adduced to prove this allegation was the testimony of Dr. Milwee, the husband of the plaintiff, in which he says that the payment was made by John E. Bradley, one of the executors; and, although his testimony as to the fact that such payment was made by John E. Bradley as executor is somewhat indefinite and shadowy, yet we will assume, for the purpose of the inquiry, that there was some testimony tending to show that the payment was intended to be made, and was made, for the estate of W. K. Bradley. But even this assumption is very far from authorizing the inference that any liability was thereby created against the estate. It is too well settled to need the citation of authority to show that an executor has no power to create a debt against the estate of his testator. To bind the estate of the testator, it would be necessary to show that the debt upon which such payment was made was a subsisting valid obligation of the testator; and of this there was not a particle of evidence. The original note was signed with the name of Bradley & Jay, a firm of which Bradley seems to have been a member; yet the note, being under seal, was not legally binding upon any one except the person who signed the firm name (*Sibley v. Young*, 26 S. C. 415, 2 S. E. 314), unless it be shown that the other partner had previously authorized or subsequently ratified such signature; and of this there was no evidence whatever. Indeed, although the testator, W. K. Bradley, lived for about nine years after the execution of the note, there was no evidence even tending to show that W. K. Bradley ever knew or had even ever heard of such a note. So that it is quite clear that under the evidence in this case it cannot be held that W. K. Bradley ever was liable on the note. If, therefore, John E. Bradley had, at the time this payment was made, undertaken, in the most explicit terms, to fix upon the estate of his testator a liability for the amount of the note, he would have been powerless to do so. It was contended, however, in the argument here, that even if John E. Bradley, by this payment, failed to fix any liability upon the estate of his testator, yet he did thereby create a liability upon himself personally. There are at least two conclusive answers to this position: (1) The plaintiff, neither by her complaint nor by her evidence, makes any such case against John E. Bradley personally. On the contrary, both by her complaint and by her evidence the plaintiff distinctly negatives any such claim against John E. Bradley personally. (2) But, in addition to and aside from this, the statute of frauds presents an insuperable bar to any such claim. It is not pretended, and cannot be pretended, that John E. Bradley ever was personally liable for the amount mentioned in the note; and if he had made verbally, the

most explicit and unequivocal promise to pay the amount secured by that note, it would have been a promise to pay the debt of another, against which the statute of frauds would have been a complete protection, unless such promise had been in writing, signed by him. It is insisted, however, that the change in the phraseology of the statute effected by the act of 1882, whereby it is declared that "payment of any part of principal or interest is equivalent to a promise in writing," meets this objection. We cannot accept any such construction of the statute, for the language above quoted is taken from the latter part of section 181 of the Code of Civil Procedure, in the previous portion of which the general declaration is made that no promise or acknowledgment shall be sufficient to take a case out of the operation of the statute of limitations unless the same be in writing; and the sole object of the language quoted was to qualify this general declaration. It certainly was not intended to operate as a repeal of any portion of the statute of frauds, which is in no way alluded to, either in the section from which the quotation is taken or in the title in which the section is found. The construction contended for would lead to this extraordinary (not to use a harsher term) result: that if a friend, from pure motives of kindness, should make a payment of \$5 on the note of another for \$1,000, he would thereby render himself liable for the whole amount of the note.

It only remains to consider the effect of the so-called "written acknowledgments" contained in the letters offered in evidence. So far as the acknowledgments alleged to have been made in the letter of 24th of November, 1893, from W. T. Bradley to the plaintiff, is concerned, that is disposed of by what we have already said in considering the effect of the payment alleged to have been made by the executors on the 7th of January, 1899. If, as we have seen, the executor had no power to create a debt against the estate of his testator,—for which there is not the slightest evidence that the testator ever was liable,—surely no acknowledgment by the executors of any such so-called "debt," even if made in the most explicit terms, could fix upon the estate of the testator any legal liability. Besides, the terms of that letter, so far from showing any acknowledgment of liability on the part of the estate, rather show to the contrary.

We will next consider the effect of the letters of the defendant D. W. Jay to Dr. W. B. Millwee; the first dated 5th of December, 1893, and the second bearing date 4th January, 1894. In the first of these letters, Jay, after saying that he had seen a copy of the note with the credits indorsed, proceeds as follows: "I made payment July 7, 1874, \$25.00. I made payment May 11, 1880, \$5. I had J. E. B. make payment Jan. 8, 1883, \$400. Please let me know who made payment Jan. 7th, 1889, of \$5, as I see there is

one of that date. I received yours of 25th Nov. I hope we can agree on a settlement of the note soon." How this language can be construed as such an explicit acknowledgment as would imply a promise to pay the balance on the note it is difficult to conceive. Although Jay, when he wrote this letter, had before him a copy of the note, with all the credits indorsed, from which it would be a very simple matter of calculation to ascertain the balance due, if there were no other element to be considered, yet, instead of making any acknowledgment that the balance thereon was due, or any promise to pay the same, he says, "I hope we can agree on settlement of note soon." If the balance were admitted, as could be shown by a simple calculation, why should Jay express a hope that they could agree on a settlement? Did not this necessarily imply that there were other elements to be considered upon which Jay expressed the hope that they might agree? And that there were other elements is distinctly shown by the terms of the second letter,—4th of January, 1894,—in which Jay uses this language: "You see from W. T. Bradley's letter to me that the note Cousin Patie [the plaintiff] holds against Bradley & Jay is invalidated by the last credit it has on it. As Uncle Aleck McCaslan's heirs set me a precedent (but one to carry out only with them) 'not to pay if invalidated by lapse of time or otherwise,' I claim invalidity of the A. L. McCaslan note, and am not willing to pay it. I would be pleased to have you come down, and let us talk the matter over. You may not know anything about Uncle Aleck's heirs and my troubles, as this all took place, I think, before you entered the family. Cousin Patie can tell you if you wish to know. I only say from my reckoning, at Uncle Aleck's death there was but little due either way, including this note." Surely, this letter contains no acknowledgment of any balance due on the note, from which any promise to pay the same could be implied; and, on the contrary, it shows that Jay distinctly repudiated any liability on the note. The most that can be said as to these two letters, whether considered separately or together, is that Jay was willing to come to a settlement, provided certain claims which he held against McCaslan (the payee of the note), which, it seems, had been repudiated by the heirs of McCaslan as barred by the statute of limitations, should be brought into the settlement. It is very clear that these two letters, whether considered together or separately, furnish no evidence of any such acknowledgment of the balance apparently due on the note as would imply a promise to pay the same; but, on the contrary, these letters only show a willingness on the part of Jay to come to a full and fair settlement of all the transactions with McCaslan, the payee of the note, which, being under seal, and therefore not nego-

tiable, was subject to any defenses which could be interposed against the original payee. We are unable, therefore, to discover any error upon the part of the circuit judge in granting the motion for a nonsuit.

There is another letter which has been commented on in the argument here, and which ought, perhaps, to receive some notice. That is a letter from the defendant J. E. Bradley to the plaintiff, bearing date September 23, 1882, in which the writer, after saying that he knew but little about the matter, and that those of the family with whom he had conferred were willing to do what is right in the case, uses this expression: "The estate will shoulder its part of the note without any litigation." When that letter was offered in evidence, defendants' counsel objected to its admissibility, but the objection was overruled, and the letter was read in evidence. Inasmuch as that letter was in no way alluded to in the complaint, and was not alleged therein to be one of the several acknowledgments relied on as implying a new promise to pay the balance apparently due on the note, we think that the letter was clearly inadmissible, as much so as if the plaintiff had offered another note in evidence which was not mentioned in the complaint. But, waiving this, and assuming that the letter was admissible, it furnishes no support for the plaintiff's action, for two reasons: (1) Because, even if that letter should be regarded as constituting such an acknowledgment as would imply a promise to pay the balance appearing to be due on the note, the action on such promise would clearly be barred by the statute of limitations; (2) because, as we have seen, J. E. Bradley, as executor, had no power to create a debt against his testator by acknowledging his liability on the note, which it is not shown that the testator ever made, or ever acknowledged in his lifetime, or ever even knew anything of. The judgment of this court is that the judgment of the circuit court be affirmed.

(98 Va. 354)

**BETHEL et al. v. SALEM IMP. CO.**

(Supreme Court of Appeals of Virginia. July 9, 1896.)

**DAMAGES—BREACH OF CONTRACT.**

Plaintiff contracted to manufacture for defendant a certain number of bricks, for which defendant agreed to pay in installments as the bricks were delivered. *Held*, that for failure on defendant's part to pay the installments, thereby rendering it necessary for plaintiff to abandon the manufacture of the bricks, for want of funds, plaintiff could recover only the amount of the unpaid installments, with interest, and not the amount of profits he would have earned if he had completed the contract.

Error to circuit court, Roanoke county; Henry E. Blair, Judge.

Action by George W. Bethel & Co. against the Salem Improvement Company. There

was a judgment for plaintiffs, and they bring error. Affirmed.

G. W. & L. C. Hansbrough and Scott & Staples, for plaintiffs in error. R. H. Logan, A. B. Pugh, and Phlegar & Johnson, for defendant in error.

**KEITH, P.** On the 20th of January, 1891, the Salem Improvement Company entered into a contract, under seal, with George W. Bethel & Co., by which the latter agreed to make and burn for the former 1,500,000 bricks during the summer of 1891; the Salem Improvement Company agreeing to pay \$6.50 per 1,000 for the bricks in the kiln, provided "the brick should not run less than two-thirds well-burned, hard bricks; that the bricks are to be examined when the kiln is burned, and, if approved by the Salem Improvement Company, it is to pay Geo. W. Bethel & Co. for three-fourths of their value, at the price aforesaid, but if, upon opening the kiln and hauling the bricks, they are found to be imperfect, and not equal to the standard above named, the Salem Improvement Company shall have the power of rejecting them." George W. Bethel & Co., under this contract, burned 803,491 bricks, and received therefor \$3,212.31. A disagreement having arisen between the parties as to their rights under this contract, G. W. Bethel & Co. on the 5th day of March, 1892, brought an action of covenant against the Salem Improvement Company, and after setting out in their declaration the terms of the contract just stated, and referring to the contract itself for the complete provisions thereof, they aver that, except in so far as they have been prevented by the defendant, they have always well and truly performed all things in the said contract on their part to be done, according to its tenor and effect, but that the defendant has not hitherto performed and kept its covenants in the said contract contained, according to the true intent and meaning of the same, "in this: that after the said plaintiffs had, according to the tenor of the contract aforesaid, manufactured 803,491 bricks, and when they were proceeding with the manufacture of the residue of the said 1,500,000 bricks, the said defendant notified the plaintiffs that it would not purchase any more of the said bricks than had already been made, and to discontinue the manufacture of the same, and that the said defendant, although the said 803,491 bricks, made according to this contract, were kilned on the said premises according to the provisions of the said contract, the said defendant hath not paid to the said plaintiffs the sum of \$6.50 per thousand for 1,500,000 bricks above mentioned, nor any part of said sum, except the sum of \$3,212.31, whereby the plaintiffs have been damaged on account of the failure to pay for the bricks actually manufactured as aforesaid, by the outlay necessarily incurred by them in the preparation for the manufacture of the residue of the said bricks, and the

failure of the defendant to allow the plaintiffs to continue the manufacture of the residue of the said 1,500,000 bricks, or to pay the plaintiffs their reasonable profit, to wit, the sum of \$3 per thousand for the same to be manufactured." The second count, after setting out the contract, states the breach as follows: "In this: that the said defendant, as soon as the said plaintiffs had manufactured the 803,491 bricks mentioned in the first count, and when they had gone to the expensive preparation to manufacture the residue of the 1,500,000 aforesaid, and were proceeding with the manufacture of the same, the said defendant notified the said plaintiffs not to manufacture any more bricks than they had already manufactured, and that it would not purchase nor pay for any bricks thereafter manufactured; and the said defendant, although the said plaintiffs had manufactured and kilned the said 803,491 bricks, which were not less than two-thirds well-burned, hard bricks, and had in every way complied with the said contract on their part to be performed, except as aforesaid, hath not paid to the said plaintiffs the sum of \$6.50 per thousand for 1,500,000 bricks as aforesaid, or any part thereof, except the sum of \$3,212.31, in the first count mentioned." The third count, after reciting the contract, states the breach thereof in the following language: "In this: that the said defendant hath not purchased of the said plaintiffs the said 1,500,000 bricks, nor paid to the said plaintiffs the said sum of \$6.50 per thousand for said 1,500,000 bricks, whereby the said plaintiffs were put to heavy costs and expenses, and incurred heavy losses, in and about performing the covenant in the said contract on their part to be performed, to wit, the sum of \$4,000.00." To this declaration the defendant filed several pleas, about which no question was made, and upon these pleas the plaintiffs joined issue; and thereupon a jury was impaneled, which, after hearing the evidence, and the instructions from the court, found a verdict for the plaintiffs, and assessed their damages at the sum of \$4,000. The defendant moved for a new trial, which the court, after consideration, granted, upon the ground, as stated in its order, that it had erroneously instructed the jury. To the ruling of the court setting aside the verdict, the plaintiffs excepted. At a subsequent term the whole matter of law and fact arising upon the case was submitted to the judge on the evidence given at the former trial, as the same appears in the bill of exceptions filed at that term. Thereupon the court proceeded to give judgment for the plaintiffs in the sum of \$1,403.04, with legal interest thereon from January 1, 1892, till paid, and their costs therein expended. The plaintiffs again excepted, and tendered their bill of exceptions, which was allowed by the court, whereupon the plaintiffs applied to one of the judges of this court for a writ of error, which was granted.

The errors assigned here are—First, to the action of the court in setting aside the verdict rendered in behalf of the plaintiffs, their contention being that there was no error in the instructions given by the court, and that it should have given judgment in their favor upon the verdict as rendered by the jury; and, secondly, that it was error in the court to give its final judgment for \$1,403.04, but that it should have been for the sum of \$3,746.07, with interest from January 1, 1892, till paid.

The instruction given by the court, and which it afterwards decided was erroneous, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiffs, up to the time they stopped the manufacture of bricks, had been manufacturing them according to the requirement of the contract, or that the bricks so manufactured had been accepted by the defendant, and that the defendant refused and failed to pay the plaintiffs the sums of money, if any, due them under said contract, as the said sums became due, and by reason of such failure the plaintiffs were forced to stop, and did stop, the manufacture of bricks, then the plaintiffs are entitled to recover for the price of the bricks manufactured by them, according to the said contract, and for the profit on the difference between the number of the bricks so manufactured by them, and 1,500,000 bricks, manufactured according to the terms of the contract; and in estimating such profit the jury shall place the bricks at the price fixed in the said contract, and deduct therefrom the cost of said bricks, as they shall believe such cost to be from the evidence." This instruction is predicated upon the performance on the part of the plaintiffs of the conditions set out in their covenant, and upon the failure of the defendant to pay to the plaintiffs the sums of money due them under the contract, as the same became payable. It is claimed by the defendant in error that this instruction was erroneous, for two reasons: First, that there was no such issue presented by the pleadings; the breach laid in the declaration being that the defendant had failed to perform the covenants in the said contract on its part to be performed, in this: "That the said defendant notified the plaintiffs that it would not purchase any more of the said bricks than had already been made, and to discontinue the manufacture of the same." The theory upon which this action was brought, as appears from the declaration, was that the plaintiffs were entitled to recover because the defendant had broken its contract, not by failure to pay for the bricks manufactured, but by its notification to the plaintiffs that it would not purchase any more of the bricks than had already been made, and to discontinue the manufacture of the same. Had this breach been established by the evidence,

there is abundant authority to warrant the verdict and judgment for the plaintiffs, upon proper instructions; but, as has already been observed, the instruction under consideration is predicated solely upon the performance by the plaintiffs of the covenants and conditions to be performed on their part, and the refusal and failure of the defendant to pay to the plaintiffs such sums of money as were due them under the contract, as the same became payable. The failure to pay the money is the cause alleged in the instruction, that forced the plaintiffs to stop the manufacture of the bricks, and which entitles the plaintiffs to recover, not only for the bricks manufactured by them according to said contract, but for the profit on the difference between the number of the bricks so manufactured by them, and the 1,500,000 bricks manufactured according to the terms of the contract, to be ascertained by placing the bricks at the price fixed in the contract, and deducting therefrom the cost of the bricks as shown by the evidence. For the breach of contract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only. *Wood's Mayne, Dam. (1st Am. Ed.) p. 15.* That this is the rule is admitted. That there are exceptions to it may also be conceded, and it is earnestly contended on behalf of plaintiffs in error that the case before us comes within the exception, and not within the rule. In support of this contention the case of *Masterton v. Mayor, etc., 7 Hill, 61*, is relied upon. That was an action of covenant, on an agreement whereby the plaintiffs undertook to furnish, cut, fit, and deliver all the marble to build the city hall of Brooklyn, to be of the best kind of white marble, from Kain & Morgan's quarry, for which the defendants agreed to pay a certain sum in installments, payable at different stages in the erection of the building. The defendants suspended work on the building, for the want of funds, and refused to receive or pay for any more marble. This was the breach complained of. Part of the marble had at that time been delivered and paid for, another part was ready for delivery, but the greater part had not yet been procured and prepared for delivery. The plaintiffs, as a part of their case, put in evidence articles of agreement between them and Kain & Morgan, made on the faith of the agreement between the plaintiffs and the defendant, whereby Kain & Morgan covenanted to furnish, in blocks prepared for cutting, all the marble required to fulfill the plaintiffs' contract, and the plaintiffs agreed to pay them a certain sum therefor, out of the sum agreed to be paid by the defendants, and in similar installments, but expressly stipulated that the said Kain & Morgan should not look to the plaintiffs, except to the funds as supplied by the defendants. The circuit judge in-

structed the jury that the plaintiffs were entitled to recover the profits which would have accrued to them from the actual performance of the contract, and that, as the rough marble was to be procured from Kain & Morgan's quarry, the contract was to be deemed a part of the performance of the plaintiffs' contract, and the plaintiffs were entitled to recover from the defendants the damages for which they would be liable to Kain & Morgan on that contract. There was a verdict for the plaintiffs for a large amount, greatly exceeding the loss of the marble actually on hand. The defendants appealed. It is obvious that the ground of complaint here was not the failure to pay for the marble already cut and delivered, but the ground of complaint, and the breach alleged, were that the defendants refused to receive or pay for any more marble, want of funds being alleged as the cause. The only item of damage in which the failure on the part of the defendants to pay money cuts any figure was the damage growing out of the contract with Kain & Morgan, with whom plaintiffs had contracted, and whom they were to pay in installments similar to the installments due the plaintiffs from the defendants; but the circuit court was reversed in the court of appeals for having allowed this damage to be computed in the verdict, Chief Justice Nelson saying, "I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract." So this may be laid out of the case altogether. Said the chief justice: "The damages for the marble on hand, ready to be delivered, was not a matter in dispute on the argument. \* \* \* The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform, in all things, on their part, and the case assumes that they were possessed of sufficient means and ability to have done so." Not that the means and ability were to be obtained from the defendants in the form of the payment of the installments as the work became due, as provided in the contract, but that the plaintiffs were possessed of sufficient means and ability, independent of what they were to receive from the defendants, to perform all things on their part to be performed, had they been permitted to do so, but they were not allowed to perform the contract, the defendants refusing to receive or pay for any more marble; but it was that refusal alleged and proved which constituted the breach for which the plaintiffs were in that case per-

mitted to recover. So far from being an authority for the plaintiffs, it seems to us that it can be relied upon to establish the contrary doctrine.

The case of *McElwee v. Improvement Co.*, reported in 4 C. C. A. 525, 54 Fed. 627, is, upon its face, a mere dictum upon the point under consideration. In that case a land company, in order to procure the erection of a mill near its land, contracted to pay a bonus to the manufacturer,—a fixed sum to be paid when the latter was ready to begin work thereon, and the rest in installments as the work progressed. The first installment was promptly paid, but two others were earned, and not paid, whereupon the manufacturer ceased work, and sued for damages for breach of contract. It appeared that his entire outlay and expenses were less than the first installment received, and there was no proof of loss or profits. Held, that he could recover nothing. The proposition upon which the plaintiff in error relies here is stated hypothetically by the court in that case, was not necessary to a decision of the case, and is a mere obiter dictum.

*Kendall Bank-Note Co. v. Commissioners of the Sinking Fund*, 79 Va. 563, was a case where, after having entered into a contract with the defendants in error, the plaintiffs in error, without any sufficient cause, revoked the contract which it had made. Thereupon the Kendall Bank-Note Company sued in the circuit court of the city of Richmond, obtained a judgment for a large sum, and the commissioners of the sinking fund brought it, upon a writ of error, to this court. Judge Lacy, in delivering the opinion, at page 573, says, "The plaintiffs can recover for prospective profits when they are prevented from going on by being ordered to desist from the work, or by the omission to perform some condition precedent to its further prosecution by the other party." The board of sinking fund commissioners had canceled the contract, and forbidden the Kendall Bank-Note Company to proceed further in the execution of it. Clearly, therefore, the bank-note company had a right to recover for whatever profits would reasonably accrue upon their contract. There is not one word said in that case about the failure to pay money, as constituting the cause of action, or that the mere failure to pay money would in any case entitle the plaintiff to recover any damages in addition to the principal sum, with lawful interest thereon. It is conceded, however, that there are such cases. A familiar example of such a case is that a banker is liable to damages for the refusal to pay a check. *Marzetti v. Williams*, 1 Barn. & Adol. 415. See, also, *Tuers v. Tuers*, 100 N. Y. 196, 2 N. E. 922.

Many instances of a like character might be given, but we have seen no case which will sustain the instruction under consideration. It is the ordinary case of a failure to comply with a contract to pay money at a

stipulated time. In such cases the measure of damages for the breach of the contract is the principal sum due, and legal interest thereon. To make a defendant responsible for the profits which might have accrued to the plaintiff by the use of the money in addition to the interest would be harsh and oppressive, and should not be sanctioned by the court, unless the plaintiff can bring his case within some well-recognized exception to the rule.

For the foregoing reasons, we are of opinion that the circuit court did not err in setting aside the verdict and granting a new trial. We are also of opinion that there was no error in the judgment rendered by the court, which is fully supported by the facts shown in evidence, and it is affirmed.

(99 Ga. 212)

#### HANYE v. STATE.

(Supreme Court of Georgia. June 18, 1896.)

CRIMINAL LAW—CONTINUANCE—HOMICIDE—MALICE—USE OF DEADLY WEAPON—INSTRUCTIONS—CHARACTER OF DECEASED—REASONABLE DOUBT.

1. This court will not reverse a judgment denying a new trial in a criminal case because the trial judge overruled a motion to postpone the trial, it appearing from his certificate that the reason given for the application to postpone was that the leading counsel for the accused, "from having traveled, was feeling too tired to go on with the case, and unwell"; and it also thus appearing that the "counsel was apparently well, and went on with the trial without \* \* \* inconvenience," and that the trial had twice before been postponed at the instance of the accused. Nor, in such case, will a new trial be granted by this court because the judge below refused to suspend the trial on the ground that leading counsel for the accused was fatigued, the judge certifying to facts showing that the accused was in no way injured by having the trial proceed.

2. It appearing upon a trial for murder that the accused used to the deceased opprobrious and insulting language tending to cause a breach of the peace, that the latter remonstrated, that the accused, after preparing for use a deadly weapon, deliberately repeated the offensive language, which the deceased then resented by a blow not disproportioned to the insult given, and that the accused thereupon attacked the deceased with the deadly weapon, using it in a manner likely to produce death, it is not, under such circumstances, cause for a new trial that the court charged, in effect, that the legal presumption of malice arising from such a use of such a weapon would not be removed because of the blow lawfully given in return for the original provocation by words.

3. The court having given in charge the sections of the Code relating to voluntary manslaughter, and having instructed the jury as to the form of their verdict in case they should convict of that offense, this, in the absence of a request for more specific and detailed instructions upon this branch of the law, was a sufficient compliance with any duty which may have devolved upon the court to charge upon the subject.

4. The character of a deceased person for violence can offer no justification or mitigation to one who slays him, when it appears that the homicide was committed under circumstances showing that the deceased had given the slayer no provocation, and that the latter could not even have believed that he was in any danger at the hands of the deceased.

5. Taking it altogether, there was no error in the charge as to the law of reasonable doubt; there was nothing in this case to invoke a charge upon the subject of involuntary manslaughter; no error was committed in refusing to charge as requested, nor in the charges, or omissions to charge, complained of; and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Arthur Hanye was indicted for the murder of Spinks, was found guilty, and sentenced to be hung. His motion for new trial was overruled, and he, excepted, and he brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in overruling the following motion to continue the case. When the case was called, counsel (Mr. Austin) stated in his place that the defense was not ready, because he was physically unable to try the case, and because counsel had not had sufficient time for the preparation of the case, having been employed therein only five days ago; that at the time of his employment his firm had an important matter pending, which had required the attention of both members of his firm, besides necessitating him (Mr. Austin) to make a trip out of the city between his employment and the day of the trial; that both counsel had worked day and night, without rest, since being employed in the case, and both were physically unable to go to trial; that counsel had seen as many witnesses as his strength and opportunity permitted, but that at 2:30 o'clock of the day preceding trial counsel had learned of the existence of two eyewitnesses to the killing, whose testimony counsel were informed would benefit the defendant; that an experienced man had been sent to find such witnesses, but had been unable to subpoena but one of them; that he (Mr. Austin) was leading counsel in the case, and had charge of same, and that he was physically unable to try the case, and moved the court to postpone the same until the following day, to wit, April 2d; that the motion was not made for delay only.

Error in overruling the motion made by counsel at 3:15 p. m., April 1st, during the trial, to suspend the case until the morning following, counsel stating in his place that he was sick, and unable to continue the trial on account of such illness.

As to the two grounds last above stated the court states: This case was set for trial on Monday, March 23, 1896. At that time the defendant was not ready, and the case was passed until Wednesday, March 25th. At that time the defendant's uncle, William E. Hanye, had a conference with the court, representing the defendant, and the case was further continued to the 1st day of April, which was Wednesday of the last week of the proposed session of the criminal branch of

the superior court of Fulton county. On Monday, March 30th, Mr. Park, of defendant's counsel, came to the court, and told him that Mr. Austin was absent from the city of Atlanta in Augusta, Ga., and that he wished to postpone the case until Thursday, or continue it for the term, for personal reasons. I told Mr. Park that Mr. Austin must come home; that I was not willing to further postpone this case, and that it would have to be tried Wednesday. Mr. Austin came into court Wednesday morning, and said that from having traveled he was feeling too tired to go on with the case, and unwell. The witnesses were brought into court, and were both examined by defendant as witnesses on the trial. Mr. Austin was apparently well, and went on with the trial of the case without any "probable" inconvenience. In the afternoon, at 3:15, after most of the evidence was in, Mr. Austin asked the court to suspend the further trial of the case on the ground of his fatigue. The court overruled this motion, and Mr. Park examined a few witnesses on the question of deceased's character for violence, and two witnesses to impeach one of the state's witnesses, and closed, and the state introduced evidence further, and Mr. Austin then examined a further witness, and the state's counsel made his opening argument for state, when, at its conclusion, the court took a recess until the next day, when both of counsel made arguments for defendant. All of the evidence offered after this motion and the opening argument for state took up one hour and three-quarters only, the court adjourning for the day about 5 o'clock in the afternoon. I saw the appearance of counsel, and I am sure that defendant was not injured in the slightest from the change from Col. Austin to Mr. Park in the examination of the few witnesses that were examined by the latter. The court felt it to be his duty, from all that he saw and knew to be true, to refuse either postponement. To have postponed the trial for one day meant a postponement for that session of the court, the session being called but for two weeks, Rockdale court being called first Monday in April; and, while the trial took but two days, I supposed, at time of passing on motion, that not less than four would be necessary. Mr. Austin had the names of Austin & Park entered on the docket of the court on the 25th of March in the afternoon. The trial was on the 1st and 2d days of April. In view of the facts stated by me, I do not think I committed error in requiring the trial to proceed, and in refusing unnecessary and ill-timed motions to delay.

Error in charging: "If you believe from the evidence that the defendant used opprobrious words to the deceased, and that the deceased resented them by slapping or striking the defendant with his hand, I charge you that such blow would not be considered as such considerable provocation as would rebut the presumption of malice on the part of the

defendant in killing the deceased, provided you shall believe that the striking was not disproportioned to the insult offered, if any. As to whether the words were opprobrious as used, if used, and as to whether, under the circumstances as testified to by the witnesses, the striking, if any, was disproportioned to the insult offered, if any, are questions for your consideration solely. If without adequate provocation a person strikes another with a deadly weapon,—one likely to produce death,—and kills, although he had no previous malice against the party, he is to be presumed to have had such malice at the moment from the circumstances, and is guilty of murder.” Alleged to be error—First, in telling the jury that, as matter of law, if the defendant on trial had used opprobrious words to the deceased, and the deceased had resented them by slapping or striking the defendant with his hand, such blow would not be such considerable provocation, and would not rebut the presumption of malice in killing deceased, provided the striking was not disproportioned to the insult. And, second, error, further, in not charging the jury correctly as to the law applicable to the evidence, and then leaving it to the jury to say whether or not, under the facts of the case, there was such considerable provocation as would rebut the presumption of malice. And, third, it was error to limit the jury, in considering the facts covered by the first part of said charge, solely to two questions, viz. whether, under all the circumstances, as testified to by the witnesses, the words were opprobrious, if used, and the striking disproportioned to the insult, if any. Movant contends that under the evidence and statement of defendant the court should have charged the jury that, if they believed the words were opprobrious, they should look further, and see at what time the deceased resented them, and whether or not, between the provocation and resentment, the defendant retracted or apologized, and whether or not the words, even if opprobrious, were used in good humor, and in a joking way, and whether or not it was the intention of the defendant to simply greet the deceased in a friendly way or to insult him, and whether or not the defendant apologized as soon as he saw the deceased objected to the words used, and then left it to the jury to say whether or not, under the facts and the law, malice was to be inferred, and whether or not the killing was murder, or some lower grade of homicide. Movant contends that under the charge as given the jury was too much restricted, and, coupled with the last part of the charge objected to, were constrained to find a verdict of murder, and especially so inasmuch as the extract from the charge above quoted contains all of the general instructions to the jury on the question of insult, provocation, presumption of malice, etc., and inasmuch as the court nowhere instructed the jury what rules should govern them in making up their ver-

dict should they find that the blow struck by the deceased was disproportioned to the insult offered, but wound up his charge by telling the jury that if, without adequate provocation, etc., the deceased was killed, malice was to be presumed at the moment from the circumstances, and rendered the defendant guilty of murder. And, fourth, error is specially assigned upon the latter clause of the extract from the charge quoted, to wit: “If, without adequate provocation, a person strikes another with a deadly weapon,—one likely to produce death,—and kills, although he had no previous malice against the party, yet he is to be presumed to have had such malice at the moment from the circumstances, and is guilty of murder.” Movant says that the same is not the law. Said charge is error in using the word “adequate,” and thereby instructing the jury that provocation must be adequate, or the defendant would be guilty of murder; and in not instructing the jury that, even though the provocation might not be adequate, to justify the killing, they might still consider such provocation for the purpose of determining whether or not such provocation would reduce the killing to manslaughter; and error thereon is further assigned because there was no evidence going to show that the knife used was a deadly weapon, or one likely to produce death, and no evidence that the knife was used in such a place or in such a way upon the deceased as was likely to produce death. It is further error in stating to the jury that, although he (defendant) had no previous malice against the deceased, he is to be presumed to have had such malice at the moment, from the circumstances, and therefore is guilty of murder. This is error because it is not the law, and because it is the intimation of an opinion as to the weight of the evidence, and in telling the jury what facts in the case on trial would constitute malice, and further instructs the jury what facts in the case on trial would render the defendant guilty of murder. Movant contends that the court, at least, should have added, substantially, “Unless the defendant or the circumstances show the contrary,” or, “Provided that there was no assault upon the person killing, or attempt otherwise to do him a violent personal injury by the deceased.”

Error in charging on the question of reasonable doubt: “A reasonable doubt must arise from a candid and impartial consideration of the evidence in the case, and then it must be such a doubt as would cause a reasonably prudent and considerate man to hesitate and pause before acting in the graver and more important affairs in life. After a careful and impartial consideration of the entire case, if you can see and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt.” Error is assigned upon the first paragraph of the above extract from

the charge, because this instruction authorized the jury to find the defendant guilty if a reasonable doubt should be removed by a preponderance of the evidence in support of the charge against him, inasmuch as men pause and hesitate, but also act in the graver and more important affairs in life upon convictions or beliefs founded upon a mere preponderance of evidence; and movant contends that said charge is error because, while the court charged that a reasonable doubt must be a doubt arising from the evidence, his honor failed to charge that such a doubt might also arise from the want of the evidence; and error is assigned upon the second paragraph of above extract from the charge because the court therein expressed an opinion as to what amount of conviction in the minds of the jury would satisfy them beyond a reasonable doubt. The standard fixed by the court, to wit: "If you can see and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt,"—is, movant contends, not the standard of the law, and fixes a standard entirely ignoring the law of reasonable doubt. Movant contends that the court should have charged the jury that: "If you can see and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge beyond a reasonable doubt, then it would be your duty to convict; but if you are not thus satisfied beyond a reasonable doubt, then you should not convict."

Because the court erred in not charging the law of involuntary manslaughter; the statement of defendant and the contention of his counsel upon the trial being that the cutting upon the head of the deceased was an accident, and brought about by a struggle between the defendant and the deceased, and by the falling of the deceased upon the defendant and upon the knife while open in the hand of the defendant; movant also contending upon the trial, and now in this motion, that the defendant's statement showed there was no intentional killing of the deceased, and that, at most, the defendant was only guilty of involuntary manslaughter in the commission of an unlawful act, or of a lawful act without due caution and circumspection. Counsel for the defendant called the attention of the court to this grade of manslaughter, and requested the court to charge section 4327 of the Code. As to this ground the court states there was no request in writing, as required, for any charge on the subject of either voluntary or involuntary manslaughter.

Error in refusing to give in charge the following written request of defendant: "If you believe from the evidence that the defendant did not open his knife until he was struck by deceased, and that he drew his knife to defend himself from attack, and

that he did not intend to kill the deceased, and that in the struggle the deceased received an accidental wound which produced his death, whether this would be justifiable homicide or involuntary manslaughter in the commission of a lawful act would depend on whether the defendant, in the struggle over the knife, used due caution and circumspection. If you believe from the evidence that the deceased was a violent and dangerous man, that great disparity of physical strength existed between Spinks and Hanye, that defendant knew of deceased's violent character, and that, after being attacked, he drew his knife, fearing that deceased would make a felonious assault upon him, and that such fear was that of a reasonable man, and that at the time the mortal wound was made the defendant was not trying to cut deceased, but that said wound was accidental, and that defendant was at the time using due caution and circumspection, and was struggling only to defend himself, then such accidental killing would be justifiable homicide; but if you find that defendant, while not intending to cut, failed to use due caution and circumspection, then such accidental killing would be involuntary manslaughter." As to the two grounds last above stated, the court states that they were covered by one request to charge, and that there was but one request to charge made in the case.

Because the court erred in not giving the jury any instruction anywhere in his charge to guide them in deciding whether or not the defendant was guilty of voluntary manslaughter, the only instruction given the jury being merely reading the Code, § 4325, the court failing to instruct the jury anywhere in his charge that if they believed that an assault had been made upon the person killing, if the blow which deceased gave defendant was disproportioned to the opprobrious words used by the defendant, and if such blow justified the excitement of passion, and excluded all idea of deliberation and malice, either expressed or implied, and if under these circumstances the defendant killed the deceased, even though intentionally, and even though such killing might be intentional and unlawful, it would only be voluntary manslaughter, provided the killing was the result of that sudden, violent, impulsive passion supposed to be irresistible. The court, in giving the form of the verdict, told the jury if they should believe, from the evidence and the law given in charge, the defendant guilty of voluntary manslaughter, then to find that verdict, but nowhere in his charge did the court instruct the jury under what circumstances, in the case on trial, if they should believe them to be true, they would be justified in acquitting the defendant of the crime of murder, and authorize a conviction of voluntary manslaughter. Movant's counsel inquired

of the court, before his honor commenced his charge, as to what the court would charge, without a written request as to manslaughter, and the court stated to counsel that he had decided to charge the law of voluntary manslaughter.

Error in instructing the jury as to the form of their verdict in the event they found the defendant guilty of murder, the instruction being as follows: "Punishment for persons convicted of murder shall be death, but may be confined in the penitentiary for life if the jury trying the case shall so recommend. If you find this defendant guilty, you say, 'We, the jury, find the defendant guilty.' That, without more, would mean that the court would of necessity sentence the defendant to the extreme penalty of the law. If you should believe that this is a case in which the extreme penalty of the law should not be inflicted, but should believe that this defendant should be punished by imprisonment in the penitentiary for life, then the form of your verdict will be, 'We, the jury, find the defendant guilty, and recommend that he be imprisoned in the penitentiary for life.'" These instructions, movant contends, limited and circumscribed the jury regarding such recommendation, and prescribed a rule by which the jury might or ought to exercise that discretion. Movant contends that in the eye of the law both verdicts sentence the defendant to the extreme penalty of the law, and that this distinction made by the court was hurtful to the defendant. According to the instruction of the court, the jury were not allowed to recommend the defendant to life imprisonment, unless they should believe that it was a case in which the "extreme penalty of the law" (meaning death) should not be inflicted. Movant contends that, even though the jury might believe that it was a case in which the "extreme penalty of the law" should be inflicted, still the jury would have the right, with or without reason, to recommend to life imprisonment, and were not required to believe that it was a case in which the death penalty should not be inflicted, before exercising their free and untrammelled discretion of recommending either punishment they saw proper.

Error in charging: "When a man commits an unlawful act, unaccompanied by circumstances justifying its commission, it is a presumption of law that he is acting advisedly, and with the intention to produce the consequences which have ensued,"—the error being in holding that, when a man commits an unlawful act, he must be justified in its commission before the presumption of law could be removed that he was acting advisedly, and with an intention to produce the consequences of his act which did ensue; and in holding that it is a presumption of law that a man is acting advisedly, with an intention to produce the consequences which have ensued, when

he commits an unlawful act unaccompanied by circumstances justifying its commission. Movant contends that such is not the law, and that any act which would otherwise be unlawful, if accompanied by circumstances justifying its commission, would not be unlawful, but would be lawful. In holding that in the case at bar the act of the defendant would have to be justified by circumstances in order to remove the presumption that he was acting advisedly, and with an intention to kill the deceased, the court, in effect, directed the jury to find the defendant guilty of murder. Under this charge the jury could not possibly find the defendant guilty of manslaughter, for, according to the rule laid down by the court, an unlawful act had to become a lawful act by circumstances justifying its commission, before the defendant could be relieved in any particular from the consequences of that act. This charge entirely eliminated each and every lower grade of homicide, and, according to the rule laid down by the court, if the act of the defendant was not justified by the circumstances, even though the battery committed upon the defendant by the deceased may have been disproportioned to the alleged insult, or even though the killing might have been accidental, but caused by culpable neglect, still the defendant would be presumed to have acted advisedly, and with the intention to kill the deceased, and therefore guilty of murder, unless entirely justified.

Error in charging on the question of reasonable doubt: "A reasonable doubt must arise from a candid and impartial consideration of the evidence in the case, and then it must be such a doubt as would cause a reasonably prudent and considerate man to hesitate and pause before acting in the graver and more important affairs in life,"—the error in said charge being that, while the court charged that a reasonable doubt must be a doubt arising from the evidence, his honor failed to charge that such a doubt might also arise from the want of evidence.

Error in not explaining to the jury, after charging Code, § 4302, what would be the consequences in case the killing was the result of culpable neglect, a mere charging of the bare section being calculated to leave the jury to infer that, if the killing was the result of culpable neglect, the crime would be no less than that of murder. Movant contends that, having undertaken to charge the law of killing by misfortune or accident, the court should have given the jury some instruction as to what verdict they should render if they found that the death of the deceased was the result of misfortune or accident, provided the jury thought it did not satisfactorily appear that there was no evil design or intention or culpable neglect.

Error in charging: "He (defendant) can derive no advantage from the character of the deceased for violence, if you should believe that the killing took place under circumstances that showed that he did not believe himself in

danger at the time of the killing; but if you should have any reasonable doubt as to whether the homicide was perpetrated in malice, or from a principle of self-preservation, then you may consider such character for the purpose of throwing light upon the motive by which the defendant was influenced."—the error being that said charge was not a fair presentation of the law, and in restricting the jury in considering the character of the deceased for violence, and in not allowing them to consider such character, unless they had a reasonable doubt as to whether the homicide was perpetrated in malice, or from a principle of self-preservation. Movant contends that under the evidence the jury may have considered the character of the deceased for violence, in order to throw light upon the motive by which the defendant was influenced; and, if this evidence generated a reasonable doubt in the minds of the jury, they should have given the defendant the benefit of it. To require the jury to first have a reasonable doubt in their minds before they could consider such evidence was, perhaps, to exclude such evidence entirely from their consideration, when, had they been allowed to consider such evidence, it might have generated in their minds the belief beyond a reasonable doubt that the defendant was acting from a principle of self-preservation. It was error, further, in not instructing the jury what effect the character of the deceased for violence would have, and what weight to give it in the case, if, under the court's instruction, the jury should consider it.

Because the charge as a whole was strongly prejudicial to the defendant, constraining the jury to find the defendant guilty of murder, and debarring the jury from even considering the evidence with a view to determining if a lower grade of homicide might be found under the facts; and because the charge wholly excluded the theory of defense offered by the defendant and contended for by his counsel, to wit, involuntary manslaughter, or justifiable homicide, or at most no higher grade than voluntary manslaughter; and because the charge as a whole limited the jury within lines so narrow that the defendant was deprived of an absolutely fair and impartial trial by the jury, as was his right.

Austin & Park and W. R. Hammond, for plaintiff in error. C. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 234)

HENDERSON et al. v. SAWYER.  
(Supreme Court of Georgia. July 13, 1896.)  
CONSTRUCTION OF DEED—ESTATE—TENANT IN COMMON.

1. Since the adoption of the Code, a mere repugnance in words will not authorize a court to

hold that there is a real repugnance in a deed, and consequently to annul the latter of two inconsistent clauses therein, when the actual intention of the maker, viewing the instrument as a whole, can be arrived at without serious difficulty. Code, § 2755; *Thurmond v. Thurmond*, 14 S. E. 198, 88 Ga. 182; *Bray v. McGinty*, 21 S. E. 284, 94 Ga. 192, and cases cited; *Rollins v. Davis*, 23 S. E. 392, 96 Ga. 107.

2. Accordingly, where premises described in a deed were thereby "granted, bargained, and sold" to a named person, "her heirs and assigns," to have and to hold "unto her \* \* \* and the heirs she may have by" one Baker, her husband, "her Baker heirs," "to them and their own proper use, benefit, and behoof forever, in fee simple," the effect of such deed was to convey the title to the grantee named, and her three children in life when it was executed, as tenants in common.

(Syllabus by the Court.)

Error from superior court, Twiggs county; C. C. Smith, Judge.

Action by Victoria Henderson and others against Amanda Sawyer. From an order granting a nonsuit, plaintiffs bring error. Reversed.

The following is the official report:

The three children of Mrs. Baker brought their action for the recovery of an undivided three-fourths interest in certain land. It was admitted that both plaintiffs and defendant claimed under a deed from one Bryant to Mrs. Baker, bearing date October 25, 1876, whereby, in consideration of \$2,000, the grantor "hath granted, bargained, sold, and by these presents doth grant, bargain, sell, and convey, unto the said Mary A. M. Baker, her heirs and assigns," the land in question, "to have and to hold said parcels of land unto her, the said Mary A. M. Baker, and the heirs that she may have by Solomon Baker (her Baker heirs), and assigns, with all the rights and appurtenances belonging, to them and their own proper use, benefit, and behoof forever, in fee simple." Mrs. Baker is yet living, and the plaintiffs are the only children of her and Solomon Baker. They were born in 1860, 1865, and 1870. The court granted a nonsuit upon the ground that plaintiffs did not take anything under the deed; the words in the habendum being inconsistent with the words granting the premises to Mrs. Baker, and therefore void.

L. D. Moore, for plaintiffs in error. Ryals & Stone, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 239)

CLARK v. FLANNERY et al.  
(Supreme Court of Georgia. July 13, 1896.)  
RES JUDICATA—ACTION AGAINST TRUSTEE—RIGHTS OF BENEFICIARIES.

1. Where, in an action against a trustee, the declaration contained allegations showing that the debt sued upon was a debt of the trust estate, binding upon it, and lawfully collectible by the sale of certain described property, and judg-

ment was rendered accordingly, this judgment, though the trustee may have neglected to make the proper defense to the action, was, nevertheless, conclusive upon the *cestui que trust* represented by the trustee; and an equitable petition filed in their behalf by a next friend, for the purpose of setting the judgment aside, was properly dismissed on demurrer. If the trustee was unfaithful to his trust in improperly allowing the judgment to be rendered, he and his sureties, if any, are liable to the beneficiaries thus injured.

2. The law of this case was practically settled by the decision of this court therein at the March term, 1895 (22 S. E. 386, 96 Ga. 782).

(Syllabus by the Court.)

Error from superior court, Pulaski county; O. C. Smith, Judge.

The following is the official report:

Clark, as next friend of the seven minor children of J. A. D. Coley, brought his petition against John Flannery & Co. and the sheriff of Pulaski county, praying that they be enjoined from selling certain land under an execution founded on a judgment hereafter mentioned, and that said judgment be set aside and declared void, or so reformed as not to interfere with the property levied on, and for general relief. There was a hearing for interlocutory injunction, and the same was denied, which ruling was affirmed by the supreme court. 96 Ga. 782, 22 S. E. 386. Afterwards the cause was heard on demurrer to the petition; and this demurrer was sustained, and the petition dismissed. Plaintiff brings error. Affirmed.

The grounds of the demurrer were, in brief: (1) No equity; (2) *res adjudicata*; (3) too long delay in seeking equitable intervention; (4) insufficient ground for interference with the judgment. It appears from the record that the land in question was devised by the will of Alatia Coley, a brother of J. A. D. Coley, to J. A. D. Coley, in trust for the children named in the petition, for and during the natural life of J. A. D. Coley, and then to vest in and become the property of the children, or such of them as may be living at such time. The will was dated December 22, 1885, and was probated and admitted to record on January 4, 1886. On January 17, 1894, John Flannery & Co. brought suits in Pulaski county court upon certain promissory notes signed by J. A. D. Coley, trustee. Their petition alleged that J. A. D. Coley, as trustee for his children, naming them, was indebted to plaintiffs in the sums sued for upon the note, a copy of which was set out; that said note was given for money furnished by the plaintiffs for the trust estate for which Coley was trustee, which money was necessary for the trust estate, and used for and by it for the benefit of the *cestui que trust*; that said trust estate consists of 400 acres of land (the land in question), whereon Coley, trustee, and the *cestui que trust*, reside, and of certain described personal property on said place; and that said property is trust property, and is subject to plaintiffs' debt, for which they pray judgment. On February 8, 1894, judg-

ment was rendered in the county court in each case by default, in favor of plaintiffs against J. A. D. Coley, as trustee for the children, naming them, for the amount of the note, with interest; the judgments reciting that, it further appearing that the claim of the plaintiffs is one for which the trust estate is liable, judgment is rendered against the trust property in the [hands of] said trustee, describing the realty and personalty before mentioned, and that execution issue against said property, etc. The present petition alleges that J. A. D. Coley undertook to discharge the duties delegated to him in the will, as trustee, and took possession of the property therein mentioned, he neither having nor claiming any title or interest therein except only a life estate in the office of trustee; that the consideration of the notes which he gave to plaintiffs was money borrowed by him for his own personal use and the use of his wife and children, and only a small portion of the money, if any, was used for the benefit of the trust estate, and but little of it was used for the benefit of the *cestui que trust*; that Coley, though well knowing the material allegations of the declarations in the county court to be untrue, neglected and failed to make any defense to said suits, but allowed judgments to be taken against him by default and against the trust estate, without any proof except the production of the notes; that in the fall of 1893 he delivered to Flannery & Co. four bales of cotton, as a credit on the indebtedness aforesaid, but, owing to their fault or neglect, no credit was given him therefor, and judgment was rendered for a much larger amount than was due on the notes; and that J. A. D. Coley is insolvent, and, if this land is allowed to be sold, it will strip the minor children of the provision made for their support by their uncle, without any fault on their part, and without any equivalent for the debt for which the property is sold. By amendment, it is alleged that, before and when judgment was taken in the county court, it was agreed between Coley and the firm of Flannery & Co., who represented them, and their attorney, that a credit should be allowed on the notes for the value of four bales of cotton previously delivered to Flannery & Co., and about which there was no dispute, the value of said cotton being over \$100, the exact amount to be ascertained by a calculation which Johnson was to make from his memorandum; and, upon this agreement, Coley agreed to allow judgment to be taken against him for the balance, and, in violation of this agreement, said attorney entered up judgment for the full amount of the notes, without the knowledge or consent of Coley, and after he had left the courthouse. The record of only one of the suits in the county court is attached as an exhibit to the petition. The judgment therein rendered is dated February 6, 1894. The pres-

ent petition was brought on December 27, 1894.

W. L. Warren and Grice, Harrison & Peebles, for plaintiff in error. J. H. Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 228)

**BOREN v. MANHATTAN LIFE INS. CO.**  
(Supreme Court of Georgia. July 13, 1896.)

**AUTHORITY OF AGENT—PAROL EVIDENCE.**

Although it may have been within the scope of the authority of certain general agents of the defendant insurance company to employ for it a subagent, and bind the company to pay him for services rendered, the company was not bound for the compensation of a person who was employed by these general agents, in their individual capacity, to work for them; nor was parol evidence admissible to vary the terms of a plain and unambiguous written contract between these general agents and the plaintiff, under the terms of which he was their employé, and not the employé of the company.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

The following is the official report:

M. R. Boren sued the Manhattan Life Insurance Company to recover certain commissions which he alleged were due him under a contract made with him on January 10, 1893, by Carroll & Bonham for and in behalf of defendant, they having full authority therefor. Upon the trial, the court having rejected the material evidence offered by the plaintiff, and defendant introducing no testimony and not moving for a nonsuit, a verdict in its favor was directed by the court, to which ruling, and to each of the others hereafter shown, plaintiff excepted and brings error. Affirmed.

When the case was called, counsel for defendant made an oral response to a notice to produce the written contract between Carroll & Bonham and the defendant, under which they were acting at the time of the making of the contract sued on, and said that defendant had notified them that the contract was in his hands, but that he did not have it, and did not think he ever had it. Both parties then announced "Ready," plaintiff stating he would go to trial without the written contract. He then offered in evidence the contract sued on, which recites that it is an agreement entered into "between Carroll & Bonham, general agents for the Manhattan Life Insurance Co., of New York, of the first part," and the plaintiff, of the second part; that the party of the first part agrees to employ the party of the second part, who agrees to serve the party of the first part exclusively and faithfully, "under the rules of the Manhattan Life Insurance Co., as their special agent in Central

Georgia and South Carolina, \* \* \* to solicit applications for insurance in the Manhattan Life Insurance Co. in all parts of the district above described, and to do all in his power to promote the interests of the Manhattan Life Insurance Co. in said district; to collect the premiums, interest, and charges on all policies issued upon applications procured under this agreement; to make a return to the party of the first part at their office in the city of Augusta, Ga., on the first of each and every month, or oftener if required by the party of the first part, of all collections for policies charged to him, and to fully account for and return all policies intrusted to him, remitting to the said party of the first part by bank draft, or otherwise if required, with such reports, all funds, notes, vouchers, policies, etc., belonging to the Manhattan Life Insurance Co., said party of the second part being personally responsible to the party of the first part for his acts and collections." The contract then provides that, in consideration of the services of the party of the second part, the party of the first part agrees to pay him a certain specified percentage upon the various kinds of policies subject to be written, it being agreed that no claim for commission shall be valid until the premium on the policy shall be received by the party of the first part in cash; that upon the termination of this contract a settlement shall be had between the parties hereto, and the party of the second part shall pay over to the party of the first part all moneys collected, and return to "them" all policies, notes, vouchers, and other property in his possession belonging to the Manhattan Life Insurance Company, and that the party of the first part, or any special agent authorized by "them," shall have the right to solicit insurance and collect premiums, during the existence of this contract, in the territory assigned to this agency. This contract was signed by "Carroll & Bonham, M. R. Boren." Defendant objected to this evidence on the ground that it was no party to the contract, and could not be bound by it, nor did the same purport to be a contract by defendant. Plaintiff then offered to show by parol that Carroll & Bonham were general agents of defendant, with power and authority to make the contract, and that they made it, not for themselves individually, but for defendant. This was objected to, and excluded, for the reason that it appeared that the contract between Carroll & Bonham and defendant was in writing. Plaintiff testified that, when Carroll & Bonham made with him the contract sued on, they had before them their contract with defendant, and referred to it constantly. They represented themselves as general agents of defendant, with full power to make a contract, and made it, not for themselves individually, but in their capacity as general agents of defendant, and in defendant's be-

half. This was objected to for the reason that plaintiff could not prove the agency of Carroll & Bonham by their sayings. Plaintiff then identified the following letter as having been written by Carroll & Bonham: "The Manhattan Life Insurance Company of New York. Carroll & Bonham, Gen'l Agents, Dyer Building, Augusta, Ga., Jan. 20th, '93. Dr. Rush M. Brown, Cordele, Ga. —Dear Doctor: This will introduce to you our friend Mr. M. R. Boren, who will represent the Manhattan in your section. Give Mr. Boren every assistance in your power in the prosecution of his work, and the same will be gratefully remembered. Yours, truly, Carroll & Bonham, General Agents." Plaintiff then introduced a policy of insurance of defendant to P. S. Tatum, and testified that it was procured through his solicitation, under the contract sued on, and upon an application sent by him through Carroll & Bonham. This policy was dated February 21, 1893, and upon the back of it were the words, "Carroll & Bonham, Augusta, Ga., General Agents." Plaintiff further testified that Morgan acted as general superintendent for defendant,—introduced himself to plaintiff as such, in the office of Carroll & Bonham, shortly after the making of the contract sued on; he said that Carroll & Bonham were general agents of defendant, and had notified him of the contract which they had made with plaintiff for defendant, and expressed his pleasure in the fact that plaintiff was going to work for defendant. He was recognized by Carroll & Bonham as general superintendent for defendant, and he superintended their work. This testimony was objected to for the reason that Morgan's agency and powers could not be proved by his own sayings, and the objection was sustained. Plaintiff testified that Carroll & Bonham sent their reports as general agents to the defendant through Morgan; he only knew this from what Carroll & Bonham told him. This was rejected on the ground that the written reports were the highest evidence, and on the ground that the testimony was hearsay. Plaintiff testified that he sent to Carroll & Bonham applications for policies in the defendant company, and letters to Carroll & Bonham accompanying them, and the policies were sent back by them to him for the applicants. This also was rejected on the ground that the writings referred to were the highest evidence of the facts sought to be proved. Plaintiff testified that the duties of general agents of life insurance companies were to appoint subagents for the company, and to oversee their work, and to exercise a general supervision over the special agents appointed by them. This was ruled out as incompetent and irrelevant. One Thomson testified that about the first of 1893 he had some collections to make for defendant, given him by Morgan, who claimed to be the general superintendent for defendant, and

he superintended these collections. He procured for witness some papers needed as evidence, which he said were at the office in New York. The representation made by Morgan was objected to on the ground that his sayings could not establish his agency; and the objection was sustained, the rest of the evidence being allowed to remain. The court then ruled out the contract sued on, and also ruled out the letter from Carroll & Bonham to Dr. Brown, upon the ground that the same was irrelevant unless the authority of Carroll & Bonham was shown. Plaintiff offered to show that work had been done by him for defendant, and what was due him. This was rejected on the ground that there was no evidence that plaintiff had any contract with defendant, or that it was liable on the contract in question.

Hal Lawson, for plaintiff in error. D. B. Nicholson and J. H. Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 353)

FRICK et al. v. HORNE.

(Supreme Court of Georgia. Oct. 21, 1895.)

APPEAL—REVIEW OF EVIDENCE.

The case turning upon the question whether or not the descriptive words "eight horse-power Eclipse engine on sills, 6x9 cylinder, No. 4,547," as used in a bail-trover declaration, and the judgment rendered thereon, included a boiler and certain attachments thereto, and this question having been fairly submitted to the jury by the court in its charge, and they having, upon sufficient evidence, determined it in the defendant's favor, there is no cause for granting a new trial. (Syllabus by the Court.)

Error from superior court, Dodge county; C. O. Smith, Judge.

Action by Frick & Co. against S. E. Horne. Judgment for defendant, and plaintiffs bring error. Affirmed.

De Lacy & Bishop, for plaintiff in error.

E. A. Smith, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 446)

SWIFT et al. v. REGISTER et al.

(Supreme Court of Georgia. Oct. 21, 1895.)

ATTORNEY AND CLIENT—SETTLEMENT OF SUIT—PROSECUTION FOR FEES—EVIDENCE.

1. Where an attorney at law, upon a fee contingent upon recovery, brought an action to recover damages, and thereafter the plaintiff and defendant, between themselves, without the consent of the attorney who brought the suit, settled the matter in controversy, if the latter continue the prosecution of the cause to recover fees, it is, in any event, indispensable to the maintenance of his action that he prove the material allegations of the original declaration, and

establish a liability upon the part of the defendant to his client, the plaintiff. Such liability cannot be shown by the mere opinion of the original plaintiff that he was entitled to recover in that case an amount stated, no facts whatever being stated upon which this opinion was based.

2. In the present case, the evidence, otherwise than as above indicated, being wholly silent upon the question of the defendants' liability, no case for a recovery was made, and the court did not err in directing a verdict for the defendants.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by A. C. Swift and another against Register, Wyly & Schmidt. Judgment for defendants. Plaintiffs bring error. Affirmed.

The following is the official report:

The case of Swift & Swift against Register, Wyly & Schmidt came on to be tried. Plaintiffs' counsel announced to the court that the parties had met and settled the case in vacation, and that they wished to try the case to secure a judgment against defendants for their fees; said settlement having been made without their knowledge or consent, and without any authority to settle their lien for fees. The case proceeded, and, at the close of the evidence, the judge below ruled that the settlement having been made with the knowledge, consent, and approval of Hal Lawson, "one of the attorneys of record" in the case, the defendants were relieved from liability for fees to plaintiffs' attorneys, and directed a verdict for defendants, which verdict was rendered. Plaintiffs excepted, alleging that the court erred in holding that plaintiffs' counsel could not recover their fees from defendants under the facts of the case, and in directing said verdict. Taylor, one of plaintiffs' counsel, testified: He wrote out the original petition in the case, and he and Col. Hal Lawson wrote from that the petition filed in the case upon which the trial is now being had. Witness is the leading and original counsel in the case. His contract with plaintiffs was and is that his fee was one-half that he recovered in the case. He had not been consulted about the settlement of the case, nor had he given any one authority to settle his fees or lien therefor. Swift, one of plaintiffs, testified: Plaintiffs and defendants have settled the case. Plaintiffs got \$900 for this and two little cases. In the settlement, this case was estimated at about \$600. This case covered dealings for \$30,000 to \$40,000 worth of lumber, and there was justly due to plaintiffs on this case \$1,300. For the defendants, Lawson testified: "Taylor first wrote out the petition, and then he and I put it in shape, and made the original petition filed. Plaintiffs consulted me about the settlement of the case, and I told them to settle it. I had no authority to settle any fees due the other counsel, and did not do so. D. H. Pope, one of counsel, represented plaintiffs in the motion made to transfer the case to United States court. I was of coun-

sel in the case. It appears that the original petition was signed: 'D. H. Pope & Son, Jordan & Watson, T. O. Taylor, and Hal Lawson, Piffs.' Attya.'"

D. H. Pope, Jordan & Watson, and T. O. Taylor, for plaintiffs in error. J. H. Martin, for defendants in error.

ATKINSON, J. The official report states the facts. Whether or not the settlement of the original cause of action between the parties, with the approval of one of the counsel for the plaintiffs, is binding likewise upon his associate counsel to the extent of preventing a further prosecution of the suit by the latter for the purpose of recovering a contingent fee, we will not in the present case pause to inquire. This was permitted by the trial court. To the successful prosecution of such an action, after settlement between the original parties, by the counsel employed upon a contingent fee for the purpose of recovering the fee stipulated to be paid to him in the event of a recovery, it is absolutely indispensable that he should prove by competent evidence the right of the plaintiffs to recover in the original case. See *Rodgers v. Furse*, 83 Ga. 115, 9 S. E. 669, which is directly in point to this proposition.

When we look to the record in this case, we find no evidence upon which a verdict could possibly rest in favor of the plaintiffs against the defendants had the parties been at issue upon the original suit. The action involved a settlement of accounts between the parties touching the operations of a saw-mill and various other business enterprises between them, and the only evidence of the right of the plaintiffs to recover is to be found in the opinion expressed by one of them when put upon the witness stand, to the effect that they (the plaintiffs) were entitled to recover \$1,800 in this action. This was purely a matter of opinion and conjecture. It was the very question the jury was entitled to try, and the witness was not competent to decide that question for them. With the case in this condition, and upon this main feature of the defendants' liability, there being no evidence upon which a verdict could legally be rendered, against them, the court did not err in directing a verdict in their favor, and for that reason the judgment of the court below is affirmed.

(37 Ga. 441)

SPENCE v. CONEY et al.

(Supreme Court of Georgia. Oct. 21, 1895.)

DISTRESS WARRANT—FORTHCOMING BOND—DEMAND.

Where a distress warrant was levied upon personal property, and a claim was filed by a third person, who gave a forthcoming bond in terms of the statute, an action against the principal and sureties thereon was, after the property had been found subject to the warrant, maintainable without a readvertisement of the property for sale, and without proving that any

personal demand therefor had, before suit, been made upon the defendants, it affirmatively appearing that it would have been physically impossible for them to produce the property in response to any such advertisement or demand. (Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Action by C. C. Spence, for the use of Mrs. Davis, against Coney, Lovejoy & Co. Judgment for defendants. Plaintiff brings error. Reversed.

W. L. & Warren Grice, for plaintiff in error. T. C. Taylor, for defendants in error.

LUMPKIN, J. A distress warrant in favor of Mrs. Davis against one Mercer was levied on certain personalty, which was claimed by Laidler, who gave a forthcoming bond for the delivery of the property at the time and place of sale, provided it should be found subject to the distress warrant. It was subsequently found subject; and, without advertising it for sale, or demanding of the claimant or his sureties a surrender of its possession, the constable brought an action against them upon the forthcoming bond. On the trial it appeared from the defendants' own testimony that none of them had possession or control of the property, and that they could not possibly have produced it if it had been demanded of them by the officer. The court granted a nonsuit on the ground that it had not been shown that the defendants had used or carried off the property, or that a demand had been made upon them for the same. This, we think, was error. It has been frequently decided that an advertisement of property for which a forthcoming bond has been given is unnecessary when such property has been consumed, or otherwise disposed of, so as to render it impossible for the obligors in the bond to deliver the same to the levying officer on demand. *Lassiter v. Byrd*, 55 Ga. 606; *Bowen v. Penny*, 76 Ga. 743; *Anderson v. Banks*, 92 Ga. 121, 18 S. E. 364. These cases proceed upon the idea that where an obligor has voluntarily placed himself in a situation which renders it impossible for him to comply with the obligation he has assumed, he is to be treated as abandoning and renouncing his contract, and consequently committing a breach thereof. Such, unquestionably, is the true law on the subject. "As the renunciation of a contract before performance is due is equivalent to a breach, and entitles the injured party to sue immediately, so if one party, by his own act, makes performance of his promise impossible, the other may at once bring an action against him for a breach." 3 Am. & Eng. Enc. Law, p. 907. It is a mistake to suppose that a breach of a written obligation can result only after the time for performance therein stated has arrived, and due demand for performance has been made and refused. "A party to a contract may break

it in one of three ways: (a) By renouncing his liabilities under it; (b) by rendering performance of his promise impossible; (c) by totally or partially failing to perform what he has undertaken." *Id.* pp. 903, 904. Even where the contract stipulates that performance is not due until a certain time, or the happening of a certain event, if a party voluntarily abandons his contract before demand for performance can be made upon him by putting it beyond his power to comply when demand shall be made, a breach results instantaneously. "When impossibility of performance is caused by the act of one of the parties, it is equivalent to a breach." See, again, page 903, above cited. Clearly, therefore, if such a breach can be shown, it follows that there has been a violation of the contract rendering the obligor liable to the party with whom he contracted; and it is utterly immaterial whether the latter did or did not subsequently demand the performance of a contract which had already been broken by the obligor as completely as it well could be. In the present case it does not appear what actually became of the property levied on and replevied; but we are unable to perceive what material difference this can make, when the defendants expressly admitted that it was not within their power to produce it, and thus conceded that, if a demand for it had been made by the officer, the same would have been fruitless. The physical impossibility to produce is the important fact, and not the causes which brought this impossibility about, unless the inability on the part of the defendants arose through no fault on their part. As to this, they offer no excuse or defense. They merely insist that there has been no breach of their bond because the surrender of the property was never demanded of them by the levying officer. If there had been an advertisement, this would have been the legal equivalent of a demand, and a failure to produce the property at the time and place of sale would have constituted a breach of the bond. As has been seen, however, it has been definitely ruled that there is no occasion for advertising when it is absolutely certain that the property cannot be produced. As demand was not made by advertisement, were the defendants entitled to a personal demand upon them before it could be said their contract was broken? Under the admitted facts, we think not. Their contract, in effect, bound them to have the property in readiness for delivery when called for by advertisement or by personal demand. Their obligation to produce the property at the time and place of sale comprehended an incidental duty to safely keep the property in order that they would be in a situation to surrender it promptly upon proper demand made on them. They could not arbitrarily abandon their keeping and possession of the property without at the same time renouncing their obligation to hold it subject to de-

mand by the officer. It would be absurd to say that a claimant who had replevied a horse might willfully turn the animal loose in the highway, and allow it to escape, and still insist that he had done nothing inconsistent with his duty under the forthcoming bond he had given, or evinced by his conduct a purpose to renounce and abandon his contract. If the defendants, by their own negligent or willful conduct brought about a state of facts which would render a demand on them utterly futile, they cannot shield themselves behind the technical objection that no such demand was in fact made. Their voluntary relinquishment of all control over the property is to be treated as a renunciation of their obligation under their bond to hold the property subject to demand. Thereafter a demand would avail them nothing; it would be entirely unnecessary to their protection, as enabling them to meet the requirements of their bond by making surrender of the property when called for. The policy of the law is not to insist upon mere futile and fruitless formalities. Under such circumstances, the defendants will be held to have waived demand by voluntarily abandoning their contract, and committing a breach of its obligation. The same reason for dispensing with an advertisement in such cases would also dispense with any legal necessity for a personal demand. It is true that in some of the cases bearing on this subject it appears that a personal demand was made, but in those cases impossibility of compliance with a demand did not appear. Judgment reversed.

(97 Ga. 449)

## JONES v. METHVIN.

(Supreme Court of Georgia. Oct. 21, 1895.)

INSURANCE—ACTION ON PREMIUM NOTE—ERROR IN POLICY—RESCISSION—NOTICE.

1. A slight error in the spelling of the name of the insured in a policy of life insurance will not, after his acceptance of the policy, constitute a valid defense to an action upon a promissory note given for the amount of the first premium due upon the policy, unless it affirmatively appears that, after discovering the error, the insured made a proper request for its correction, and the same was refused.

2. Where the insured mailed such a policy to the plaintiff's agent, the former took the risk of the mails; and even if the policy had been accompanied by a communication distinctly pointing out the error, and requesting its correction, but in fact these documents never reached the agent, the plaintiff would not be chargeable with any notice of the defect in the policy, nor with the consequences of a failure to remove the same by having the appropriate correction made. In no event was the error in question, of itself alone, cause for rescission.

(Syllabus by the Court.)

Error from superior court, Twiggs county; C. C. Smith, Judge.

Action by T. R. Jones against William B. Methvin. Judgment for defendant. Plaintiff appeals. Reversed.

R. V. Hardeman & Son, for plaintiff in error. L. D. Moore, for defendant in error.

LUMPKIN, J. This was an action by Jones against Methvin upon a promissory note signed by the latter, and payable to the order of the former. It was given in payment of a premium upon a policy of life insurance issued by an insurance company to Methvin upon his application, but procured through Jones. When the policy was tendered to Methvin, he accepted it, not noticing at the time that his name was therein improperly spelled "Metholn." After making this discovery, the defendant (according to his testimony) mailed the policy to the company's agent from whom he had received it, inclosing the same in a letter. There was evidence from which it could be inferred that no such letter was ever in fact written; and it seems quite certain that, if written at all, the defendant did not point out the misspelling of his name, and request a proper correction, or otherwise indicate in what respect he was dissatisfied with the policy, or state any reason for the return of it. It clearly appeared that the agent received neither the letter nor the policy; and it was not even contended that the insurance company itself was ever notified of the error in the policy, or that it had any knowledge whatever of its alleged return to the agent.

The jury found for the defendant. We think the verdict was manifestly wrong. The defense set up seems to us absolutely without merit. Notwithstanding the slight error in the spelling of Methvin's name, the policy was doubtless binding upon the company; and though it was unquestionably the right of the insured to have a policy literally correct in this respect, if he so desired, it was his duty to present a proper request for its correction. Had such a request been made and refused, the case would have been altogether different. It is quite plain, however, he did not in good faith attempt to have a correction made. According to his own testimony, he mailed the policy to an agent of the company, accompanying it with some kind of a nondescript letter, the contents of which are not disclosed, but in which he utterly failed to state his reason for returning the policy, or to indicate what, if any, objection he had to it. Even if this letter reached the agent, it would have been totally insufficient to charge either the company or its agent with any notice of the defect in the policy, or with the consequences of a failure to remove the same by having the appropriate correction made. About the only idea the agent could gather from the return of the policy inclosed in a letter of this kind would be that the insured was simply endeavoring, without good cause, to repudiate his contract, and escape liability upon his premium note. In other words, the defendant's method of dealing with this policy—taking him at his own word—was neither ingenious nor fair; and his de-

fense, based upon such conduct, is entitled to but little consideration.

His defense was, however, bad for another and still stronger reason. It affirmatively appears that neither the policy nor the alleged letter ever reached the hands of the agent. In sending these documents in the manner stated, the defendant took the risk of the mails, and he therefore cannot complain if the papers failed to reach their destination. It was incumbent upon him to take the proper steps to have the policy corrected. Assuming that the letter he claims to have written had any existence in fact, and was all that it should have been, it was his business to see that it reached the company's agent. The means of transportation selected by himself utterly failed to accomplish this result; and, consequently, he stands in no better position than if he had made no effort whatever to return the policy. Judgment reversed.

(97 Ga. 426)

#### DYAL v. STATE.

(Supreme Court of Georgia. Oct. 21, 1895.)  
VOLUNTARY MANSLAUGHTER—WHAT CONSTITUTES  
—INSTRUCTIONS.

1. Where K. D. and W. M., upon an agreement to fight "a fair fight" without weapons, were preparing to engage in such a fight, and A. M., a brother of W. M., came up to them with a gun, which K. D. seized, and, while K. D. and A. M. were struggling over the gun, J. D., a brother of K. D., with another gun, shot and killed W. M., K. D. was criminally responsible for J. D.'s act if it was the result of a previous conspiracy between these two to kill W. M.; but if there was no such conspiracy, and K. D. did not participate in the design to kill, he was not legally responsible for the homicide. In any event, K. D., under such circumstances, was guilty of murder, or nothing.

2. There being no view of the evidence under which a verdict for voluntary manslaughter could be legally rendered against the accused on trial, it was error to give in charge to the jury the law relating to this grade of homicide.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Kossuth Dyal was convicted of voluntary manslaughter, and brings error. Reversed.

G. J. Holton & Son and T. A. Parker, for plaintiff in error. W. G. Brantley, Sol. Gen., for the State.

LUMPKIN, J. An indictment was returned against John Dyal and Kossuth Dyal, who were brothers, for the murder of William McEachin. Kossuth Dyal was tried, and found guilty of voluntary manslaughter. Andrew McEachin, a brother of the deceased, was present, and to some extent participated in the difficulty which resulted in the homicide. For the sake of brevity, these parties will hereinafter be designated, respectively, as "John," "Kossuth," "William," and "Andrew." It appears from the evidence that Kossuth and William had made an agreement to fight "a fair fight" without weapons.

While they were preparing to engage in a fight of this kind, Andrew came up to them with a gun, which Kossuth immediately seized, and a struggle then ensued between these two for the possession of the gun. While this struggle was in progress, John, with another gun, shot and killed William.

It was contended by the state that, previous to the occurrences just narrated, John and Kossuth had entered into a conspiracy to kill William, and that the design of that conspiracy was accomplished by his being killed at the time and in the manner above stated. This theory of the state was denied by the accused, and the evidence upon this issue was conflicting. If such a conspiracy in fact existed, and, in pursuance of it, John killed William in the presence of Kossuth, and the latter at the time participated in the design to kill, he was, though not the actual slayer, legally responsible for John's act, and was guilty of murder. If there was no such conspiracy, and the only purpose of Kossuth upon the occasion in question was to have a "fair fight" with William, from which he was diverted by the appearance of Andrew with the gun, and if Kossuth, while struggling with the latter to obtain possession of the gun, in no way participated in John's attack upon William with the other gun, it would be difficult to perceive how Kossuth was in any way chargeable with the homicide. Taking the case as a whole, there is no view of it which would justify a conviction of Kossuth for the offense of voluntary manslaughter. The law upon this subject ought not to have been given in charge to the jury, because it is wholly inapplicable to the facts presented, and diverted the attention of the jury from the real issues to be passed upon by them. The case should be tried again, and, if the evidence is substantially the same as at the previous trial, Kossuth should either be convicted of murder or acquitted. Judgment reversed.

(97 Ga. 430)

#### JONES v. STATE.

(Supreme Court of Georgia. Oct. 21, 1895.)

#### COMMON CHEAT—EVIDENCE.

Where the purchaser of goods worth 25 cents delivered to the seller, for the purpose of making payment and receiving the correct change, a gold coin worth \$20, the former ignorantly supposing that the coin was a silver dollar, and the latter, perceiving the mistake, retained the coin, and returned only 75 cents in change, he was guilty of being a common cheat and swindler, under the provisions of section 4595 of the Code.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

William Jones was convicted of swindling, and brings error. Affirmed.

M. G. Bayne, for plaintiff in error. Wm. H. Felton, Jr., Sol. Gen., for the State.

**LUMPKIN, J.** A little girl was intrusted with a \$20 gold piece, for the purpose of going to the market, buying a chicken, and returning with it and the change. The owner of the coin, through inadvertence, supposed it was a silver dollar, and the little girl was ignorant of its real value. From the evidence for the state, which the jury evidently believed, it further appeared that the little girl went to the market, purchased a chicken of the accused at the price of 25 cents, and gave him the coin. He took it, and said, "Do you want me to change all this money?" to which she replied, "It is a dollar." He turned to the light, examined the coin again, and gave a guttural sound, expressive of assent, and most probably intended to induce the child to remain in the belief that the coin was in fact a silver dollar. At any rate, he returned her in change only 75 cents, which would, of course, have been the proper amount had the coin been only a dollar.

The conduct of the accused was undoubtedly fraudulent and criminal. The question is, was it larceny, or cheating and swindling? He was indicted for and convicted of the latter offense; and, in our opinion, this was legal and proper. Though ignorant of its true value, the girl intended to pay, and did in fact pay, the \$20 gold piece to the accused. She parted with it voluntarily, and up to this point no fraud, deception, or dishonesty of any kind had been practiced upon her by the accused. He was rightly in possession of the coin, and had an inchoate title to it, which would immediately have become complete and perfect if he had returned the proper amount of change, as he ought to have done. Certainly, it was not delivered to him upon a trust of any description, nor did he obtain possession of it against the girl's consent. If he had handed her \$19.75, her ignorance of the value of the coin she had paid to him would have been of no consequence, and the whole transaction would have been perfectly legal and regular. His fraudulent conduct began when he ascertained that the girl believed the coin to be a silver dollar. The artful practice and the deceitful means which he employed consisted in adopting the necessary precautions to keep her in this belief, and thus enable him to obtain the valuable coin, and satisfy her with the inadequate sum given back in change. His persuasive silence and equivocal assent to the girl's misstatement that the coin was only a dollar, while a less tangible form of deceitful practice than a more active form of artifice would have been, were none the less effectual in the accomplishment of his fraudulent design. Perhaps, they were the most effectual means he could have employed, because allaying suspicion on the part of the girl was essential to the success of his dishonest purpose. The ingenious cheat and swindler cannot escape punishment merely because he invents and employs

less clumsy means of deceit, and more cunningly pursues his artful practices, than is usually the case with less adept and skillful members of his craft.

For the reasons above stated, the offense cannot be larceny; and, if this be true, it falls directly within the description embraced in section 4595 of the Code, defining the offense of being a common cheat and swindler. He certainly used "deceitful means," and employed an "artful practice," by which the girl in question, representing the owner of the coin, was defrauded and cheated. The case of *Crofton v. State*, 79 Ga. 584, 4 S. E. 333, is altogether different. There it appears that a newsboy intrusted the accused with a newspaper, valued at 5 cents, and 95 cents in change, for the purpose of procuring and bringing back to him \$1. It was a clear case of trust on the one side, and conversion of the property on the other, the title to which the newsboy never intended to pass to the accused, and even the possession of which was surrendered for a specified purpose only. Judgment affirmed.

(97 Ga. 432)

#### TAYLOR v. STATE.

(Supreme Court of Georgia. Oct. 21, 1895.)

##### HOMICIDE—REVIEW OF EVIDENCE—INSTRUCTIONS.

The evidence disclosed beyond doubt the perpetration of a wanton, cruel, and unprovoked murder, and warranted the jury in finding that there was a guilty participation in it by the accused, on trial as a principal. The motion for a new trial, considered in connection with all the testimony and the charge of the court, presents no sufficient legal reason for setting the verdict aside. The request to charge was covered by the general charge given to the jury, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; **J. L. Hardeman**, Judge.

Gen<sup>e</sup> Taylor was convicted of murder, and brings error. Affirmed.

**M. G. Bayne**, for plaintiff in error. **W. H. Felton, Jr.**, Sol. Gen., for the State.

**LUMPKIN, J.** This case is not one requiring special or extended comment. Its determination depended almost entirely upon the evidence. That a wanton, cruel, and unprovoked murder was committed is established beyond question, and there was sufficient evidence to warrant the jury in finding that the accused on trial participated therein as a principal. We can find no legal reason for disturbing the verdict. There is nothing in any of the assignments of error which would justify us in so doing. The legal questions presented are not of sufficient weight or importance to require elaboration or discussion. On the whole, justice seems to have been done; and we therefore decline to set aside the judgment of the trial judge, refusing to grant a new trial. Judgment affirmed.

(97 Ga. 471)

**HANESLEY v. MONROE et al.**

(Supreme Court of Georgia. Oct. 28, 1895.)

**ASSUMPSIT—PLEADING—EVIDENCE.**

There being no special plea filed by the defendants, authorizing the introduction of the evidence objected to by the plaintiff as irrelevant and immaterial, the court erred in not rejecting the same; and as the evidence in question was harmful to the plaintiff's case, and gave to the defendants the benefit of a defense which they had not pleaded, this error requires the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by J. J. Hanesley against J. R. Monroe and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

Hal. Lawson, E. H. Cutts, and T. L. Holton, for plaintiff in error. E. H. Williams and Pate & Bright, for defendants in error.

**LUMPKIN, J.** An action was brought by Hanesley against Monroe and others for services alleged to have been performed in procuring for them a loan from an insurance company in Cincinnati. The plaintiff proved compliance with his part of the contract. The defendants offered evidence tending to show that the plaintiff was an agent of the insurance company; that it was his duty, as such, to solicit applications for insurance therein; and that the rules of the company forbade an agent to take any commission for his services in procuring a loan from the company, other than his commission upon the insurance taken. The court admitted this evidence over the objection that it was irrelevant and immaterial. There was no plea setting up as a defense to the plaintiff's action the facts brought out by this evidence. In other words, the defendants did not plead any disability on the part of the plaintiff to contract for and receive from them a commission upon the loan which he procured the insurance company he represented to make to them. It is plain, therefore, that no issue of this kind was involved in the case; and it is an elementary rule of evidence that testimony, in order to be admissible, must have at least some relevancy to the issue in controversy. By admitting the evidence in question, the court gave to the defendants the benefit of a defense which they had not made by their pleadings; and, as so doing was manifestly harmful to the plaintiff's case, a new trial should be granted. Judgment reversed.

(97 Ga. 461)

**OGDEN v. DODGE COUNTY.**

(Supreme Court of Georgia. Oct. 28, 1895.)

**EJECTMENT—EQUITABLE DEFENSE—PLEADING—DECLARATIONS OF ONE IN POSSESSION—WHAT CONSTITUTES—ADMISSIBILITY.**

1. The principle stated in section 3189 of the Code was applicable to the issues involved in v.258.E.no.6—21

the present case; and, under this principle, a perfect equity may, without praying for specific performance, be set up as a defense to an action at law for the recovery of land.

2. Declarations by a donor of land in favor of his own title, made after he has delivered possession of the same to the donee, are not admissible in evidence against the latter. Declarations of a donor against his title, and in favor of that of the donee, bind the donor and his privies in estate, and consequently are admissible in the donee's favor against one who derived title from the donor after the declarations were made.

3. Declarations of one in possession of land, and claiming under a parol gift, are admissible to show an adverse claim of title. An inventory made by an ordinary purporting to include all property belonging to the county is in the nature of such a declaration.

4. The evidence warranted the verdict, and the newly-discovered evidence being merely cumulative of that introduced upon the trial, and such as would not probably change the result, the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Ejectment by Caro C. E. Ogden against Dodge county. There was a judgment for defendant, and plaintiff brings error. Affirmed.

De Lacy & Bishop, for plaintiff in error. D. M. Roberts, for defendant in error.

**SIMMONS, C. J.** Mrs. Ogden brought her action of ejectment against the county of Dodge for certain land in the town of Eastman, used by the county for courthouse purposes, to which she claimed title under a deed from her father, William P. Eastman. She alleged that the defendant entered into possession of the land by inclosing the same with a wire fence, by the express consent and permission of her father, and that its possession was permissive until 1894, when it set up an adverse claim, since which time the possession had been against her consent. The defendant denied that its possession was permissive, and alleged that it had a perfect equitable title by reason of its having taken possession of the land under a parol gift from said William P. Eastman, and having made valuable improvements thereon upon the faith of the gift. There was a verdict for the defendant, and the plaintiff made a motion for a new trial, which was overruled, and she excepted.

1. The court gave in charge to the jury section 3189 of the Code, which declares that if possession of land has been given under a voluntary agreement or merely gratuitous promise, upon a meritorious consideration, and valuable improvements made upon the faith thereof, equity will decree the performance of the agreement. It is complained that this was error, because the law as stated in this section was inapplicable to the case. It is true that, under the pleadings, the case was not one for specific performance, there being no prayer for it. The principle of the section referred to is applicable, however, not merely where specific performance is sought,

but wherever a donee in possession of land under the circumstances stated is seeking to defend his possession against the donor or person claiming under him. A donee of land under a parol gift would under these circumstances have a perfect equity in the land, which would enable him to defend his possession against the plaintiff; and this he could do without praying for specific performance. *Floyd v. Floyd*, 97 Ga. —, 24 S. E. 451. In the case of *Howell v. Ellsbury*, 79 Ga. 475, 5 S. E. 96, relied upon by the plaintiff in error, the party setting up the equity was not in possession of the land, but was seeking to recover it in ejectment; and, a legal title being therefore necessary to enable him to recover, it was held that the action could not be supported without first or contemporaneously obtaining a decree for specific performance. Where the person setting up the equity is already in possession, it is not necessary that he should have the legal title in order to defend his possession; but a perfect equity in the land, as against a plaintiff seeking to recover in ejectment, is a sufficient defense to the action. In the present case there was evidence that the alleged donor gave the land in question to the county, from motives of public spirit, and because the town in which it was situated, and which was named after him, had been selected as the county site,—a sufficiently meritorious consideration; and that the county went into possession upon the faith of the gift, and expended, in fencing and other improvements on the land, something over \$200. In view of this evidence, the court was authorized to give in charge the principle of the section referred to; and, although that part of the section which says that "equity will decree the performance of the agreement" was not applicable to the case, no harm resulted from its being given in charge with the rest of the section, there being no finding by the jury that the defendant was entitled to specific performance.

2. The court ruled out testimony as to declarations alleged to have been made by Mr. Eastman in favor of his own title after he had delivered possession of the land in question to the county, and tending to show that the possession was only permissive. It is complained that the court erred in ruling out such testimony, and in admitting, over the objection of the plaintiff, testimony as to declarations alleged to have been made by him against his title, and in favor of the county. There was no error in these rulings. It is well settled that declarations of a donor in favor of the donee, made after the time of the alleged gift, are admissible in behalf of the donee, and those claiming under him, to establish the fact of the gift; and that his declarations after the time of the alleged gift, and while the donee is in possession, are not admissible to disprove the gift, and are not rendered admissible by the fact that declarations admitting the gift are in evidence

for the donee. *Porter v. Allen*, 54 Ga. 624 (6); *Lewis v. Adams*, 61 Ga. 559 (3); *Poullain v. Poullain*, 76 Ga. 420; *Bialock v. Miland*, 87 Ga. 573, 13 S. E. 551. And see *Thornt. Gifts*, § 224, and cases cited; 1 Am. & Eng. Enc. Law (2d Ed.) tit. "Admissions," p. 684.

3. There was no error in admitting in evidence the inventory made by the ordinary of the county, purporting to include all the property belonging to the county, and including the land in question. Declarations by one in possession of land are admissible to show an adverse claim of title (Code, § 3774); and this was in the nature of such a declaration, the ordinary being the official in charge of the county property.

4. There was ample evidence to support the verdict. The newly-discovered evidence was merely cumulative, and was not such as would probably change the result; and the court did not err in refusing to grant a new trial. Judgment affirmed.

(97 Ga. 485)

#### SURLES et al. v. MILIKEN.

(Supreme Court of Georgia. Nov. 15, 1895.)

##### TIMBER LEASE—CONSTRUCTION.

A printed timber lease, made August 4, 1890, in which it was covenanted that the lessee might "commence boxing, working, or otherwise using the said timber for turpentine purposes" at any time he might desire, and also that the lessee should "have the right to continue to box, work, or otherwise use the said timber, and every portion thereof, for the full term of two years, beginning, with reference to each portion of the timber, from the time only that the boxing and working of each portion is commenced, it being the intention of the parties that this lease shall continue to operate until all of the timber, and each and every portion thereof, has been boxed, worked, and otherwise used for turpentine purposes for the full period of two (2) years, and shall end after the year 1893," it appearing that the words "and shall end after the year 1893" were interlined before the lessor would consent to execute the lease, properly construed, gave the lessee no right at all to work or use the timber in question for any purpose after the expiration of the year 1893.

(Syllabus by the Court.)

Error from superior court, Wayne county; J. L. Sweat, Judge.

Action by Ben Miliken against J. B. Surles and others. Judgment for plaintiff, and defendants bring error. Affirmed.

S. R. Harris and Goodyear, Kay & Brantley, for plaintiffs in error. J. H. Thomas and John W. Bennett, for defendant in error.

LUMPKIN, J. This case turned entirely upon the construction to be given a timber lease made August 4, 1890, the material portions of which are quoted in the headnote. It appears that the main portions of the instrument were in print, and that, before the lessor would agree to sign it, he required an interlineation in ink of the words "and shall end after the year 1893." It is a well-set-

tled rule in construing contracts, such, for instance, as policies of insurance, the main portions of which are printed, and the special or particular portions, adapting it to the precise agreement of the parties, are written, that the written words should be given greater force and effect than those which are printed. That rule is applicable, in principle, to the present case. The lessee contracted for the use of the timber, and every portion thereof, for the full term of two years. He was left free to begin boxing and working each portion of the leased premises whenever he chose, and to continue his operations as to such portion for two years, with the condition, nevertheless, that the entire contract, and all rights under it, should end with the year 1893. It is obvious that the contract, thus construed, could have been carried out, and that the lessee could have obtained the benefit of boxing and operating all the timber for two full years, for the contract was dated August 4, 1890, and he had from that date until December 31, 1893 (a period of three years and several months), within which to get the benefit of the contract he made. The court below entertained the same view of this contract which we have taken, and, in so doing, committed no error. Judgment affirmed.

(97 Ga. 513)

**JOSEPH v. MAYOR, ETC., OF CITY OF MILLEDGEVILLE.**

(Supreme Court of Georgia. Nov. 15, 1895.)  
CONSTITUTIONAL LAW—BUSINESS TAX—VALIDITY OF ORDINANCE—UNIFORMITY.

A municipal ordinance imposing a business tax of one-third of 1 per cent. upon "all gross sales of goods, wares, and merchandise of every kind," is not obnoxious to that clause of the constitution which declares that "all taxation shall be uniform upon the same class of subjects" (article 7, § 2, par. 1) because it further provides that "any person can relieve themselves of the gross sales tax by paying two hundred dollars in advance per annum." In so far as the ordinance in question imposes a tax, it is uniform as to all persons upon whose business it is imposed. If, for any reason, the commutation of the tax by an annual payment of \$200 is illegal, it affords no reason for enjoining, at the instance of a taxpayer, the collection of the tax itself.

(Syllabus by the Court.)

Error from superior court, Baldwin county; J. C. Hart, Judge.

Action by Adolphus Joseph against the mayor and aldermen of the city of Milledgeville. Judgment for defendant. Plaintiff brings error. Affirmed.

Roberts & Pottle, for plaintiff in error. Whitfield & Allen, for defendant in error.

**SIMMONS, C. J.** On January 16, 1894, the mayor and aldermen of the city of Milledgeville passed an ordinance for the levy and collection of license and special taxes for the purpose of raising revenue to meet the ordinary and extraordinary expenses of the city for that year. The ordinance imposed "up-

on all gross sales of goods, wares, and merchandise of every kind, made on and after February 1, 1894," a tax of one-third of 1 per cent. It was provided, however, that any person could relieve himself of this tax by paying \$200 in advance per annum. An execution was issued against Adolphus Joseph for the amount of tax due by him under the ordinance; and he brought his petition to enjoin its enforcement upon the ground that the ordinance was void because repugnant to paragraph 1, § 2, art. 7, of the constitution, which declares that "all taxation shall be uniform upon the same class of subjects"; it being contended that the tax was rendered unequal by the provision for its commutation upon the payment of \$200 in advance. The court refused an injunction, and the petitioner excepted.

If the ordinance in question contravenes the rule of uniformity prescribed by the constitution, it does so only in that part of it which provides for the commutation of the tax. In so far as it imposes a tax, it is uniform as to all persons upon whose business the tax is imposed. The rate is the same upon all gross sales of goods, wares, and merchandise of every kind. The fact that a person thus taxed may, under another provision of the ordinance, secure a commutation of the tax, which, in case his sales for the year should exceed a certain amount, would result in reducing below the prescribed rate the rate actually paid by him, could not affect the legality of the tax as laid. That part of the ordinance which imposes the tax is independent of and separable from the part which provides for its commutation, so that, if this latter part should be rejected as invalid, the part which is legal would still stand and be capable of enforcement. This being so, it makes no difference in the present case whether the provision for commutation is illegal or not. The illegality of the commutation would afford no reason for enjoining the collection of the tax itself. Judgment affirmed.

(99 Ga. 223)

**ROUNTREE v. WILLIAMS.**

(Supreme Court of Georgia. July 18, 1896.)  
DEED—CONSTRUCTION—EXECUTION—PROPERTY SUBJECT.

1. Construed in the light of the parol evidence admitted without objection to explain the meaning of the deed from the claimant to her son's wife, it passed the title to the son. By its terms, the land described therein was "granted, bargained, and sold" to the daughter-in-law "for herself and for the use of" the son; but the habendum and warranty clauses restricted the beneficial use to the son alone, and it plainly appeared from the parol evidence referred to that the grantor's intention was to convey the entire title to him.

2. The land, therefore, became subject to a judgment against the son, in existence when the deed was executed; and this is so although the real consideration of the deed may have been a promise by the son to support the mother, which he failed to perform, and because of which failure the deed, upon proper pleadings, with proper parties, and with proof of his in-

solvency, might, in equity, as between the parties thereto, have been set aside.

(Syllabus by the Court.)

Error from superior court, Brooks county; A. H. Hansell, Judge.

Action by A. J. Rountree against B. W. Williams. There was a judgment for plaintiff, on which an execution issued, which was levied on land claimed by Mary A. Williams. The property was found not subject, and plaintiff brings error. Reversed.

The following is the official report:

In March, 1880, Rountree obtained judgment against B. W. Williams, and on November 3, 1885, the execution issued thereon was levied upon certain land to which a claim was interposed by Mary A. Williams. The case was submitted to the judge without a jury, and he held the property not subject. It appears from the evidence for the claimant that on November 4, 1884, she executed a deed conveying the land in question to Permella F. Williams, the wife of B. W. Williams, "for herself, and for the use of B. W. Williams and his heirs, and the assigns of said P. F. Williams and B. W. Williams." The deed recites a consideration of \$500 in hand paid. The habendum clause is, to "P. F. Williams for the use of B. W. Williams, or his heirs, executors, administrators, and assigns, in fee simple." The warranty is to "P. F. Williams, for the use of B. W. Williams and his heirs, executors, administrators, and assigns." Claimant testified: "B. W. Williams never gave me any money, or anything else of value, as a consideration of said deed, nor was there any consideration from any one, except that the said deed was made under the following circumstances: I was at home, and had no one to be with me, except him and his wife. I got after them to stay with me and take care of me the balance of my life, and told him if he would do so I would give him my land at my death; and he was to live there and take care of me. Not long after that he wanted me to deed him the land. He and I went to Dr. Coon, and got him to write a deed, and it was not long after I got home that he took a notion to leave, and told Fannie, his wife, to give me back the deeds, which I at first refused to take; but he insisted, and I consented to take them back, and did take them back, and Fannie made me a deed back. B. W. Williams went off to Jacksonville, and worked there for several years, and came back to this county, but never lived with nor supported me. I cannot recollect what property I turned over to B. W. Williams when he moved over to the Williams homestead. I do not remember how long B. W. Williams remained on the place; I think, about three or four years, though it may not have been more than two. He went to Jacksonville when he left there. He left me about 100 bushels of corn, and household and kitchen furniture, buggy, one horse, and two mules;

also, about twenty or twenty-five head of cattle. I think this property was on the place when he first came there, and belonged to me, I reckon. B. W. Williams was to stay on the place as long as I lived. He was to take care of and support me. He was to provide for me. He took a notion to go to Jacksonville, and left me, and did not provide any more for me. I think I signed the original deed, of which a copy is hereinbefore given, but not for the consideration named therein. I understood said deed conveyed the property to B. W. Williams, provided he did as he contracted; but after he backed out I thought it was all done away with. I live with my son Berry M. Williams, in this county, and am eighty-three years old. There was nothing said about as to where my support should come from, to the best of my recollection. There was nothing said about my having to live on the place. The understanding was that I was to live there with him. I claim all that land now, because he went off." Mrs. Simpson, who was formerly the wife of B. W. Williams, testified: "In 1884 and 1885 I lived on claimant's place with her. She resided during 1885 upon the land in dispute. She was living alone, and my husband and I went to live with her and take care of her and be with her, and she made me a deed as trustee. My husband and I remained on the place about two years. My husband left us, and she broke up housekeeping, as we could not live alone. My understanding was that the consideration of the deed was that B. W. Williams and I were to live with claimant, on her dower place, and take care of her, during her life, and he was to farm on the place deeded. No money passed from me, and I know of none passing from my husband to claimant. There was no performance of the consideration of the deed, as my husband left the premises. He went to Jacksonville, Florida. Claimant had her farm stocked and supplied when he moved from the premises. She kept one of the horses until she died. I do not remember now about the remainder. On November 17, 1885, I made to her a deed, in consideration of \$10, conveying the premises in dispute. She and some of her children requested me to make the deed back to her. It was not made for any consideration of money, or other thing of value. I made it because B. W. Williams failed in doing what he promised to do when she made him the deed. The deed from her to him was written by Dr. Coon. He was a physician, and not a lawyer."

Glenn & Rountree, for plaintiff in error. J. G. McCall and W. B. Bennett, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 477)

**ENGLISH v. REED.**

(Supreme Court of Georgia. Nov. 15, 1895.)

**ATTACHMENT—REPLEVY BY DEFENDANT—LIABILITY ON REPLEVY BOND—PLEADING.**

1. It appearing that the plaintiff in attachment had given an attachment bond on the same day the attachment was issued and levied, a plea by the surety upon the replevy bond given by the defendant in attachment, alleging "that said attachment and the levy thereunder was utterly void, said attachment having been issued and levy made without the necessary attachment bond having been first given," was properly stricken on demurrer. Construed in the light of the entire record, this plea could not be treated as alleging that no attachment bond at all had been given, nor as negating the fact that an attachment bond of some description had been given before the issuing and levy of the attachment.

2. If the purpose of the plea was to attack the attachment bond actually given, the plea was bad because it failed entirely to point out any defect in the bond.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by H. W. Reed against A. P. English. Judgment for plaintiff, and defendant brings error. Affirmed.

Hitch & Myers, for plaintiff in error. L. A. Wilson, for defendant in error.

**LUMPKIN, J.** In order to support an attachment, the plaintiff must give a bond as required by law, and a failure to do so would be a good ground for dismissal. It follows, necessarily, that where an attachment has been levied, and the property replevied by the defendant in attachment, a surety upon the bond given by the latter could set up as a legal reason why a judgment should not be entered against him on the replevy bond that the attachment had been issued without the necessary accompanying bond. In order, however, to make this defense available, the surety should distinctly and unequivocally aver that no attachment bond had in fact been given before the issuing and levy of the attachment. In the present case a judgment was entered in a justice's court against the defendant in attachment and his surety upon the replevy bond. An appeal from this judgment was taken to the superior court, and upon a hearing of the same, after the plaintiff had introduced certain evidence, the surety offered a plea alleging "that said attachment and the levy thereunder was void, said attachment having been issued and levy made without the necessary attachment bond having been first given." The record before us shows affirmatively that an attachment bond was in fact given on the very day the attachment was issued and levied. Construing the plea referred to in the light of this fact, it cannot be treated as alleging that no attachment bond at all had been given in the first instance. There is a possible play upon the word "necessary"; and, in view of the record, the language above quoted from the

plea would seem really to mean that the attachment bond actually filed was, for some reason or other, imperfect or incomplete. In other words, the surety attempted by his plea to aver, in effect, that the "necessary"—that is to say, the "requisite"—bond had not been given. This is not a good plea. If he meant to allege that no attachment bond at all had been given, it would have been easy to say so. If the purpose of his plea was to attack the sufficiency of the bond actually given, the defect or defects in it ought to have been specifically pointed out. The order striking the plea was properly granted. Judgment affirmed.

(97 Ga. 433)

**COLLINS v. STATE.**

(Supreme Court of Georgia. Oct. 21, 1896.)

**CRUELTY TO CHILDREN.**

Construing together all the provisions of the act of October 20, 1879, "for the prevention of cruelty to children," a male person who has attained the physical strength and stature of manhood, and who is "almost as large as his father, but not quite as strong," is not a "child," in the sense in which this word is used in that portion of the act in question now embodied in section 4612h of the Code. This word, as here used, means a child of tender years, or a person between infancy and youth.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

John Collins was convicted of cruelly beating his child, and brings error. Reversed.

L. F. McDonald and R. W. Peeples, for plaintiff in error. R. B. Russell, Sol. Gen., for the State.

**SIMMONS, C. J.** John Collins was tried in the county court of Gwinnett county upon an accusation under section 4612h of the Code, charging him with cruelly beating, etc., Robert Collins, his minor child. He was found guilty, and took the case by certiorari to the superior court. The certiorari was overruled, and he excepted. The main ground of exception is that it did not appear from the evidence that the person alleged to have been beaten was a child. The evidence in the record does not show directly the age of this person, but does show that he was of the size and strength of a man; that he was almost as large and strong as his father, who was only "a little the best man"; and that he had worked the public road for 8 years, which would make him 19 years old if he commenced such work at the age when, under the law, he became subject to road duty. Section 4612h of the Code, upon which the accusation was based, is taken from the third section of the act of October 20, 1879, entitled "An act for the prevention of cruelty to children." Acts 1878-79, p. 162. The first and second sections of the act (Code, §§ 4612f, 4612g) have reference expressly to children under 12 years of age. The third and last section reads as follows: "Who-

ever shall torture, torment, deprive of necessary sustenance, mutilate, cruelly, unreasonably and maliciously beat or ill treat, or cause to be tortured, tormented, deprived of necessary sustenance, mutilated, cruelly, unreasonably and maliciously beaten, any child, shall be guilty of misdemeanor," etc. Construing together all the provisions of the act, and giving the word "child" its ordinary and popular meaning, the section above quoted is clearly inapplicable to the case at bar. Except where used as a term of relationship,—which is not the case here, for the language is, "Whoever" shall torture, etc., "any" child,—no one, in the ordinary use of the term, would apply it to a person who had attained the physical strength and stature of manhood, or even to a person who had entered the period of youth; and there is nothing in the language of the statute to indicate that the legislature intended to use the term in a broader sense than that in which it is ordinarily employed. There is no reason to suppose that it was intended to include youths who are, in law, old enough to perform road duty and military service. Indeed, it is manifest that the statute was intended for the protection only of those of tender years, who, by reason of their physical immaturity, are unable to protect themselves, and are helpless against the cruelty of older persons. Black's Law Dictionary, in defining the term "child," says that, in laws for the protection of children, it means generally the young, under the age of puberty. See, also, *Allen v. State*, 7 Tex. App. 298. As used in the present instance, we think it means children of the period between early infancy and youth. At any rate, we are quite clear that it does not apply to a person of the age, size, and strength of the person alleged to have been beaten by the accused in this case. Judgment reversed.

(97 Ga. 1.)

**EXCHANGE BANK OF MACON v. MACON CONSTRUCTION CO. et al.**

(Supreme Court of Georgia. Oct. 5, 1895.)

**CORPORATIONS—OWNERSHIP OF STOCK OF ANOTHER CORPORATION—RIGHTS OF CREDITORS—RAILROAD COMPANIES—RECEIVERS—APPLICATION OF EARNINGS.**

1. The fact that one corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical. On the contrary, they are separate and distinct legal entities.

2. Accordingly, though one who lends money to a corporation which owns all of the capital stock of a railroad company may, under some circumstances, subject to the payment of the loan the property of the railroad company as equitable assets of the borrower, the lender in such case cannot, in preference to the lien of a valid mortgage executed by the railroad company to secure an issue of bonds, even in equity, have his claim paid out of money realized by a receiver from the sale of the property of that company.

3. Nor, under the facts recited, can the lender,

as a party to an equitable proceeding, be allowed, by virtue of his rights as an alleged creditor of the railroad company, under a decree disposing of the assets of the latter alone, payment of the loan out of earnings of the railroad company which came into the hands of the receiver while it was being operated by him; and this is so although the receiver may have previously used portions of such earnings in paying interest to the bondholders secured by the mortgage, and in making betterments and improvements upon the railroad property, which largely increased the value of the bondholders' security.

(Syllabus by the Court.)

Error from superior court, Bibb county; O. O. Smith, Judge.

Action by McTighe & Co. against the Macon Construction Company and the Georgia Southern & Florida Railroad Company for the appointment of a receiver. The Exchange Bank of Macon filed separate interventions, seeking to have its claim against the construction company paid as a debt of the railroad company out of the proceeds of the sale of the property of the latter by the receiver, or from its earnings while the receiver was operating it. The interventions were consolidated, and there was a judgment against intervener, from which it brings error. Affirmed.

Bacon & Miller, for plaintiff in error. Gustin, Guerry & Hall, Hoke Smith, and Dessau & Hodges, for defendants in error.

**LUMPKIN, J.** The affairs of three corporations, viz. the Exchange Bank of Macon, the Macon Construction Company, and the Georgia Southern & Florida Railroad Company, are involved in this case. For convenience, and for the sake of brevity, they will be respectively designated the "Bank," the "Construction Company," and the "Railroad Company." The railroad of the company last named was built by the construction company under a contract between the two companies, by the terms of which all the stock of the railroad company became and was the property of the construction company; and it appears that after its completion the railroad was operated exclusively by the construction company, but the organization of the railroad company was kept complete and intact. Before the indebtedness of the construction company to the bank, which will presently be mentioned, had been incurred, the railroad company, in its corporate name and capacity, had issued and negotiated a large number of bonds, and secured the same by a deed of trust conveying all of its property, and the present controversy is between the trustee of the holders of these bonds and the bank. The nature and extent of this controversy, so far as material to this discussion, will appear from the following statement: The bank at different times loaned to the construction company, and upon its credit, large sums of money, portions of which were to be used, and were in fact used, in paying the employees operating the railroad their wages, and in paying

off an indebtedness incurred by the construction company in purchasing equipments for the railroad. There were no direct dealings between the bank and the railroad company, and no contractual relations whatever existed between these two corporations. The construction company gave its promissory notes to the bank for the sums borrowed as above stated; and as to some or all of the indebtedness thus created agreed to deposit in the bank, to be applied in its reimbursement, the daily earnings of the railroad. A portion of the construction company's indebtedness to the bank was also secured by the deposit of collaterals, upon which a considerable sum was realized, and credited upon that indebtedness. In view of the principles by which, in our judgment, this case is controlled, it is not now important to determine definitely whether the agreement of the construction company to deposit for the security of the bank the earnings of the railroad related to the whole or only to a part of the indebtedness of the former to the latter; nor whether all of these earnings were to be applied to the satisfaction of the notes of the construction company, or only such portions of the earnings as could be used for this purpose after excepting so much of the same as were necessarily withdrawn in order to keep the railroad in operation; nor whether or not the bank, with the means for so doing in its hands, neglected to make the proper application of the same, and thus obtain full payment from the construction company. Whatever the truth as to these several matters may be, the fact remained that the construction company was still very largely indebted to the bank for money borrowed and used as above stated, when, upon the petition of McTighe & Co., all the property of both the construction company and the railroad company was placed in the hands of a receiver, thus making a case which resulted in prolonged and complicated litigation. The bank filed in this case two separate interventions, in which it set forth its claims in substance as hereinbefore recited, showing the balances due to it, and seeking, among other things, to have the same paid as debts of the railroad company out of the proceeds of the sale of its property by the receiver, or from its earnings while he was operating it under the orders of the court; the bank contending that, under the facts as stated, it was really a creditor of the railroad company, and as such entitled to priority of payment as against the claims of its bondholders. The trustee of the bondholders, who was also a party to the case, on the other hand, contended that the bank was in no sense a creditor of the railroad company, but of the construction company alone; that the bank, therefore, had no lien, either legal or equitable, upon the property of the railroad company, or its proceeds, or upon the earnings of that company; and that, consequently, in administering its as-

sets, the bank could have no priority, or rights of any kind as against the bondholders. These interventions were referred to a special master, who reported against the intervener, and it filed various exceptions to his report. By agreement the two interventions were consolidated, and tried together by the judge without a jury, and by consent this branch of the main case made by the petition of McTighe & Co. was treated as a separate and distinct case between the bank and the trustee of the bondholders. The judge held that the master had committed no error, overruled the bank's exceptions, and, so far as it was concerned, made the report of the master the judgment of the court, to all of which the bank excepted.

The main contention upon which the bank rested was that it was a creditor of the railroad company. Upon the assumption that it was, it set forth various grounds for its further contention that it was entitled to be treated as a preferred creditor of that company, having a lien superior to that of its bondholders. If the bank had succeeded in establishing its first proposition, an inquiry into these grounds and their merits, with a view to testing the correctness of the second contention, would be necessary. As it did not, in our opinion, establish the first proposition, an investigation into what would have been the rights of the bank had it been a creditor of the railroad company, holding against it the claims it has against the construction company, is not essential. It must be borne in mind that the assets with which the court was dealing were those of the railroad company, as such. While they may, in a sense, have belonged to the construction company, because it was the sole owner of the stock of the railroad company, the right of the construction company to assert its ownership, or to actually have the beneficial use and enjoyment of these assets, was beyond all doubt or question postponed to the lien of the bondholders. This, as we understand the matter, was a conceded point, the contest being between the bank, insisting that it was a creditor of the railroad company and claiming as such, on the one hand, and the bondholders, admitted to be creditors of that company, on the other. Had these parties been contesting as creditors of the construction company over a distribution of its assets, the questions to be disposed of would have been altogether different. As it is, the controversy must be determined with reference to the true relations existing between each of the respective claimants and the railroad company; and, this being so, the bank's claim must stand or fall upon the proper decision of the question as to whether or not it can rightly be regarded as a creditor of that company. That it cannot be, and consequently has no lien either upon the proceeds of the sale of the railroad property or the income derived from its operation by the receiver, will, we think, be made

apparent by the following brief discussion of the points announced in the headnotes.

1. Every corporation is a person,—artificial, it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes a corporation, he is not himself the corporation. In such case the man is one person, created by the Almighty, and the corporation is another person, created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member. That a business corporation is a separate legal entity, and as such owns the property belonging to it, is recognized by Mr. Justice Nelson in the case of *Van Allen v. Assessors*, 3 Wall. 584, as “familiar law,” and in this connection he cites *Reg. v. Arnaud*, 9 Adol. & E. (N. S.) 806, and quotes from Lord Denman as follows: “It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease; but in no legal sense are the individual members the owners.” In *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, *Orton, J.*, says: “From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary co-partnership the members of it act as natural persons, and as agents for each other, and with unlimited liability. But not so with a corporation. Its members, as natural persons, are merged in the corporate identity.” And see the numerous authorities cited by this learned jurist in support of the above. Two other cases strongly in point are *Pullman's Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, and *Railroad Co. v. Cochran*, 43 Kan. 225, 23 Pac. 151. We conclude what we have to say on this branch of the case by making the following pertinent extracts from that most ex-

cellent work, *Cook on Stock and Stockholders and Corporation Law*: “A corporation is an entity and existence separate from its officers and stockholders. And the inclination of some writers to assimilate a corporation as nearly as possible to a partnership, and to apply to the former the rules applicable to the latter, leads only to confusion, and is contrary to the law. The difference between a corporation and a partnership and the advantages of a corporation over a partnership as a means of doing business are very marked, and should not be limited by construction. A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person. Although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues, and they are not thereby merged.” See volume 1, § 6, and authorities cited in notes.

2. The construction company and the railroad company being, therefore, distinct corporations, and the bank being a creditor of the former only, and not of the latter, it is clear that the bank has no legal lien upon the property of the railroad company. Has it, then, an equitable lien upon such property? It claims that it has, and contends, among other things, that as to the money it furnished, and which was used in paying the employes of the railroad company, it became subrogated to their rights and equities, and thus acquired a lien upon the property of the railroad company superior to that of the bondholders; and that it also has a like superior lien as to the money it furnished, and which was expended in purchasing equipments for the railroad. This is not an exhaustive statement of the contentions of the bank, nor of the reasons urged to sustain the same, but will suffice to show, in a general way, the nature of the grounds upon which it rested its claim of priority over the bondholders. Its able and learned counsel submitted many strong arguments, and cited numerous authorities in support of their contentions, including those the nature of which we have stated, and others which we have not deemed it necessary to set forth. We feel convinced that the moral equities of their client, the bank, stand upon a very high footing, but are constrained to deal with the case from a legal standpoint. Thus regarding the matter, we are of the opinion that these arguments and authorities are not applicable to the case in hand, and for this reason, as already indicated, we do not undertake to state or follow them out in detail. It must not be overlooked that the bank dealt with and extended credit to the construction company. It had no direct dealings at all with the railroad company, and never became its creditor. If it had furnished money to that company, then, in a contest over the distribution of its assets between the bank and

(97 Ga. 475)

the bondholders, all the positions now taken in support of the bank's alleged superior equities, and the arguments presented to show the correctness of those positions, would be pertinent and appropriate, and, we are frank to say, would be of great weight, and entitled to the most serious consideration. If, however, we have shown that the bank, in the present controversy, does not occupy the position of a creditor of the railroad company, the case is altogether a different one from that just supposed. Again, if the bank, as a creditor of the construction company, was seeking to subject to the payment of its claims the property of the railroad company as equitable assets of the construction company, there might undoubtedly be circumstances under which this could be done. A case affording an illustration of this kind is that of *Day v. Telegraph Co. (Md.)* 7 Atl. 608. As will have been seen from what has been said above, that case, and others of like character, are entirely different from the case at bar; for, we repeat once more, it must not be overlooked that the bank is here claiming to be a creditor of the railroad company, and insisting upon the enforcement of its alleged rights in that capacity, and in no other.

3. If our views of this case as above expressed are sound, it follows as a necessary conclusion that under a decree disposing of the assets of the railroad company alone the bank cannot claim repayment of its loans to the construction company out of the earnings of the railroad company which came into the hands of the receiver while it was being operated by him. It makes no difference what disposition the receiver may have previously made of portions of such earnings. Whether, with the same, he paid interest on the company's bonds, or used the same in making betterments and improvements upon the railroad property, is a matter of no concern to the bank, for the reason that it is not a creditor of the railroad company, and therefore is not affected in any manner by the receiver's conduct in dealing with its assets. It must be remembered that in the case now under consideration the court was not undertaking to dispose of any assets directly belonging to the construction company as such. The court had in its hands for distribution no property to which the construction company had a legal title, nor any fund arising in any manner from such property. Although, in a sense, and for certain purposes, the corpus and the income of the property belonging legally to the railroad company might be regarded as equitable assets of the construction company, the bank, as an alleged creditor of the railroad company, has to stand upon whatever may be its rights in that capacity, and can take nothing in this litigation as a creditor of the construction company. Our conclusion, therefore, upon the whole, is that no error was committed by the trial court. Judgment affirmed.

# STRAUSS v. MAYOR, ETC., OF WAYCROSS.

(Supreme Court of Georgia. Nov. 15, 1895.)

INTOXICATING LIQUORS—SOLICITING ORDERS—CONFLICTING ORDINANCE—STATUTORY CRIME.

Although a given act was, by a valid municipal ordinance, made an offense against the corporation, at a time when such an act was not indictable under the criminal laws of this state, the subsequent enactment by the general assembly of a statute making this identical act a crime or misdemeanor deprived the municipal authorities (they having no jurisdiction over state offenses) of the power to try and punish offenders for committing the act in question.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Jerome Strauss was convicted of violating an ordinance of the city of Waycross, and brings error. Reversed.

W. M. Toomer, for plaintiff in error. J. L. Crawley and L. A. Wilson, for defendant in error.

LUMPKIN, J. The plaintiff in error was tried and convicted by the mayor and council of Waycross upon the charge of "selling, taking, or receiving orders for the sale of, intoxicating drinks or spirituous or malt liquors or fermented or mixed intoxicating drinks, contrary to ordinance," on January 27, 1894. Prior to the passage of the act of December 18, 1893 (Acts 1893, p. 115), soliciting orders for the sale of spirituous, malt, or other intoxicating liquors in any "prohibition" county in this state was not indictable under any criminal statute of Georgia, but was, for the first time, made a state offense by the passage of that act. The offense for which the plaintiff in error was convicted by the municipal court of Waycross was exactly the thing which the act of 1893 made a misdemeanor. Except in special instances (like that referred to in the case of *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564), it is well settled in this state that municipal corporations have no authority to inflict punishment for acts indictable under the criminal laws of this state. The municipal authorities of Waycross (the charter of which was granted since the constitution of 1877) have no such power. It is undoubtedly true that sometimes an act, in its nature, constitutes two separate and distinct offenses,—one against the laws of the state, and the other against the ordinances of the municipality; and for the latter the municipal government may inflict punishment. The offense with which we are dealing in the present case was not, however, one having such a dual character. The particular act forbidden by the city ordinance and the statute of 1893 has in it no "ingredient or concomitant" offense to the peace and good order of the city for which it can separately punish, leaving the state to deal with the main accusation.

It was insisted, however, that inasmuch as the municipality adopted the ordinance in

question prior to any state legislation on the subject, and at a time when it had an undoubted right so to do, the subsequent passage of the act of 1893 did not divest the city of its jurisdiction over offenses of this character. But this contention is not sound. No citizen can be twice tried and punished for the same offense. The legislature has declared that the offense committed by the plaintiff in error shall be indictable and punishable in the state courts. The general assembly surely had the authority to pass this act; and, if the city of Waycross is to retain its jurisdiction over the offense, the state court, in any given instance, would lose its jurisdiction over the offender if he had already been tried in the municipal court, or else he would be subjected to two trials for the same offense, which would be clearly unconstitutional. It follows that either the state of Georgia or the city of Waycross must give up its right to try cases of this class; and, in our humble judgment, the city must yield to the state's superior authority in the premises. Judgment reversed.

(97 Ga. 515)

**ADAMS et al. v. HANNAH.**

(Supreme Court of Georgia. Nov. 15, 1895.)

**DEATH OF PARTNER — APPOINTMENT OF RECEIVER — POWERS.**

In view of the entire record, the trial judge was authorized to deal with the petition as a proceeding instituted by the plaintiff in her representative capacity as administratrix upon the estate of her deceased husband. This being so, there was not, under the evidence submitted, any abuse of discretion in appointing a receiver; but the order of the judge, in so far as it authorized the receiver to take possession of the individual property of the surviving partner, was too comprehensive, and direction is given that this order be so modified as to confine the possession of the receiver to the partnership assets.

(Syllabus by the Court.)

Error from superior court, Terrell county; J. M. Griggs, Judge.

Action by Mrs. Lizzie Hannah against B. C. Adams and others. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

Mrs. Lizzie Hannah brought her petition against B. C. Adams (doing business as the Dawson Variety & Manufacturing Company), the First State Bank of Dawson, and J. R. Mercer, praying, among other things, for a receiver of the property of said Dawson Variety & Manufacturing Company, and for injunction restraining Adams from longer attempting to run or manage the business, and restraining the bank and Mercer from foreclosing a mortgage he had given on the property used in the same. The prayer for injunction against the bank was denied; but the court appointed a receiver to take charge of all the property of Adams, to continue the business, to employ necessary labor, and contract for necessary material, for carrying on the same, and to make sales, employing

Adams to assist him, at a salary of \$100 per month, etc. To this judgment Adams excepted. The petition alleges that prior to the death of plaintiff's husband, T. R. Hannah, he and Adams were partners and joint owners of the property in question. She became her husband's administratrix in the fall of 1893 or early winter of 1894. Adams came to her, and proposed to buy out the interest of Hannah in said business and property. He proposed to give her \$8,000 for said half interest, and wanted her to make him a deed to the same for a stated consideration of \$12,000. Not being used to the transaction of business, she agreed to do so, not knowing why he wished to have the papers written in that way. He made many protestations of his honest intentions, and what he intended to do; that he would keep up the business to its old standard; that he would pay all the debts, and so manage it that there would be no danger of loss to her. She agreed to sell, and took the necessary steps to perfect the title in him, and he gave her his four promissory notes of \$2,000 each, payable in the fall of 1894, 1895, 1896, and 1897. At the same time, he gave her a contract or agreement that, should he fail to pay any of said notes at maturity, they should all thereupon become due, at her option. On December 22, 1894, one of the notes became due, and he wholly failed and refused to pay it, and continues so to refuse. At the time of her husband's death, an inventory was made of said property, and it was found that the assets of said firm amounted to over \$50,000, consisting of real estate and outside personal property, and material, lumber, and manufactured articles on the grounds of the plant. Ever since that day, Adams has had sole control and management of said property. He has so managed and carried on the business that (January 28, 1895) there is no material with which to work. The credit of the concern is gone. He is every day becoming more and more involved, and is indebted to his laborers as well as to outside creditors; and it is only a question of a short time when the business will be a total wreck, and wholly unable to pay its liabilities. The property has so depreciated by his management that it is not now worth more than ten or fifteen thousand dollars. During the lifetime of Hannah, he and Adams made and delivered to Mercer a mortgage to secure \$5,000 on this property. Petitioner does not know the consideration of the mortgage, whether it was for money then due or to be obtained. Hannah transferred it to the bank (of which he was president). Soon afterwards, Hannah and Adams, as a firm, contracted to rebuild the Andrew Female College, the amount due them on this account being \$2,500 or other large sum. The claim was transferred to Mercer or the bank, and ought to go as a credit on the mortgage last mentioned. At the last term, plaintiff proceeded to foreclose her mortgage for the

full amount thereof, and the bank proceeded to foreclose its mortgage for \$5,000, with interest. Instead of putting the college claim as a credit on said mortgage, Mercer and the bank and Adams, acting in collusion, are attempting to defraud plaintiff, by pretending to put it as a credit on the individual indebtedness of Adams to said parties. Within the last six weeks, Adams has given Mercer or the bank another mortgage on the property, for \$5,000 or other large sum. Adams is a trader, engaged in buying and selling building material, and is also a manufacturer of over \$5,000 worth of goods per annum. He is insolvent. Her claim against him of \$8,000, with interest, amounts to more than one-third of his debts. She asks that Mercer and the bank be required to make full showing as to the character and amount of indebtedness under which they obtained the mortgage for \$5,000 against Hannah and Adams, the amounts received and yet due on the college claim, and the application of any collection made thereon; and that Adams be required to make full showing as to the amounts paid by him on indebtedness he assumed of the late firm, and all collections on amounts due them, from the time of Hannah's death until now. In other respects discovery is waived. By amendment, she alleges that, ever since Adams took possession of the property, he has been collecting debts due the old firm, and appropriating the same to his own uses and purposes. He has kept the books in such manner as to be able to deceive any ordinary person, has not given credits where money has been paid to him, and has not credited material which has been paid to him in settlement of debts due the old firm. Property he has received in payment of debts due the old firm has been so covered that creditors could not reach it, by putting title in his wife's name; and other moneys and materials have been forwarded to Atlanta, and there delivered to a corporation or firm of which Adams is a member, of which no notice has been given to the old firm of Hannah & Adams,—all for the purpose of defrauding his creditors, and especially plaintiff.

Defendants demurred to the petition, for want of equity, for multifariousness, and for misjoinder of parties defendant. The answer of Adams alleged: He did not propose to buy the interest of plaintiff's intestate, but she proposed to sell to him, and urged him to buy, and at one time offered to take \$6,000, which offer he was considering, but, at the instance of her kinsman Young, she afterwards declined, and then insisted on defendant buying at \$8,000, which he did, on the terms hereafter stated. She and he both were anxious that a half interest in the business might be disposed of for cash, and several parties from abroad were negotiating with him to this end; and it was mutually agreed between him and her that the consid-

eration to be set forth in the contract of sale by her to him should be \$12,000. In event he had succeeded in making a sale of a half interest or more, it was understood that she should be paid \$8,000 for the interest of Hannah in the entire property of the late firm, and defendant was to assume all of the firm's liabilities. He made no protestations of honest intentions and what he intended to do, except such as he has carried out; and he has so managed that there has been and is no danger of loss to plaintiff. While it was stipulated in the mortgage he gave her to secure the notes that a failure to pay any one of them at maturity would cause all to become due, yet such result depended on circumstances; and a contemporaneous writing was executed by her and him, showing what was the true meaning and purpose of both parties, by the terms of which he insists that all of the notes have not become due and payable. The note which fell due on December 22, 1894, was not paid by him, because he was reliably informed that she had avowed it to be her purpose to institute legal proceedings against him, and break him up, whether he paid this note or not. He was making arrangements to pay it when it came to his knowledge what she contemplated doing; and he deemed it impolitic and unjust to himself to furnish her money with which to set on foot legal proceedings to hamper and embarrass him, when he had given her no cause therefor. Nearly half of the \$50,000 at which the assets of the late firm were appraised on Hannah's death was made up of a vast lot of accounts and notes, long past due, and of very uncertain and doubtful character, the great bulk of which have not been and cannot be collected, and are valueless. In the appraisement was also a very large quantity of very old lumber, which the appraisers doubtless thought was of better quality than it actually was. It was nearly worthless, and could not be used at all. Said property was all appraised at high prices, in view of its age and real qualities, and it was not actually worth anything like the amounts figured up in said inventory. Defendant denies the allegations touching lack of material to work, and of credit, depreciation of property, etc., and says there are more manufactured goods now on hand than were at the time of his purchase. There is on the premises a large quantity of material, amply sufficient to meet all the requirements of the business; and fresh supplies and material are constantly being received by him. He has caused the value of the property to be enhanced, and, since he became sole owner, he has expended large amounts in its improvement and enlargement, and by erecting new buildings, amounting to \$2,205, a statement of which is attached to his answer. The mortgage for \$5,000, given by him and Hannah, was made to secure valid and bona fide indebtedness;

and the same has never been paid, as he has been endeavoring to pay other more pressing indebtedness; and, this debt being amply secured, the holder of the mortgage, in view of the financial stringency of the times, was willing to allow further time to pay off the mortgage, especially since defendant had given to the bank (the holder of said \$5,000 debt) additional security, by mortgaging to it a large quantity of other property. As to the college contract, the late firm had a lien for material furnished to the amount of \$2,067.99, besides interest. The lien was foreclosed in May, 1894. Execution issued, and was levied on the property, but litigation arose, and the money was not collected. Defendant afterwards transferred the judgment and execution to Mercer, to indemnify him as surety on a bond to L. Ruggles, given by defendant, for \$846, for eventual condemnation money on a lien foreclosure, which is undetermined, also as surety on a bond to dissolve garnishment in the suit of L. Ruggles against defendant, and to secure a note for \$1,478.21, executed by defendant to Mercer, for valid and bona fide indebtedness. He denies the validity of Ruggles' suit, and is contesting it. He denies that plaintiff had any right to foreclose her mortgage for all of the \$8,000, because only one of the notes was due. He denies that he is acting in collusion with Mercer and the bank, or with any one else, or in any way to defraud and wrong plaintiff. It is not true that, within six weeks before the filing of the petition, he gave Mercer or the bank another mortgage on the property for \$5,000 or other large sum. He denies that he is insolvent, or that plaintiff has any right to injunction and receiver. He does not concede her right to the discovery prayed against him; but, if the court holds otherwise, he has prepared a detailed statement of all disbursements and receipts, which will disclose that he has settled \$11,362.22 of the debts of the late firm, and has collected only \$3,670.82 on the notes and accounts. At the time he received conveyance from plaintiff of the half interest, he executed in favor of Hannah's estate a mortgage on all the property, to indemnify the estate against loss should he fail to pay the partnership debts assumed by him. She has this mortgage in her possession. Since he became sole owner of the property, all industries throughout the entire country have languished. Business of every kind has been depressed. Especially is this true of the kind of business in which he has been engaged, there being little demand for building material, and few contracts for constructing houses. But he has kept the business running, has used every effort to maintain and successfully conduct it, and is progressing as well as could be done by any one. If allowed to continue, he believes he will be able to successfully operate the enterprise in which he has his all invested, and

in which he has incalculable interest, and will thus be in position to satisfy plaintiff's claim.

It seems unnecessary to set out here the answers of the bank and of Mercer. It appears that on April 2, 1895, the Andrew Female College claim was settled by the bank on what were deemed by it the best possible terms: \$1,700 cash, and \$700 in bonds issued by the trustees of the college. At the hearing, there was much evidence, of conflicting character, introduced in support of the allegations of the petition and answer, including numerous affidavits, books of account, records of suits, tax digest, appraisement of Hannah's estate, mortgages referred to in the pleadings, etc. Plaintiff introduced the agreement of March 13, 1894, between herself and Adams, referred to in his answer. It recites that he has this day executed to her his mortgage, covering all the property, real and personal, which belonged to the Dawson Variety Manufacturing Company, to secure four promissory notes for \$2,000 each, dated March 13, 1894, and due December 22, 1894, 1895, 1896, and 1897, given for the purchase price of one half interest in said property; that it is a stipulation and agreement in connection with said mortgage that, should Adams fail to pay any of said notes as they fall due, all of them shall instantaneously become due and payable; and that now Mrs. Hannah, the payee, "makes and enters into this contemporaneous writing, and agrees and stipulates that said agreement or contract that all of said notes are to be due on failure to meet any one thereof was made to protect her, and she agrees that she will not take advantage thereof, or claim the privilege of foreclosing for all of said notes on failure to pay any one thereof, unless, by the bad management of said property, or failure to work or run the same, or the insolvency of said Adams, or the commencement of proceedings against him by his creditors, her rights should be jeopardized, on which event she would claim the right to enforce all the parts of said mortgage contract." The mortgage of March 13, 1894, "to indemnify Mrs. Lizzie Hannah, administratrix, against any loss by reason of my failure to pay said debts and liabilities," referred to in defendant's answer, recites that he has this day bought the half interest of Hannah, deceased, in all the real and personal property owned by them jointly, known as the Dawson Variety & Manufacturing Company, for \$8,000, payable in four annual installments of \$2,000 each, secured by mortgage on all said property, and the further consideration that he is to assume and pay all the debts and liabilities of said company. It creates a lien on all said property, describing it, and on two other town lots. It contains a waiver of homestead, and concludes: "To be void on the full satisfaction of all damages and

loss occurring by the failure of B. C. Adams or his assigns to pay all of said debts and liabilities." It was recorded March 29, 1894.

E. J. Hart, J. G. Parks, and Harrison & Peeples, for plaintiffs in error. J. H. Guer-ry and J. A. Laing, for defendant in error.

**LUMPKIN, J.** We have directed the reporter to prepare and prefix to this opinion a condensed statement of so much of the record as may be essential to an understanding of the points ruled. Under the facts, it is surely safe to say that there was no abuse of discretion in appointing a receiver if the petition of Mrs. Hannah can be treated as one filed in her representative capacity, as the administratrix upon the estate of her deceased husband. Regarding it as a petition filed in her individual right, the propriety of appointing a receiver at her instance would present quite a serious and difficult question; but, in view of the entire record, we think the judge was authorized to deal with the petition as a proceeding in behalf of the administratrix. This being so, there is no difficulty in sustaining the action taken by the judge, except as to so much of the order passed by him as authorized the receiver to take possession of the individual property of B. C. Adams, the surviving partner of the Dawson Variety & Manufacturing Company. To this extent the order was too comprehensive, but appropriate direction has been given for its correction in this respect. Beyond this, we see no further occasion for interference on our part with the judgment as renuered. Judgment affirmed, with direction.

(97 Ga. 502)

**CLUBB v. AMERICAN ACC. CO. OF LOUISVILLE.**  
**AMERICAN ACC. CO. OF LOUISVILLE v. CLUBB.**

(Supreme Court of Georgia. Nov. 15, 1895.)  
**INSURANCE — APPLICATION — INSERTION OF FALSE STATEMENTS BY AGENT.**

1. Where soliciting and forwarding applications for policies of insurance were within the scope of the duties of an agent of an insurance company, and such agent undertook to prepare for another an application for insurance, and willfully inserted therein a false answer to a material question, he will be regarded in so doing as the agent of the company, and not of the applicant, and the agent's knowledge of the falsity of the answer will be imputed to the company.

2. Although, in such case, the application was, by its terms, a part of the contract of insurance, and was signed by the person to whom the policy was subsequently issued, if the latter was fraudulently misled and deceived by the agent as to the contents of the application in the respect indicated, and was in fact ignorant that it contained the false answer in question, the company will not be allowed to avoid the policy on the ground of a false warranty in relation to that answer.

3. This case, upon its substantial merits, is controlled by the propositions of law above announced; and there was no error in refusing to

grant a new trial upon any grounds of the motion therefor to which the cross bill of exceptions relates.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by R. S. Clubb against the American Accident Company of Louisville, Ky. There was a judgment for plaintiff, and a new trial was granted, and plaintiff and defendant bring error and cross error, respectively. Reversed on main bill. Affirmed on cross bill.

Johnson & Krauss, for plaintiff in error. Symmes & Bennett, for defendant in error.

**LUMPKIN, J.** The principal and controlling legal questions involved in the present case are stated in the headnotes. We rest the correctness of our conclusions upon the reasoning of Mr. Justice Miller in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222. The whole subject relating to the responsibility of insurance companies for the acts of their soliciting agents is elaborately discussed in his opinion. We take from it the following extended extract, which is sufficient for our present purpose: "It is not to be denied that the application [for an insurance policy], logically considered, is the work of the assured; and, if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies wait-

ed for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves insured are the victims. The tendency of modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal." Those desiring to enter upon a further investigation of the subject with which we are now dealing may, with profit, consult the numerous authorities cited in the second note on pages 324-328 of volume 11 of the American & English Encyclopedia of Law. In view of the law, as we understand it, the plaintiff, under the evidence submitted, was entitled to a recovery, and the court erred in granting a new trial. Judgment on main bill of exceptions reversed; on cross bill affirmed.

(97 Ga. 482)

**GARDNER v. WAYCROSS AIR-LINE  
R. CO.**

(Supreme Court of Georgia. Nov. 15, 1895.)

**CARRIERS—INJURY TO PASSENGER.**

Where a passenger on a train standing upon a track at a station, whence it was to be started, went into the baggage car for the purpose of seeing the conductor upon legitimate business connected with the passenger's journey, and while there was thrown down and injured by the sudden bumping of another car against the standing car, whether or not, in view of all the evidence submitted, the passenger was rightfully in the baggage car, and whether or not the injury resulted from the negligence of the company, and whether or not such injury might have been avoided by the exercise of ordinary diligence on the part of the passenger, were all questions for determination by the jury, and not for final solution by the trial judge. It was, accordingly, error in such a case to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Hardeman, Judge.

Action by W. J. Gardner against the Waycross Air-Line Railroad Company. From an order granting a nonsuit, plaintiff brings error. Reversed.

Hitch & Myers, for plaintiff in error.  
John C. McDonald, for defendant in error.

SIMMONS, C. J. Gardner sued the railroad company for damages from personal in-

juries. The declaration is set out in 94 Ga. 538, 19 S. E. 757, the case having come to this court upon exceptions to a judgment sustaining a general demurrer to the declaration and dismissing the action. It was then held that the declaration stated a cause of action, and the judgment of the court below was reversed. The plaintiff now excepts to the granting of a nonsuit. It appears from the evidence that while the defendant's train was at Waycross, at the usual place of departure, the plaintiff, intending to take passage on the train, entered, shortly before the time of leaving, a car in which there were other passengers, and took his seat. He had not purchased a ticket, there being no ticket office at the station, but he had the money with him with which to pay his fare. The car in which he was seated contained a baggage compartment, separated from that part of the car in which the passengers were by a partition, in which there was a door. He was going a short distance, and desired to see the conductor, who was in the baggage compartment, in order to explain to him, before the car started, where he wished to go, and to get information in regard to getting off. He had but one leg, and did not wish to go to the conductor after the train was in motion. The train was then waiting for passengers who were expected to arrive soon on another train, and he feared there would be a "rush" of passengers, and he would not have time to see the conductor after the train started. There was a notice over the door of the baggage compartment of "No admittance," but the plaintiff did not see it. The door was standing open. The plaintiff entered the baggage compartment, and was standing there, getting the information he desired from the conductor, when the car they were in was suddenly struck by another car. The lick was unusually hard, and caused the plaintiff to fall, thereby sustaining severe injuries to his person. The shock also caused the conductor to fall. The plaintiff testified that he had before ridden on that railroad, and in that car, but had never before experienced such a bump on that railroad, or on any other. The conductor testified that the car that caused the shock was a box car, which was being coupled to the car they were in; and that generally the bumper of a passenger car was higher than that of a freight car, and, in order to have the springs work, it was necessary to hit them a hard lick. Before the plaintiff went into the baggage compartment the conductor had been "drilling" cars, and the plaintiff, before going to the conductor, looked out of the car, and saw no "drilling" being done, and that everything was still. He supposed he had been in the baggage compartment about three minutes when the shock occurred. There was evidence as to the extent of his injuries, and as to his earnings, age, diminution of capacity to labor, etc.

We think the court erred in granting a nonsuit. The plaintiff, although he had not purchased a ticket, sustained the relation of a passenger, and the defendant was under the duty of exercising extraordinary diligence for his safety. *Railroad Co. v. Huggins*, 89 Ga. 495, (5), (6), 508, 15 S. E. 848. Such diligence must be exercised by a railway company whenever it undertakes to couple cars of a train having in it passengers to be carried by the train. The plaintiff having shown that he was injured by reason of the manner in which the cars came together, the presumption was that the injury was occasioned by the defendant's negligence, and it was incumbent upon the defendant to show that it was without fault, unless the evidence showed that the plaintiff was at fault himself to the extent of failing to exercise ordinary care for his own safety. Under the evidence, we think the question whether the plaintiff was rightfully in the baggage compartment or not, and whether or not the injury might have been avoided by the exercise of ordinary diligence on his part, as well as the question whether the injury resulted from the negligence of the defendant, were questions for determination by the jury, and not for final solution for the trial judge upon a motion for nonsuit. See *Cotchett v. Railway Co.*, 84 Ga. 687, 11 S. E. 553. Judgment reversed.

(97 Ga. 587)

# OBEAR v. FIRST NAT. BANK OF BIRMINGHAM.

(Supreme Court of Georgia. Dec. 2, 1895.)

CONFLICT OF LAWS — STATUTES OF LIMITATION — PARTIAL PAYMENT — STATUTE OF FRAUDS.

1. Where a suit upon a written contract executed and to be performed in another state is brought in a court of this state, the question whether or not the plaintiff's right of action is barred, being one relating exclusively to the remedy, must be determined with reference to the limitation laws of Georgia.

2. Although in Alabama the promise arising by implication from the mere making by the debtor of a partial payment upon a promissory note may be sufficient to constitute a new point from which the limitation will begin to run, the law of Georgia distinctly provides that a new promise, in order to constitute such a point, "must be in writing, either in the party's own handwriting, or subscribed by him or some one authorized by him." Code, § 2934.

3. It follows that the right of action upon such a promissory note not under seal is barred in Georgia after the lapse of more than six years from the maturity of the note, notwithstanding the making of a partial payment thereon, as first above stated; and this is true although such right of action would not be barred in Alabama. Whether the defense made by demurrer to the declaration in such a case be treated as arising under the statute of limitations or the statute of frauds is immaterial, as both relate to questions of remedy only.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by the First National Bank of Birmingham against George S. Obear. There

was a judgment for plaintiff, and defendant brings error. Reversed.

Hines & Hale, for plaintiff in error. J. H. Gilbert, for defendant in error.

SIMMONS, C. J. This was an action upon a promissory note, not under seal, which was executed and by its terms made payable in the state of Alabama. The note was dated February 9, 1888, and was payable on demand. The suit was filed April 17, 1894. Upon the note were unsigned entries reciting the payment of certain amounts thereon, on August 7 and August 23, 1888. By an amendment to the declaration, the plaintiff alleged that these amounts were paid on the dates mentioned, and that, by the law of Alabama, partial payments upon a note not barred by the statute of limitations operate as a recognition of the debt, and establish a new date for the commencement of the period of limitation. It did not appear by whom the entries on the note were made. The defendant demurred generally to the declaration as amended, and demurred to the amendment, on the ground that the facts therein stated do not take the note out of the statute of limitations, and that the case is governed by the statute of limitations of Georgia, and not that of Alabama. The defendant also moved to dismiss the suit, because it appeared to be barred by the statute of limitations of this state. The demurrer and the motion to dismiss were both overruled, and to these rulings the defendant excepted.

In this state all actions upon promissory notes not under seal must be brought within six years after the same become due and payable. Code, § 2917. The note sued upon was payable on demand, and therefore was due immediately. *Id.* § 2791. In order for a partial payment upon a note to constitute a new point from which the period of limitation will begin to run, the payment must be entered upon the note, and the entry must be made in the debtor's own handwriting, or subscribed by him or some one authorized by him (Code, §§ 2934, 2935); and the holder of the note cannot be the agent of the debtor to make such an entry (*Shumate v. Williams*, 34 Ga. 245; *Wright v. Bessman*, 55 Ga. 187). If, therefore, the case is controlled entirely by the law of this state, the action was barred, it appearing that more than six years had elapsed from the time the right of action accrued until the suit was filed, and it not appearing that either of the alleged payments on the note was entered thereon by the debtor, or by any person authorized by him.

It is well settled that the limitation of actions is controlled by the *lex fori*, and not by the law of the place where the contract was made or is to be performed. This was conceded, but it was contended that the rule is different as to the statute of frauds and laws of that nature, and that, while the period of limitation in this case is that fixed by the

law of Georgia, the law of Alabama governs with regard to the effect of partial payments in constituting a new point for the commencement of that period, and, such payments being of themselves sufficient for this purpose under the law of Alabama, it was not necessary that they should be entered on the note in the manner prescribed by the law of Georgia. In support of this contention, counsel relied upon section 8 of the Code of this state, which declares that "the validity, form and effect of all writings or contracts are determined by the laws of the place where executed." We do not agree with counsel in this contention. This provision of the Code is declaratory of a rule which prevails universally among civilized nations, and which is applied in determining as to the nature, validity, and interpretation of contracts; and it is not to be so construed as to conflict with the rule, equally well established, that matters respecting remedies on contracts, such as the mode of procedure and proof, and the time within which suit shall be brought, are regulated by the law of the forum or place where the suit is brought. A law prescribing the manner in which a new promise, or a payment from, which such a promise will be implied, shall be evidenced in order to extend the period within which suit may be brought upon a contract, relates to the remedy, and does not affect the intrinsic validity of the promise. The question of what evidence shall be required for this purpose in an action upon the contract is one thing; the question whether a promise not so evidenced is valid or not is another and different thing. The statute referred to is in the nature of a statute of frauds, its object being the prevention of fraud and perjury, and the avoidance of the uncertainties to which parol evidence is exposed (*Watkins v. Harris*, 83 Ga. 683, 10 S. E. 447); and it should be applied as well in cases like the present as in cases where such a promise is alleged to have been made in this state, if it be possible to do so without holding the promise itself void. This, we think, can be done; and in this view we are supported by various decisions upon the statute of frauds, both in England and in this country, and by the authority of leading text writers. Upon the ground that compliance with the requirements of the statute does not constitute the contract, but that the statute presupposes an existing lawful contract, and affects only the remedy for the violation of the contract, it is held that where a contract within the statute is, by the laws of the country where it is made and to be executed, valid and enforceable, still no action can be maintained upon it in the courts of the country where the statute prevails, unless its requirements be satisfied. See *Browne, St. Frauds* (5th Ed.) §§ 115a, 136, and cases cited; especially the leading English case on this subject, *Leroux v. Brown*, 12 Q. B. 801, where the question was argued

at some length, and, upon the ground above stated, it was unanimously held by the judges that an action would not lie in the courts of England to enforce an oral agreement made in France, and valid there, which, if made in England, could not, by reason of the statute of frauds, have been sued upon. See, also, the well-considered opinion of Park, J., in the case of *Downer v. Chesebrough*, 38 Conn. 39, where it was held that the evidence by which the contract was to be proved was no part of the contract itself, and was governed therefore by the *lex fori*, and not by the *lex loci contractus*. "Any other view of the law," it was said, "would lead to endless perplexity. Evidence merely informs the court what contract was made. It has nothing to do with the obligations imposed by the agreement. Parties are presumed to contract in accordance with the law of the place where a contract is made. The law forms a part of it. But can it be said that the parties contract in regard to the mode by which its terms and conditions shall be made known to the court if a suit should be brought on the contract?" There is some conflict of opinion on this subject, but we think the views above stated are sustained by sound reason, as well as by the weight of authority. Dr. Wharton, in his work on the Conflict of Laws (section 690), says: "Such statutes are based on moral grounds. Their object, as is shown by the title of that which served as the pattern of all others, is to prevent fraud and perjury. Here, then, would come into play the position on which Savigny lays such great stress, that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states. It is true that Judge Story opposes to such a conclusion his great authority. He maintains that, where parol contracts are good by the law of the place where they are made, they may be enforced in countries where they would, if there executed, be barred by the statute of frauds; and he cites a number of cases to this point, none of which, his editor, Judge Redfield, states, seem to adopt the views he here intimates." Judge Redfield, in the note referred to, says: "We must confess that upon principle, as the statute does not declare the contracts void, but only that no action or suit, either in law or equity, shall be maintained on such contract, it ought to be regarded as a statute affecting the remedy, rather than the contract, and that, wherever made, it could not be sued in the courts of a state where the statute expressly provided that no such action shall be maintained." In the case of *Denny v. Williams*, 5 Allen, 1, where a different rule was stated, and in the cases of *Van Reimsdyk v. Kane*, 1 Gall. 630, Fed. Cas. No. 16,872, *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019, and *Low v. Andrews*, 1 Story, 33, Fed. Cas. No.

\$3,559, in which doubt on this point was expressed by Judge Story, the question was not actually presented for decision. A case which goes very far in vindicating the control of the *lex fori* in such cases is that of *Bain v. Whitehaven*, 3 H. L. Cas. 1, where the matter is discussed by Lord Brougham, and the conclusion stated that whether a certain matter requires to be proved in writing or not, and whether certain evidence proves a certain fact or not, is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. See, also, *Wilson v. Miller*, 42 Ill. App. 332; *Kleeman v. Collins*, 9 Bush, 460; *Wood, St. Frauds*, § 166. It follows from what has been said that the court below ought to have sustained the demurrer and dismissed the action. Judgment reversed.

(97 Ga. 567)

### KERR v. HAMMOND.

(Supreme Court of Georgia. Dec. 2, 1895.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE  
—TENDER OF PRICE—PAYMENT INTO COURT.

1. Where one entitled to a conveyance from another of realty, or an interest therein, upon the payment of a given sum, tendered at the proper time that sum to the latter, which he then refused to accept, and subsequently denied the existence of any contract binding him to convey at all to the person making the tender, such person could maintain his equitable petition for specific performance; and, if the petition contained an offer to pay the amount which the plaintiff was due to the defendant, or for which he should be held liable, when the amount so due was fixed and ascertained by the decree to be rendered, this was sufficient without actually producing the money and paying it into court.

2. In the present case it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. L. O. Kerr against W. R. Hammond. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

A. H. Davis and Dorsey, Brewster & Howell, for plaintiff in error. W. R. Hammond and M. J. Clarke, for defendant in error.

SIMMONS, C. J. The plaintiff's evidence makes substantially this case: He had arranged, on May 17, 1890, to buy of one Weaver the land described in the pleadings, consisting of 250 acres, for the sum of \$6,250, of which \$2,000 was to be paid in cash and one-half the remainder in one year, and the other half in two years, the deferred payments to bear interest at 8 per cent. per annum. Shortly afterwards he made a parol agreement with the defendant by which they were to become interested together in the proposed purchase on this basis: The defendant to make the cash payment, and, if the land was sold at a profit in 30 days, such profit to be divided between the parties, and,

if it was not thus sold within this time, plaintiff to pay defendant \$1,000, and have a half interest. There were no writings between the parties, and no agreement as to the form which the transaction should assume in written instruments. Defendant made the cash payment, gave his individual notes for the other payments, and took a bond for titles to himself. The land was not sold within 30 days. The plaintiff tendered the \$1,000 within the time required by the contract. The tender was not accepted by the defendant, and he subsequently denied the existence of any contract binding him to convey at all. No further actual tender was ever made, nor was the money held by the plaintiff for the defendant's use. The defendant, on May 6, 1891, sold 100 acres of the land for \$4,500, and received the money. The defendant rented the land for two years at \$75 per year. He had cut on the land about 450 cords of wood worth \$1 per cord, and about 50 cords worth \$1.50 per cord. The cutting of the wood injured the land \$25 per acre. The petition prayed that the defendant be required to specifically perform the contract between him and the plaintiff, and be required to execute to the plaintiff proper papers conveying to the plaintiff a one-half undivided interest in the bond for titles held by the defendant upon the plaintiff paying to him the \$1,000, "which sum your petitioner now tenders to the said [defendant], and offers to pay the same into court, subject to the order or said [defendant]." By amendment the plaintiff prayed that the defendant be required to execute to him such conveyance as would protect his interest in the premises; that the defendant should account to him for all the timber the defendant had cut off the land, and for whatever damage he may have done the land by the cutting of the timber, and for rents and profits of the land, and that the defendant be required to account for the money which he received from the sale of 100 acres of the land on May 6, 1891. At the conclusion of the plaintiff's evidence the trial judge, on motion of the defendant, granted a nonsuit, on the ground that there was no continuing tender, and no payment into court of the plaintiff's part of the purchase money; and to this judgment the plaintiff excepted.

We think the court erred in holding that such a tender was necessary. The decisions cited by the learned counsel for the defendant do not deal with a case of this kind. The case is different from that of a defendant pleading tender to escape the payment of interest and costs. The rule applicable here is well stated in *Waterman on Specific Performance* (section 446) as follows: "Where a vendor places himself in such a position as to make it appear that, if a tender of the purchase price were made, its acceptance would be refused, the purchaser need not make a tender in order to maintain his bill. In such case an offer to bring the

money into court when the amount is liquidated, and his decree granted, is sufficient. If the vendor refuses to receive the purchase money when tendered, or prevents the vendee from performing his part of the agreement, thus in effect making a demand nugatory, neither law nor equity requires it of the vendee. Under such circumstances specific performance will be decreed within a certain time, provided the vendee, before that time, shall have performed on his part." In the case of *Irwin v. Askew*, 74 Ga. 581, this court held that, where a contract for the sale of land and putting the purchaser in possession was broken by the vendor saying to the purchaser that he could not comply with its terms, tender of the purchase money was unnecessary. In the present case it appeared that the plaintiff tendered in due time the full amount required of him by the contract, but the defendant refused to accept it, and denied that there was any contract at all which bound him to convey to the plaintiff. Moreover, in view of the sale of a part of the land by the defendant, and of the sums realized by him from the rent of the land, the cutting of wood therefrom, etc., an accounting was necessary in order to ascertain how much was due by the plaintiff. A tender of the money into court was rendered unnecessary, therefore, not only by the defendant's repudiation of the contract, but by the uncertainty as to the amount actually due. See *Delchmann v. Delchmann*, 49 Mo. 107, 110; *Irvin v. Gregory*, 13 Gray, 215. In the case last cited it was said by Shaw, C. J.: "When money is brought into court with a plea of tender, it is an admission of the party bringing it that the adverse party is entitled to it, and may take it out when he pleases. But in a suit for specific performance it is sufficient for the plaintiff to offer by his bill to bring in his money whenever the sum is liquidated, and he has a decree for performance." The plaintiff, as we have seen, did this in the present case. In addition to the authorities above cited, see 3 Pom. Eq. Jur. (2d Ed.) note to section 1407, and cases cited; 22 Am. & Eng. Enc. Law, art. "Specific Performance," pp. 1040, 1041, and cases cited. Judgment reversed.

(97 Ga. 549)

**KIMBALL v. MOODY et al.**

(Supreme Court of Georgia. Dec. 2, 1895.)

**MECHANIC'S LIEN—ENFORCEMENT—COMMON-LAW SUIT—GARNISHMENT.**

1. A laborer for a contractor cannot, by a mere common-law suit against the latter and garnishment proceedings against the owner of realty upon which the contractor had agreed to build a house, enforce against such owner an alleged lien for labor done for the contractor upon the house, but can only do so by proper proceedings under the statute in such cases provided.

2. Where such a laborer obtained only a common-law judgment against the contractor, and a garnishment sued out in connection therewith

was not served upon the owner of the realty until after he had settled in full with the contractor, the owner, as such garnishee, cannot be made liable to the laborer for any portion of his judgment.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Howard Kimball against Moody & Brewster. Judgment for defendants, and plaintiff brings error. Affirmed.

Speolrs & Smith, for plaintiff in error. Rosser & Carter, for defendants in error.

**LUMPKIN, J.** The statute plainly and distinctly points out the method by which a laborer may establish and enforce a lien upon realty, as against the owner thereof, for labor done under the employment of a contractor engaged by the owner to erect a building upon such realty. It is absolutely certain that such a lien cannot be nursed into existence, nor enforced merely by instituting a common-law suit against the contractor, and causing a garnishment to be served upon the owner. It is proper enough to bring such a suit, and, if the garnishment is served in time, it may result in the collection by the laborer of the money due him for his services. But, if the garnishment is not served until after the owner of the realty has settled in full with the contractor, like all other garnishments served too late, it will be entirely unproductive. Judgment affirmed.

(97 Ga. 546)

**THORNTON et al. v. ABBOTT et al.**

(Supreme Court of Georgia. Dec. 2, 1895.)

**OPEN ACCOUNT—WHAT CONSTITUTES—PRACTICE.**

The action not being upon an "open account," and having been brought before the pleading act of 1893, it was error to allow the plaintiff to take a verdict and enter a judgment without proving his cause of action; and this error was properly corrected by subsequently setting the verdict and judgment aside, and reinstating the case, upon a motion made by the defendants during the same term.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by J. J. Thornton and others against Abbott, Parker & Co. There was a verdict for plaintiffs, which was set aside, and plaintiffs bring error. Affirmed.

The following is the official report:

To the January term, 1894, of the city court of Atlanta, J. J. Thornton and J. L. Hooten, surviving partners of J. H. Couch & Co., and J. L. Key, administrator of J. H. Couch, brought suit against Abbott, Parker & Co. for \$1,367.27, besides interest, alleging: Thornton and Hooten began business in Fulton county with Couch, January 4, 1893, trading in live stock under the firm name of J. H. Couch & Co. Petitioners furnished the entire capital,—\$2,409.60. The business was conducted at defendants' stables. Upon the

books of defendants was kept an account of their transactions. Such funds as arose from the business and from the sale of their stock were paid into the hands of defendants. The business was closed up March 13, 1893, with due notice to defendants. At that time, and divers times thereafter, there appeared upon the books of defendants a balance of \$5,907 as a credit in favor of J. H. Couch & Co., which amount defendants admitted as being due petitioners, and which they refused to pay on demand. While the business of J. H. Couch & Co. was being carried on, Couch formed another and separate partnership with one Whitson, with which petitioners had nothing to do. Whitson, in the course of time, sold out to Couch, and he closed up said business. Defendants took of the money of petitioners belonging to the firm of J. H. Couch & Co., and credited the same on the account of Couch & Whitson, or to the account of Couch & Whitson, or to the account of Couch, in closing up the business of Couch & Whitson, \$573.20, which is a misappropriation, misapplication, and conversion of said funds, and which defendants refuse to pay on demand heretofore made. The funds composing the capital and profits of said business all went into the hands of defendants, and after the profits and expenses have all been accounted for there remains in the hands of the defendants \$735 balance of original capital invested by them, and defendants have converted the same to their own use, and refused to pay on demand heretofore made. John H. Couch died in August, 1893. At the appearance term the case was undefended and in default, and so remained until October 23d, during the September term, at which time plaintiffs asked leave of the court to take a verdict by default against defendants. This leave was granted, and thereupon the judge instructed the jury that, this being a suit on account, and as no defense had been filed thereto, and no appearance had been made by defendants, and as the service on defendants was personal, they were authorized and instructed to find for plaintiffs the full amount of the account, with interest and costs of suit. Under this charge the jury returned a verdict for plaintiffs for the amount claimed in their declaration. During the term at which the verdict was rendered, defendants filed a motion for new trial and motion to set aside the verdict and judgment, and also a traverse of the officer's return of personal service on defendants. The traverse of the return was submitted to a jury, who found against the traverse. The motion for new trial and the motion to set aside the judgment came on to be heard at the same time, and the motion to set aside was granted, which, having been done, the motion for new trial was dismissed. Plaintiffs excepted to the judgment of the court sustaining the motion to set aside the verdict and judgment. In notes by the court to the bill of exceptions the judge states:

"The declaration was not read in the hearing of the court, but the court treated it as a suit on an account, with personal service, plaintiffs' counsel having stated it was so." The jury having rendered a verdict without any evidence whatever, upon the statement of plaintiffs' counsel that it was a suit on an account with personal service, the court set the judgment aside on the ground that this was not a suit on an account, but one requiring proof before a judgment could be rendered.

Jas. L. Key, for plaintiffs in error. Dorsey, Brewster & Howell, for defendants in error.

LUMPKIN, J. An action was brought by the plaintiffs below, the nature of which will appear from the reporter's statement. It was filed before the pleading act of 1893, and therefore, in deciding the case, that act was not considered. It is by no means an easy matter to define in precise and accurate terms what constitutes an action upon an "open account." An attempt to do so is not necessary in the present case, for we can, without serious difficulty, safely assert that the action with which we are now dealing is not one of this character, which is sufficient for the purpose in hand. The action was really one of assumpsit for money had and received by the defendants to the plaintiffs' use, and not properly accounted for and paid over on demand. This, we think, will appear from a casual inspection of the plaintiffs' declaration. It follows that the court erred in allowing the plaintiffs to take a verdict without submitting evidence, and rightly corrected that error by setting aside the verdict and reinstating the case upon a motion for this purpose duly filed by the defendants during the same term at which the verdict was rendered. Judgment affirmed.

(97 Ga. 10)

#### ROGERS et al. v. BURR.

(Supreme Court of Georgia. Oct. 5, 1895.)

CORPORATIONS—CONTRACT OF SUBSCRIPTION—CONSTRUCTION—DIVIDENDS—GUARANTY.

1. Where one was induced to subscribe and pay for certain shares of stock in an incorporated company upon the faith of a written agreement signed by others, who thereby guaranteed to such subscriber the payment of certain dividends upon the stock for a period of three years, and also therein agreed that if, at the expiration of said three years, the subscriber did not desire to carry the stock any longer, they would, upon 30 days' notice from him, pay to him the par value of the stock for which he had subscribed, held: (1) That it was not incumbent on the subscriber to make his election as to keeping the stock, and to give the notice stipulated for in the contract, immediately upon the expiration of the three years, but that he could do so within a reasonable time thereafter; (2) that the failure of the subscriber to give the guarantors notice that he had received no dividends upon the stock was not fatal to his right of action, under the contract, for the recovery of the same.

2. Under the construction of the contract as

above announced, the plaintiff's declaration, as amended, set forth a cause of action, and there was no error in overruling the demurrer to the same.

(Syllabus by the Court.)

Error from superior court, Pike county; J. J. Hunt, Judge.

Action by M. E. Burr, administratrix of H. R. Chambers, deceased, against J. J. Rogers and others. There was a judgment for plaintiff, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Mrs. M. E. Burr, administratrix of the estate of H. R. Chambers, brought suit against J. J. Rogers and a number of others upon the following contract: "Georgia, Pike County. The undersigned parties, recognizing the importance to our town and community of a speedy and successful completion of the subscription to the capital stock of the Barnesville Manufacturing Company, and it being known to us that there is a balance of about five thousand dollars of said capital stock untaken and unsubscribed for, and having confidence in the success and profits of the enterprise, it is therefore agreed by us that for the purpose of inducing any one or more persons to subscribe for said untaken balance, or any part thereof, we will guaranty to them the payment of an annual dividend on the amount of their stock equal to eight per cent. per annum on the money paid into said company on said stock. This agreement and guaranty for the payment of eight per cent. as aforesaid is to run for the space of three years from the first day of December, 1889; and if, at the expiration of said three years, the stockholders or holders of said stock desire and wish not to carry the same any longer, we hereby further agree, with thirty days' notice from any or all of them, to pay each holder par value, or fifty dollars, for each share of stock held by them, their heirs or assigns. And, if said amount of par value is not paid promptly, we hereby consent that the agreement and guaranty to pay eight per cent. dividend, above set forth, shall continue of force until the same is fully paid up. Witness our hands and seals, this the 27th day of April, 1889." This was signed by the defendants, after which signatures appeared the following: "We, the subscribers, consent and agree to take the amounts of stock in the Barnesville Manufacturing Company opposite our names below, respectively, upon the terms and conditions set forth in the above agreement." This was signed by J. J. Rogers and 21 others, including, "R. J. Powell, Adm'r H. R. Chambers, 60 shares, \$3,000." Plaintiff alleged: The defendants are indebted to her \$3,000, principal, besides interest from April 27, 1889. After the expiration of three years from December 1, 1889, she demanded payment of both principal and interest, of the parties to the contract, and payment was refused. In pursuance of the proposition made

by the defendants, as set out in the contract, R. J. Powell, former administrator of H. R. Chambers, deceased, agreed to take 60 shares of stock of the Barnesville Manufacturing Company, paying therefor \$3,000, and did so take said stock on the representations and guaranty of all of defendants; and all of defendants had notice that he subscribed for the stock on said representations, and the manufacturing company received the \$3,000, and issued the 60 shares to him, which fact was known to all of defendants, and they approved and indorsed the same. Plaintiff now has said stock, and has been ready to turn it over to defendants upon their paying the principal and interest due on the same, in accordance with the terms of the contract sued on, and has the stock now in court to tender to defendants whenever they comply with their contract; and she asks the court to decree a surrender and transfer of the 60 shares to defendants when they shall pay the amount due her. R. J. Powell, former administrator, and petitioner, have received no dividend on the stock from the manufacturing company since the same was taken. All of the defendants knew, at the time plaintiff accepted the proposition of defendants on their said contract, that Powell, administrator, did accept the same on April 27, 1889; and all of defendants had full knowledge of plaintiff's acceptance on or about the same time they signed the contract. Powell died before the expiration of said three years, and plaintiff was appointed administratrix de bonis non; and as soon as she knew or ascertained the terms of the contract, and as soon as she had the opportunity, she made the demand of all of defendants. All of the defendants were stockholders in the manufacturing company, interested in its erection, and have sustained no loss by reason of the delay of the demand so made, and said demand was made by plaintiff in a reasonable time after the time fixed, if any is fixed, in the contract. Defendants demurred, on the following grounds: (1) No cause of action is set out. (2) Plaintiff cannot recover interest or dividends (if entitled to recover) except from December 1, 1889. (3) Plaintiff gave defendants no notice of the fact that she had subscribed for stock on the faith of the alleged agreement. (4) She does not allege that she notified them, at the expiration of three years from December 1, 1889, that she did not wish any longer to carry the stock. (5) If she has any right to recover, it is for the specific performance of the contract, and then only upon the showing that she has complied strictly with its terms. (6) She does not offer to comply with the contract by offering to surrender and transfer the stock to defendants. (7) She does not allege that she notified defendants of the nonpayment of dividends, and demanded payment thereof from defendants. (8) She does not allege that the manufacturing company failed to pay dividends, or that she has sought to collect them from said com-

pany. The demurrer was overruled, and defendants excepted.

J. S. Boynton, for plaintiffs in error. J. F. Redding, for defendant in error.

JANES, J. 1. The official report sets out fully the declaration as amended, the demurrer, and the contract sued on. This contract, on the faith of which the administrator of Chambers subscribed for 60 shares of stock in the Barnesville Manufacturing Company, stipulates that if, at the expiration of three years from December 1, 1889, the subscriber desires no longer to carry the stock, the plaintiffs in error will, "with thirty days' notice," pay such subscriber par value for the same. This provision gave to the subscriber the right, at the expiration of three years from the time stated, to elect whether he would keep the stock, or turn it over to plaintiffs in error, and require them to pay him therefor its par value. He had no right to make this election before the expiration of the time. The time for such election expired at midnight on November 30, 1892, and it could not have been made until the full expiration of the time. The position that the election ought to have been made on the last moment of the last day is too absurd to seriously consider. It follows that the time for the exercise of the right was after the expiration of the three years. The word "at," in this contract, is equivalent in meaning to "after." It was held in *Annan v. Baker*, 49 N. H. 169, cited in 1 Am. & Eng. Enc. Law (1st Ed.) p. 893, note, that "at the end of one year" means "at the expiration of one full and entire year," and that "at," is equivalent in meaning to "after." If the word "after" is substituted for "at" in the contract under review, there can be no doubt about the correctness of the construction given to it in the headnote. As the election could be made after the expiration of the time limited, of course a reasonable time was allowable for this purpose.

2. Plaintiffs in error, in their contract, guaranty the payment of an annual dividend, equal to 8 per cent. per annum from December 1, 1889, on the money paid into the company on the stock. It is alleged in the declaration that no dividends have been received, but there is no allegation that any notice was ever given to plaintiffs in error of the failure by the company to pay such dividends. They contend that such notice was necessary in order to make them liable on their guaranty. The guaranty is absolute and unconditional, and there is no stipulation whatever in the contract requiring the subscribers for the stock to notify the guarantor of the company's failure to pay dividends. It was the duty of the plaintiffs in error to know of the default of the company, and information could have been easily obtained by inquiry of the company or of defendant in error. In the case of an absolute guaranty, no condition

being annexed to the contract, no condition is implied by law requiring notice to the guarantor of the default of the principal. Having guaranteed unconditionally the performance of a contract by a third person, the guarantor must at his peril see that the contract is performed. The authorities on this question in other states are numerous and somewhat conflicting. See *Heyman v. Doolley* (Md.) 26 Atl. 117. But, be this as it may, the rule above enunciated is sustained by the decisions of this court. *Wright v. Shorter*, 58 Ga. 72; *Gammell v. Parramore*, 58 Ga. 54.

3. The defects in the declaration pointed out by the demurrer are cured by the amendments, and the declaration as amended, contains a good cause of action. There was no error in overruling the demurrer. Judgment affirmed.

SIMMONS, C. J., being disqualified, JANES, J., of the Tallapoosa circuit, was designated to preside.

(97 Ga. 452)

#### BAKER et al. v. STATE.

(Supreme Court of Georgia. Oct. 28, 1895.)

SOLICITOR GENERAL AS PROSECUTOR—FINDING OF INDICTMENT—WAIVER OF OBJECTIONS—CRIMINAL LIBEL—TRIAL—OBJECTIONS TO EVIDENCE—INSTRUCTIONS—EVIDENCE OF PUBLICATION—VERDICT—NEW TRIAL—SPECIFICATIONS OF ERROR.

1. That the solicitor general was himself the prosecutor in a criminal case, and appeared before the grand jury, not only as such, but also in his official capacity, is not, after the trial and conviction of the accused, good cause for a new trial, no exception to the indictment on that ground having been previously taken. In such a case, however, a solicitor general pro tem. should have been appointed before the indictment was acted upon by the grand jury.

2. As has been repeatedly ruled, the supreme court will not undertake to correct alleged errors in admitting evidence, when it does not appear what, if any, objection was made to the evidence at the time it was offered, nor when the evidence objected to is not set out in the motion for a new trial, but is merely referred to therein as being contained in the brief of evidence.

3. A ground of a motion for a new trial which undertakes to complain of an alleged irregularity at the trial, without clearly and distinctly stating of what it consisted, but simply averring in general terms that "the circumstances attending this matter are also fully set out in the brief of evidence," does not properly and legally present any question for determination by this court.

4. Where two persons are jointly indicted and tried for the offense of libel, there may, if the evidence so authorizes, be a conviction of one and an acquittal of the other.

5. Although certain expressions in the charge of the court may have been somewhat calculated to convey the impression that, if either of the two persons who were on trial was guilty, there should be a conviction of both, yet, as the court elsewhere in its charge in effect instructed the jury that the guilt of one would not necessarily result in the conviction of the other, and the jury must have understood from the charge as a whole that neither should be convicted unless his own guilt was satisfactorily proved, the inadvertent use of the expressions above referred to is not cause for a new trial.

6. Where, in such a trial, it appeared that the alleged libelous matter was published in a newspaper, and that at least one copy of that paper

was sent to a given county, this was sufficient evidence as to publication therein, without showing that the paper in question had a general circulation in that county.

7. Where an alleged libel consisted in the publication of a letter which did not, upon its face, without the aid of innuendo and of extrinsic evidence, impute to the person alleged to have been libeled the commission of an indictable offense, it was error for the court, in construing this letter, to instruct the jury that it did charge such an offense, and was consequently libelous per se. Whether or not, in such case, the letter, in the light of all the evidence, was or was not libelous, was a question of fact, which ought to have been submitted to and passed upon by the jury.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Thomas H. Baker and C. H. Cunyus were convicted of criminal libel, and bring error. Reversed.

Glenn & Rountree, for plaintiffs in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

LUMPKIN, J. The grand jury of Bartow county indicted Thomas H. Baker and C. H. Cunyus for the offense of criminal libel. A. W. Fite, in his individual capacity, was the prosecutor; and, in his official character of solicitor general of the circuit including the county named, also appeared before the grand jury by which the indictment was found. The alleged libel consisted of the publication of a letter purporting to have been addressed to Baker by one Harrison Smith, which letter was in the following words: "Pine Log, Ga., Sept. 18, 1894. Dr. Baker: Gus Fite, solicitor general, was here Saturday, and made our church a proposition to pay all the debt on the church if we would vote for Lumpkin. The debt is \$90.00 and interest. John Vaughan told me to see you about it before I let it go before the church. Let me know as quick as you can what to do about it. I would like for you to speak at our schoolhouse somewhere towards the last of the month. Let me know as soon as you can. There will be a large crowd at the church Sunday, and I want to have it given out if you will come. Harrison Smith." It was set forth in the indictment with various innuendoes, the nature of which will appear from the following copy of the letter as it therein appeared: "Pine Log, Ga., Sept. 18, 1894. Dr. Baker: Gus Fite (thereby meaning the said A. W. Fite) was here Saturday, and made our church a proposition to pay off the debt on the church if we would vote for Lumpkin (thereby meaning William H. Lumpkin, who was then a candidate for state senator in and for the 42nd senatorial district of Georgia). The debt is ninety dollars and interest. John Vaughan told me to see you about it before I let it go before the church, and let me know as quick as you can what to do about it. I would like for you to speak at our schoolhouse somewhere towards the last of the month. Let me no as soon as you can. There will be a large crowd

at the church Sunday, and I want to have it give out if you will come. Harrison Smith." Upon conviction, the accused filed a motion for a new trial, upon the overruling of which they assign error. This preliminary statement, in connection with the facts hereinafter stated, will render intelligible the rulings made by this court upon the questions presented for review.

1. We shall undertake no discussion of the proposition that it is improper for the solicitor general to appear before the grand jury in a case which he himself prosecutes personally. It is, of course, his right as a citizen to be the prosecutor in any criminal case; but, as he is the official counselor of the grand jury, he could not with propriety appear before that body, and give advice in a case in which he was personally concerned. In such a case a solicitor pro tem. should be appointed before the indictment is laid before and acted upon by the grand jury. In the present case, however, no objection of any kind was made to the indictment on the ground that the solicitor general had appeared before the grand jury in the dual character of prosecutor and state's counsel until after the accused had been tried and convicted, and it was then too late to raise the question that, because of the fact above recited, no proper indictment had been returned against the accused.

2. If this court, by a long and unbroken line of adjudications, has been able to definitely and finally settle any question of practice, the rules announced in the second headnote should be accepted as authoritative and conclusive. They apply to several of the grounds of the present motion assigning error in admitting evidence.

3. One of the grounds of the motion complains of error in conducting an inquiry in the presence of the jury as to whether or not Baker, one of the accused on trial, then had a pistol in his pocket; and it is alleged that "the circumstances attending this matter are also fully set out in the brief of evidence." This court cannot undertake to scrutinize the brief of evidence for the purpose of ascertaining what were the "circumstances" to which allusion is here made. This announcement is in accord with the practice uniformly observed in this tribunal.

4, 5. The statement contained in the fourth headnote is axiomatic. There are, in the charge of the court, some expressions calculated to convey the impression that, if the jury should find either one of the accused on trial guilty, there should be a conviction of both. We do not think, however, the jury were misled as to this matter, because elsewhere in his charge the judge gave them positive instructions to the effect that the guilt of one would not necessarily result in the conviction of both; and, as men of common sense, the jury must have understood that they were at liberty to convict one and acquit the other if, in their opinion, the guilt

or one was established beyond a reasonable doubt, and that of the other was not.

6. Among the charges complained of was an instruction relating to the newspaper in which the libel was published, to the effect that, if it appeared that only one copy of the paper was sent to the county of Bartow, that would be sufficient evidence as to publication therein, without showing that the newspaper in question had a general circulation in that county. This was a correct presentation of the law on the subject. 2 Starkie, Sland. & L. \*320; Odgers, Sland. & L. 430; 2 Bish. Cr. Proc. § 800.

7. It is an indictable offense to buy or sell a vote at any public election authorized by any law of this state; but it is not a criminal offense to buy or sell votes at elections with which the laws of this state have no concern,—such, for instance, as an election for the pastor of a church, for the president of a debating society, manager of a baseball team, and the like. The Harrison letter does not, on its face, show for what office or position William H. Lumpkin was a candidate; and therefore Mr. Fite, without violating any law of this state, could have offered to pay off the church debt on condition that the members would vote for Mr. Lumpkin, if, in fact, the election in which their votes were desired was not one provided for or authorized by a statute of Georgia. It is perfectly clear, therefore, that this letter does not, upon its face, impute to Mr. Fite the commission of an indictable offense. Of course, it was perfectly proper, in preparing the indictment, to show, by way of innuendo, what the charge contained in the letter really meant. This was done, as will have been seen, by second copy of the letter, appearing above, in which the innuendoes are inserted. It would have been equally proper to sustain the indictment thus prepared by appropriate evidence. But the difficulty is the trial judge did not, as he ought to have done, leave this matter to be demonstrated by evidence, but cut off any necessity for proving the offense as laid by instructing the jury that the letter in question did charge an indictable offense, and was consequently libelous per se. This was a grave error, and requires the granting of a new trial. The question whether or not, in the light of all the evidence, the letter was libelous, is one for solution by the jury at the next hearing. Judgment reversed.

(97 Ga. 500)

# CONQUEST et al. v. NATIONAL BANK OF BRUNSWICK.

(Supreme Court of Georgia. Nov. 15, 1895.)

RECEIVERS—EQUITY JURISDICTION—HOW LONG  
RETAINED—ACTIONS—DISMISSAL—REINSTATE-  
MENT—DECREE—WHAT CONSTITUTES.

1. Where, by a consent order, an equitable petition filed by several plaintiffs, for injunction and the appointment of a receiver, was dismissed, the receiver discharged, and thereafter the property in his hands was restored to the

defendants in the petition, the effect of the order of dismissal was to take the case entirely out of court, and end the litigation between the parties.

2. Mere recitals in the order of dismissal to the effect that the defendants had satisfied all obligations against them in the petition set out, except the amounts due one of the plaintiffs upon certain promissory notes therein described, "which amounts are hereafter to be satisfied by the payment within a reasonable time, or additional security given," did not amount to a final and conclusive decree in favor of this plaintiff against the defendants for the amounts apparently due upon such notes; and one who subsequently acquired title to the same could not, upon the facts above recited, maintain an equitable petition for a reinstatement of the original case, and the appointment of a receiver to again take charge of the defendants' property, in order to administer the same for the purpose of realizing money with which to pay off these notes.

3. If such a petition could in any event be maintained, its prayers for relief of the nature above indicated should not be granted when the defendants not only tender a bond for the payment of any sum or sums which may be adjudged to be due by them upon the notes in question, but also offer to pay into court a sufficient amount in cash to satisfy any judgment which may be rendered against them thereon.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Petition by the National Bank of Brunswick against P. L. Conquest & Co. for the reinstatement of a previous action by the Merchants' & Traders' Bank and others against the same defendants, which had been dismissed. The petition was granted, and defendants bring error. Reversed.

O. O. Thomas and Garrard, Meldrum & Newman, for plaintiffs in error. Goodyear & Kay, L. A. Wilson, Symmes & Bennett, and Hitch & Myers, for defendant in error.

LUMPKIN, J. Fortunately, there is such a thing as a lawsuit's coming to an end. The case at hand is an instance in point. The Merchants' & Traders' Bank and others filed an equitable petition against P. L. Conquest & Co. for an injunction, and the appointment of a receiver. This case, under a consent order, was finally dismissed, the effect of the order of dismissal being to take the case entirely out of court, and end the litigation between the parties. It is true that in the order of dismissal it was recited that the defendants had satisfied all the obligations against them in the petition set out, except the amounts due one W. P. Lee upon certain promissory notes, "which amounts are hereafter to be satisfied by payment within a reasonable time, or additional security given"; but this mere recital certainly did not amount to an adjudication in favor of Lee against the defendants, Conquest & Co., for the amounts apparently due on the notes to which it referred. In fact, so far as concerned Lee and Conquest & Co., nothing was adjudicated except that the case be dismissed as to the latter upon the payment by them of all costs accrued up to the day of dismissal. The petition was retained in court solely for the purpose of adjusting a contro-

versy between the counsel as to the distribution of certain fees, as to which matter none of the parties to the record had any interest or concern. The Lee notes afterwards passed into the hands of the National Bank of Brunswick, and it filed a petition praying for a reinstatement of the original case, and the appointment of a receiver to again take charge of the property of Conquest & Co., in order to administer the same with a view to realizing money with which to pay off these notes. Upon this petition, the judge granted an order "for a renewal or reinstatement" of the original case, and also appointed a receiver, as prayed.

There is no law, rule of practice, or precedent of which we have any knowledge which authorized the granting of such an order. The original case was completely dead, and this method of resurrection was entirely without authority of law. But if, in any event, the petition of the bank was maintainable, the order should not have been passed in the face of a tender on the part of Conquest & Co. of a bond conditioned for the payment of any sum or sums which might be due by them upon the notes in question, accompanied by an offer to pay into court a sufficient amount in cash to satisfy any judgment which the bank might obtain against them upon these notes. The record shows that such a tender and such an offer were in fact made; and, even if the bank's petition had been such as to give it a standing in court, the business of the defendants ought not to have been broken up when they were ready to do everything necessary to fully protect the bank as to all its alleged rights in the premises. Judgment reversed.

(97 Ga. 550)

#### CULVER v. HOOD.

(Supreme Court of Georgia. Dec. 2, 1895.)

TRIAL—RIGHT TO OPEN AND CLOSE—INSTRUCTIONS—APPEAL—REVIEW—WEIGHT OF EVIDENCE.

1. Where complicated matters of account were referred to an auditor, under the act of October 16, 1885 (Acts 1884-85, p. 98), and both parties filed exceptions of fact to his report, it was not an abuse of discretion to allow the opening and conclusion of the argument to that party against whom the report bore the more unfavorably, and whose exceptions, both as to number and substance, were of the greater importance.

2. It appearing from the evidence of the plaintiff himself that the promissory note upon which his action was brought was given in final settlement of all the mutual accounts between himself and the defendant, a statement by the court, in its charge, to the effect that this was an undisputed fact in the case, even if incorrect, was not a matter of which the plaintiff had any right to complain.

3. Where, in such a case, the auditor reported his conclusions of fact, together with the evidence introduced before him, and the case was submitted to a jury upon exceptions of fact, it was within their power, without the introduction of any other testimony, to reach different conclusions from those of the auditor, and to find accordingly.

4. The verdict was not so entirely unwarranted by the evidence submitted to the jury

as to authorize this court to set it aside after its approval by the trial judge, and there was no error requiring a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by W. A. Culver against Eliza Hood. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Culver sued Mrs. Eliza Hood upon a promissory note for \$3,717.50, principal, besides interest and attorney's fees, dated November 2, 1891, and due November 1, 1892, payable to Culver or order, for "value received." Defendant pleaded the general issue; further, plaintiff is her brother in law, and was a bosom friend of her deceased husband, J. R. Reynolds, who died in March, 1889. At the date of his death, she had never had to look after her business matters, knew nothing about business, and, having the utmost confidence in plaintiff, turned over all of her business to him, supposing he would treat her right. They were partners in a truck farm, and so great was her confidence in him that she allowed him to have full control of the entire business, along with all her other business. Shortly after her husband's death, she collected \$3,000 insurance on his life, which she put in bank, and, having also \$800 in bank, and desiring to improve her Whitehall street property, turned the matter over to plaintiff, and sold a piece of realty for \$3,000. This, too, was placed to her credit in the bank, making in all \$6,800. During the time she was having the work done, she borrowed \$6,000, which was also placed to her credit in the bank, and shortly afterwards \$4,000, which was also placed in the bank, and shortly afterwards \$2,500. Of this amount she handed plaintiff \$2,400. During the time she was having the work done, she paid plaintiff, in checks, as by exhibit attached, \$8,105. She paid M. T. Culver, brother of plaintiff, and by his direction, in checks, as per exhibit attached, \$5,154.84. She paid Culver, Elisman & Co., of which firm plaintiff was a member, checks to the amount of \$1,053.49, as per exhibit attached. She paid for material for the improvement of said realty, as per exhibit attached, \$2,183.85; making \$12,677.28 she had paid out. After her husband's death, plaintiff collected her rents, and paid her expenses; and on November 2, 1891, they had a settlement, in which he claimed that she owed him a difference of \$686.97, and on the stores (improvement of the realty) he claimed that she owed him \$2,943.23, besides \$37.50, interest, and insisted that she give him her note for that amount, which she did, under his representations, believing them to be true, which amount, added to the \$12,677.28, makes the cost of the building, according to plaintiff's statement, \$15,708.06. She attaches the statement furnished her by plaintiff, showing

the cost of the building to be \$14,460.45, admitting that defendant had paid this sum less \$2,945.28, which last amount is included in the note sued on. The relationship between her and plaintiff was of such a character as to be of a confidential nature, and he knew she had all confidence in him, that she knew nothing of business, and relied solely on him; and he took advantage thereof, and by false and fraudulent representations as to the cost of the buildings, and as to what she owed him, knowing she knew no better at the time, and thinking she would never find out his treachery, had her give him the note sued on. She refused to pay the note at maturity, having in the meantime found out to a certain extent that he had purposely practiced a fraud upon her. Since the suit was filed, she has employed an experienced architect to make a careful estimate of the entire cost of said buildings, which shows that they cost but \$11,829.93, which makes a difference of \$2,479.68, and added to this sum the amount paid by defendant, which plaintiff has charged to her, makes \$4,663.45. This last named amount was due her by him when she gave the note, but she did not know it, etc. The note is without consideration, was obtained by fraud, and she prayed judgment against plaintiff for \$4,663.43, or for such sum as the evidence may show she is entitled to. She further pleaded: Since the filing of the plea above mentioned, she finds that plaintiff owes her, as per an exhibit attached, besides other amounts stated therein, \$675.85, for which several amounts he failed to render any account, and her failure to discover the impositions on his part is attributable to the implicit confidence she had in him.

The case was referred to an auditor, the nature of whose report, so far as material, will sufficiently appear from the report hereinafter made. To this report, plaintiff made the following exceptions: (1) Because, as appears from the evidence, defendant was indebted to plaintiff \$3,716.50, November 2, 1891, and it is reported that at said date she owed him only \$3,586.36. (2) The note sued on, as shown by the evidence, was a settlement, not of a general balance on the account for work of plaintiff in building the stores, and doing other things for defendant, but the note was given to cover amounts advanced by plaintiff to defendant for certain items of the work mentioned. Wherefore the basis of the auditor's calculation made in order to ascertain the debits and credits is a mistake, and in the teeth of the evidence. The evidence showed that no items of the work mentioned above, which had been paid for out of the money of defendant, were considered between the parties at the settlement just preceding the making of the note, and that the note was given solely to cover the balance due on such advances as had been made by plaintiff to defendant, as stated above. As said note was so made with a

full knowledge by defendant of all the matters and things involved in said settlement, and all defenses, if there were any, being thereby waived, the auditor ought to have found the full amount of the note for plaintiff. (3) Defendant filed pleas which were sustained only to a very small amount, to wit, \$250. Under these facts, plaintiff was entitled to the attorney's fees stipulated in the note, to wit, 10 per cent. upon the amount of principal and interest reported in favor of plaintiff; and said report does not allow plaintiff for said attorney's fees. The report ought to be corrected by allowing plaintiff attorney's fees for the whole amount to which the pleas of defendant were not sustained. Defendant filed the following exceptions to the report: (1) The credit allowed plaintiff of \$686.97 by the auditor is contrary to the evidence, by reference to which it will be seen that plaintiff's account against defendant as kept by himself was \$3,411.40. From this amount he deducted what he claimed he had collected for her, to wit, \$2,724.45, leaving \$686.97; and this amount was included in the settlement, and is already embraced in the note. The report shows that Culver has already had the benefit of this credit. (2) The allowance to Culver by the auditor of \$260, West End taxes, is contrary to the evidence, which shows that defendant paid it, or that it was paid out of her money. (3) The allowance to Culver by the auditor of \$1,000 is contrary to the evidence, except a general statement of plaintiff in answer to this question: "How much did you pay out on different checks other than the buildings, and while it was going on?" Answer: "About \$1,000 or \$1,500, I suppose." This statement should not have been considered by the auditor, as plaintiff furnished the auditor no data upon which to base such a judgment. (4) It was contrary to the evidence to deduct \$424.70 from amount of rents collected by plaintiff, and not accounted for, to wit, \$675.85, said \$424.70 having already entered into the first settlement, and the judgment of the auditor simply allows plaintiff credit for the same thing twice, making the amount found to be due plaintiff originally of \$16,023.63 too large by \$3,053.52, the items stated in the foregoing making this amount. (5) The judgment of the auditor as to the nature of the relations existing between plaintiff and defendant is in direct conflict with the testimony, as it is overwhelmingly shown that the relations were as set out in defendant's plea, and is based alone on one expression used by the defendant while testifying before the auditor in this case,—that she discovered plaintiff's treachery in August, prior to the giving of said note; but, by reference to her testimony, the remark related to their truck-farming enterprise, and was in no wise connected with this settlement in November following, and, in connection therewith, stated that even after that she had confidence in plaintiff. She states

further, that, while she signed the note in her husband's presence, they had only been married but a few days, and her husband knew nothing whatever about the matter. (6) The evidence of the plaintiff shows that he borrowed on his wife's property \$2,400, which he placed in the bank to his wife's credit; that this money was borrowed for the benefit of the defendant, to be used by the plaintiff on defendant's buildings; but he did not take the defendant's note for the same; did not show any mortgage upon which this loan was made. He furnished the court no data upon which the court could act. The plaintiff claims that this \$2,400 was paid out by him on the defendant's buildings, mostly on pay rolls, and the defendant contends that no such thing was done. It was unnecessary, in the first place, for plaintiff to mortgage his property for the defendant's benefit when she had unincumbered property of her own; and therefore it was unnecessary for that to have been done, and the same was without her knowledge and consent. Plaintiff's wife, on this point, testified that this was done, and that the defendant gave the plaintiff her note for said amount; that the same had been lost; that plaintiff had been looking for it, and could not find it. This testimony is contradicted by the plaintiff himself. This amount, having entered into the original settlement, and having been embraced in said note, should have been deducted, upon the grounds that the proof was insufficient to establish that fact. (7) The finding of said auditor, the cost of the building to be \$11,049.20, is in conflict with the testimony. The following architects, Corput and Foote, each testified that the cost of the labor in buildings of that character is not more than 25 per cent. of the cost of the material. The other architect, Le Seur, says that the cost of labor in erecting said building, or buildings of that kind, does not exceed two-fifths of the cost of the material. Therefore, taking Corput's estimate, it being the highest, as to the cost of said building, and deducting therefrom \$5,376.77, leaves the cost of the material to be \$8,697.23; and now 25 per cent. of this amount, according to Foote and Corput, would be \$2,174.30, and this amount should be taken from the cost of the labor as claimed by the plaintiff's side of the case, leaving a difference of \$3,202.47, which amount the defendant is entitled to be credited with.

The jury sustained the second, third, fourth, fifth, sixth, and eighth exceptions of defendant, and rejected the first and seventh. They rejected the first exception of plaintiff. No finding appears as to the other exceptions of plaintiff. The charge of the court is not in the record, and it does not appear what rulings the court made on the exceptions, except as indicated by the motion for new trial hereinafter reported. No judgment or decree appears in the record. Plaintiff's motion for new trial was overruled, and he excepted. In the heading to the motion for

new trial, it is stated that the verdict disallowed all of plaintiff's exceptions. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc., and because it was contrary to certain specified portions of the charge. Further, because, while plaintiff was entitled, under the law, to open and conclude the argument, the court, against plaintiff's objection, permitted defendant to open and conclude the argument. Because the court charged as to the second exception of plaintiff, "The undisputed evidence is that this note was given in final settlement of the mutual accounts of the parties, and I instruct you to disregard this exception," when he ought to have permitted the jury to pass upon this exception. Because the court refused to give in charge the following written request of plaintiff: "If the evidence shows that defendant has mislaid or lost papers which might throw light upon this controversy, such papers having been turned over to her by plaintiff when he made the adjustment, then the plaintiff is not to be charged with his failure to show exactly how the amount for which the note was given was reached, but such failure may be attributed to the loss of said papers. Here the burden is upon the defendant, and not upon the plaintiff."

J. O. Reed and M. Foote, Jr., for plaintiff in error. R. J. Jordan, Jas. A. Anderson, and Dorsey, Brewster & Howell, for defendant in error.

SIMMONS, C. J. Culver brought his action against Mrs. Hood on a promissory note for \$3,717.50. The defendant filed several pleas, among which was a plea that the note had been procured from her by fraudulent representations of the plaintiff, in whom she had at that time the utmost confidence, he being her brother-in-law. There was also a plea of set-off. It appearing that the note was given in settlement of long standing and complicated matters of account, the matters in dispute were referred to an auditor, under the act of December 16, 1885; and the auditor, after hearing the evidence, reported that, at the time the note was given, the defendant owed the plaintiff only \$3,586.36, with interest from the date of the note at 8 per cent. To this report the plaintiff filed three exceptions: (1) That the auditor should have found the full amount of the note, instead of making the deduction; (2) that "the note sued on, as shown by the evidence, was a settlement, not of a general balance on the account for work of plaintiff in building the stores and doing other things for defendant, but was given to cover amounts advanced by plaintiff to defendant for certain items of the work mentioned"; and (3) that the plaintiff was entitled to the attorney's fees stipulated in the note, to wit, 10 per cent. on the principal and interest, and the report does not allow such fees. The defendant filed eight exceptions of fact, which will be seen by reference

to the report which precedes this opinion. The jury sustained all of the defendant's exceptions except the first and the seventh, the effect of their finding being that the defendant was not indebted to the plaintiff. The plaintiff made a motion for a new trial, which was overruled, and he excepted.

1. The first ground of the motion for a new trial was that the court erred in allowing the defendant the opening and conclusion of the argument before the jury, over the plaintiff's objection. Under the facts of the case, we do not think this was an abuse of discretion. The exceptions of the plaintiff to the auditor's report were of minor importance, while the exceptions of the defendant went to the whole merits of the case. The auditor had made a finding which, if sustained, would fix upon her a liability to the plaintiff for a large amount; and the burden was upon her to overcome the prima facie case thus made by the finding of the auditor. If she had made no exceptions, judgment would, as a matter of course, have been rendered against her for the amount found by the auditor. Under this state of facts, it seems to us that she ought to have had the opening and conclusion. At any rate, this, under the act of 1885, was a matter of discretion with the trial judge; and the judge, in exercising that discretion, did what the law now requires shall be done in such cases. See Act Dec. 18, 1894, which provides that, "in all cases where both parties file exceptions of fact, the party against whom judgment would be rendered if the report were approved, shall be entitled to open and conclude the argument."

2. Another ground of the motion for a new trial is that the court erred in charging, with reference to the second exception of the plaintiff to the auditor's report, that "the undisputed evidence is that this note was given in final settlement of the mutual accounts of the parties, and I instruct you to disregard this exception." The full charge of the court was not brought up in the record, and we therefore cannot see in what connection this was said; but, in view of the testimony of the plaintiff himself, we do not see what right he has to complain of this instruction. He testified: "The account (in settlement of which the note was given) covered all expenses I had expended for her [the defendant]. I expended money for [her] husband's death and burial, and completing the building; also, running the house. I bought supplies for the house. We run a little farm then,—the expenses for that; truck farms at different lots; also, some repairs at different places," etc. At the settlement, he had "all the bills for such things as he had paid for and charged up to her." It will be seen, therefore, that the plaintiff's second exception is contradicted by his own testimony.

3. Under the act of 1885, under which the case was submitted to the auditor, it was his duty to "report the evidence heard by him, the facts found by him, and his rulings on all

questions of law, and a general summary of his findings." Under that act, each party had the right to except; and it was the duty of the judge to examine the report, and, if it did not appear that error had been committed, to approve the report, and dismiss the exceptions; but, if he should find that error had been committed, it was his duty to approve the exceptions, and cause the issue thus made to be submitted to a jury; and it was provided that, on the trial before the jury, "only so much evidence reported by the master or auditor as is pertinent to the issue then on trial shall be read to the jury, with such newly-discovered evidence as would authorize the grant of a new trial, taken in connection with the evidence already adduced, which newly-discovered evidence shall be made to appear to be such by affidavits supporting the same satisfactory to the presiding judge, and which newly-discovered evidence may be presented to the jury either orally or by deposition." Acts 1884-85, p. 98. In this case the auditor reported the evidence, and the evidence so reported was all that appears to have been submitted to the jury upon which to try the issues of fact raised by the exceptions to the report, which exceptions had been approved by the judge, and submitted to the jury. In the motion for a new trial, the question is raised whether the jury had a right, under the same evidence, to find differently from the auditor. It will be seen that under the act above quoted from, when the judge approved the exceptions, and submitted them to the jury, no other evidence was to be read before them than that reported by the auditor, unless it was newly-discovered evidence. In this case there was no newly-discovered evidence. If the jury could not disagree with the auditor, and make a different finding upon the facts, what would be the use of submitting the same facts to them? It was certainly not contemplated by the act that they should be mere figureheads, to register the findings of the auditor. In our opinion, the act contemplated that a jury might reach a different conclusion from the auditor upon the same evidence, and should be authorized to find accordingly. If this were not so, the trial of the issues made by the exceptions of fact would be a mere farce, and it would be a waste of the time of the court and country to submit the case to the jury.

4. There was evidence which would authorize the jury to find as they did, and, the trial judge being satisfied with their verdict, this court will not interfere with it. Judgment affirmed.

(97 Ga. 543)

HUNTER v. WAKEFIELD et al.

(Supreme Court of Georgia. Dec. 2, 1895.)

**LIBEL — VERDICT AGAINST JOINT DEFENDANTS —  
APPORTIONMENT OF LIABILITY — APPEAL —  
PARTIES — NEW TRIAL.**

1. If, in an action for a libel brought against several defendants, the plaintiff recovers at all,

the damages awarded must be for the same amount as to all of the defendants found liable. In a case of this kind, different sums cannot be assessed against different defendants.

2. Where, in such a case, there is a verdict for the plaintiff against some of the defendants for a given amount, and in favor of the other defendants, there can be no new trial between the plaintiff and the latter alone; but, if a new trial is granted at all, it must be granted as to all the parties. Accordingly, all the defendants below are necessary parties to a bill of exceptions sued out by the plaintiff for the purpose of obtaining a new trial; and, if some of these defendants are not made such parties, the writ of error must be dismissed.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by James K. Hunter against Henry D. Wakefield and others. There was a judgment for certain defendants, and plaintiff brings error. Dismissed.

Goodwin & Westmoreland, for plaintiff in error. M. J. Clarke, for defendants in error.

LUMPKIN, J. An action for a libel was brought by Hunter against Hagler & Co. (a firm composed of H. A. Hagler and Mattie Hagler), Henry D. Wakefield, and the Atlanta Newspaper Union (a corporation). Under the charge of the court, a verdict was rendered against Hagler & Co., of which they did not complain. The court directed a verdict in favor of the other defendants, and to this the plaintiff excepted. Hagler & Co. were neither made parties to nor served with the bill of exceptions. Upon the call of the case in this court, a motion was made to dismiss the writ of error, on the ground that H. A. Hagler and Mattie Hagler were necessary parties to the bill of exceptions, but had not in fact been made parties, nor served. In support of this motion, it was urged that the only relief possible under the bill of exceptions would be the granting of a new trial to the plaintiff in error as against Wakefield and the Atlanta Newspaper Union, and that the court could not grant this relief, because it could not disturb the verdict as to Hagler & Co., they not having moved for a new trial, and not being now before the court. This contention was based upon the proposition that it would be necessary to set aside the verdict as to all the defendants below if set aside as to any of them, for the reason that the law requires that in an action of libel the same amount must be found against all the defendants, and not a different sum as against each.

We think the motion to dismiss was well taken. In *McCalla v. Shaw*, 72 Ga. 458, it was held that where two persons were sued jointly for a malicious arrest, the act on which the suit was predicated being the joint act of the two, each was responsible for the entire recovery; and, consequently, a verdict for \$300 against one of them, and \$100 against the other, was illegal. It was further held in that case that a new trial having been granted to that one of the defendants

against whom the jury found \$100, and the liability of the two being the same, the other defendant was also entitled to a new trial; and that section 8075 of the Code, providing for the apportionment of damages by the jury in an action against several trespassers sued jointly, referred to trespassers on property, and not to actions for personal torts. The principle of that case controls the question in hand. Applying the rule there announced, it will be seen that where a verdict in a case of personal tort has been found for the plaintiff against some only of several joint defendants, and the plaintiff moves for a new trial against those of the defendants as to whom he failed to recover, if his motion is granted at all, the verdict in his favor against those of the defendants who were found liable must necessarily be set aside; for, unless this be done, there might, upon a subsequent trial, be a finding for the plaintiff for a sum totally different from that already found, and thus there would result a recovery in one amount against some of the defendants, and a recovery in quite a different amount as against others of them. This would be directly contrary to the law as above announced. In the present case it is obvious that the verdict which the plaintiff obtained in the court below cannot be set aside, as the two defendants against whom it was rendered are not before this court, and no judgment we might render could, in any way disturb that verdict, so far as they are concerned. Writ of error dismissed.

(97 Ga. 524)

HOBBS et al. v. CHEMICAL NAT. BANK.

(Supreme Court of Georgia. Dec. 2, 1895.)

ACTION ON NOTE—WHO MAY MAINTAIN—PLEADING—NOTICE OF PROTEST—SUFFICIENCY OF NOTARY'S CERTIFICATE.

1. An action upon a negotiable promissory note payable to order, the title to which, by appropriate indorsement, has become vested in a named person as cashier, may be maintained by a bank of which this person was in fact cashier when the indorsement was made. The declaration in such a case ought to contain allegations showing that this person was such cashier, and that the ownership of the note sued upon was in the plaintiff. Its failure to contain such allegations, unless cured by amendment, renders it fatally defective, and advantage of its defects may be taken even at the trial term by a motion to dismiss.

2. Where, in order to prove the dishonor of a negotiable instrument by the maker, and notice thereof to the indorser for the purpose of binding the latter, a notarial certificate alone is relied upon, the same is not prima facie evidence as to any act of the notary not therein certified to have been performed. A notarial certificate reciting the fact of protest for nonpayment, but silent as to whether or not notice of protest was given to the indorser, is no evidence that such notice was in fact given.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by the Chemical National Bank against Hobbs & Tucker and others. There

was a judgment for plaintiff, and Hobbs & Tucker bring error. Reversed.

Johnson & Krauss, for plaintiffs in error.  
Goodyear, Kay & Brantley, for defendant in error.

**SIMMONS, C. J.** 1. This was an action by the Chemical National Bank against Mayer, as surviving partner, and Hobbs & Tucker, upon a promissory note made by Mayer & Ullman, and payable to the order of Hobbs & Tucker, at the Chemical National Bank, which note the plaintiff alleged had been discounted by it in the due course of its banking business. The note was indorsed as follows: "Pay to the order of W. J. Quinlan, Jr., cashier. Hobbs & Tucker." There was no further indorsement, nor was there any averment in the declaration that W. J. Quinlan, Jr., was cashier of the plaintiff, or that the ownership of the note was in the plaintiff. Upon the call of the case, Hobbs & Tucker demurred to, and moved to dismiss, the declaration as to them, on the ground that it set forth no cause of action against them in favor of the plaintiff, and that, according to the face of the note and the indorsements on it, the plaintiff had no title therein. In reply, plaintiff's counsel urged that the motion and demurrer came too late, being at the second term, and after filing pleas. The demurrer and motion to dismiss were overruled, and to this ruling Hobbs & Tucker excepted. We think the objection to the declaration was well taken. Although it is true that, by indorsement to a named person as "cashier," title to a note may be vested in a bank of which he is cashier, and the bank may maintain an action thereon (*Collins v. Johnson*, 16 Ga. 458, 465; 1 *Morse, Banks*, § 170, and cases cited; *Baldwin v. Bank*, 1 Wall. 234), yet in such case the declaration ought to contain allegations showing that the indorsement was made to him as cashier of the bank, and that the ownership of the note is in the plaintiff (Code, § 3257). In the absence of such allegations, the declaration is fatally defective, and advantage of the defect may be taken even at the trial term by a motion to dismiss.

2. The plaintiff introduced in evidence the certificate of a notary public of New York that, on the day upon which the note fell due, he presented it at the Chemical National Bank (at which it was made payable), and demanded payment, which was refused; whereupon he protested both against the drawer and the indorser of the note. There was no statement in the certificate to the effect that notice of protest was given, and no other evidence was introduced to show that such notice had been given. The plaintiff having closed, counsel for Hobbs & Tucker moved that a nonsuit be granted as to them, upon the ground that the plaintiff had failed to make out a case as to them, and that it appearing that the note sued on was

payable on its face at a bank, and was discounted at and by a chartered bank, and there being no evidence of any notice to the indorsers of demand payment, nonpayment, or of protest, the indorsers could not be held liable. The motion for nonsuit was overruled, and to this ruling Hobbs & Tucker excepted. We think the court erred in not granting a nonsuit. In order to bind the indorsers, it was necessary to show, not only that the note had been protested, but that "notice of the nonpayment thereof and of the protest of the same for nonpayment" had been given to them (Code, § 2781); and the certificate of protest was not evidence that notice had been given to the indorsers. At common law, the certificate by a notary of his protest of a foreign bill of exchange was evidence only as to presentment and dishonor, and no statement therein as to notice given an indorser would be accepted as evidence of such notice, it being no part of a notary's official duty in protesting a paper to give notice, which is entirely distinct from the protest. *Proff. Not.* § 160, and cases cited; 2 *Daniel, Neg. Inst.* (4th Ed.) §§ 960-962. By our statute of 1838, from which section 3829 of the Code was taken, a wider scope was given to the notarial certificate; that statute, according to the decision of this court in *Walker v. Bank*, 3 Ga. 486, making it prima facie evidence, not only of the nonpayment, but of notice also, when so stated in the certificate, but it did not make the certificate evidence of any fact not stated therein. "The statute making such ex parte statements of the notary evidence of notice of dishonor, being an innovation on the common law, which excluded all such statements, should be strictly construed, and confined to the facts stated in or upon the certificate of protest." The burden of proof is upon the plaintiff to show that all the steps which are necessary to charge the indorser were taken, and no steps are presumed to have been taken without evidence; and, when the notarial certificate is the only evidence relied on to establish due presentment, dishonor, and notice, it should contain averments sufficient to show that everything requisite has been done on the part of the holder to authorize demand upon the indorser. Clearly, a certificate reciting the fact of protest, but silent as to whether or not notice of protest was given to the indorser, is no evidence that such notice was given. See *Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888, where this subject is fully discussed, and authorities cited; 2 *Daniel, Neg. Inst.* (4th Ed.) § 964.

(97 Ga. 612)

**BURDETTE v. ROBERTSON et al.**

(Supreme Court of Georgia. Dec. 13, 1895.)

APPEAL—RECORD—REVIEW—USURY.

1. Whether or not books of account which had been produced under notice, and inspected by the party calling for the same, but not introduced

by him, are, without more, admissible in evidence at the instance of the party producing them, this court cannot, without being informed by the record what the books disclosed, determine that so admitting them, if erroneous at all, was cause for a new trial.

2. There being no information before this court as to the contents of the books, and the only legitimate conclusion upon the question of usury which can be drawn from the evidence in the record being that the notes sued upon were, to some extent, infected with usury, the verdict, in so far as it found for the plaintiffs the full amount of the notes (thus including the usury), and established a special lien upon the land conveyed by the defendant to the plaintiffs for the purpose of securing the payment of the notes, was necessarily wrong, and ought to have been set aside. There could be no lawful recovery of the usury, and the security deed, being infected with usury, was void.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by E. A. Robertson and others against S. J. Burdette. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Hillyer, Alexander & Lambdin, for plaintiff in error. Simmons & Corrigan, for defendants in error.

LUMPKIN, J. 1. One of the questions presented and argued in this case was whether or not books of account, produced under notice, and inspected by the party calling for the same, but not introduced by him, were, without more, admissible in evidence at the instance of the producing party. It is unnecessary, however, to decide this question in the present case, for there is nothing in the record giving any information as to what the books which the court erroneously, as alleged, admitted in evidence, disclosed; and therefore we are entirely unable to determine whether the action of the court, even if erroneous, was in any way harmful to the opposite party, and, consequently, cause for a new trial. Before we could properly reverse the judgment, it would have to appear—First, that error was thus committed; and, secondly, that the books contained something which operated injuriously and prejudicially against the party who objected to their introduction in evidence. It by no means follows that error in admitting evidence will invariably require a new trial. The contrary is true in a large number of instances. Error, in order to authorize the reversal of the judgment below, must be harmful to the complaining party; and this must be made to appear to the reviewing court.

2. Having before us no information as to the contents of the books above mentioned, and the evidence incorporated in the record sent to this court showing conclusively that the notes sued upon were, to some extent at least, infected with usury, the verdict in the plaintiffs' favor for the full amount of the notes was not warranted. The verdict was also necessarily wrong in so far as it estab-

lished a special lien upon the land conveyed by the defendant to the plaintiffs for the purpose of securing the payment of these notes. This is so because, under the facts as they appear in the record, the security deed, being infected with usury, was void; and therefore the special lien, in legal contemplation, did not exist.

We do not wish to be understood as deciding how this case should result at the next trial. Our judgment is predicated upon the record as it now stands. If, in another investigation, and upon a fuller development of the facts by the introduction of other relevant evidence, it should appear that the notes were free from usury, the case will assume an altogether different aspect. We simply grant a new trial for the reasons indicated, leaving the parties free to establish their respective contentions as best they can when the case is tried again. Judgment reversed.

(97 Ga. 527)

#### BROBSTON v. PENNIMAN et al.

(Supreme Court of Georgia. Dec. 2, 1895.)

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM  
—NOTICE TO CORPORATION—SUFFICIENCY.

1. Where the president and cashier of a bank, being also members of a partnership composed of themselves and another person, to the capital stock of which they had, under the partnership articles, agreed to contribute a given sum, without the knowledge or consent of that person executed and delivered to the bank a promissory note in the name of the partnership for the purpose of raising the money they had so agreed to put into the partnership business, although the money obtained from the bank upon such note was in fact used for the purpose stated, the transaction was one for the private benefit alone of the two members of the partnership who thus raised the money, and in no sense for the benefit of the partnership itself.

2. Under these circumstances, the knowledge of the president and cashier of the facts above mentioned was the knowledge of the bank itself; and neither the partnership, as such, nor the remaining member, was liable to the bank upon the note in question.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Edwin Brobston, receiver of the Brunswick State Bank, against E. A. Penniman and others on a note. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Goodyear & Kay, for plaintiff in error. Johnson & Krauss and Harrison & Peeples, for defendants in error.

LUMPKIN, J. An agreement for the formation of a partnership under the name and style of the "Union Warehouse & Commission Company" was entered into between Mrs. Penniman, Charles B. Lloyd, and Frank E. Cunningham, by the terms of which Mrs. Penniman was to convey 25 acres of land to the firm, and Cunningham and Lloyd were each to contribute to it the sum of \$2,500

in cash. Lloyd was president, and Cunningham cashier, of the Brunswick State Bank. In order to raise the \$5,000 which they were to pay into the partnership, they, without the knowledge or consent of Mrs. Penniman, borrowed that sum from the bank, and gave for it a note executed in the partnership name. Mrs. Penniman conveyed to the partnership the 25 acres of land, in accordance with her agreement. Afterwards an action upon the \$5,000 note was brought by Brobston, as receiver of the bank, against the partnership; and the question presented for determination is whether it is liable upon the note. If it is, it would, of course, follow that Mrs. Penniman would be liable also.

We have no difficulty whatever in holding that the plaintiff was not entitled to a recovery in this case. It was the duty of Lloyd and Cunningham to raise on their own account the money which they had agreed to contribute to the partnership business. It is perfectly obvious that the partnership itself had no immediate concern in this matter, it not being in any sense a transaction for its benefit, but one exclusively for the benefit of the two members who contracted for the loan. The debt created by the giving of the note was not a partnership debt, and therefore, upon general principles, it should not be made liable for its payment. It was insisted, however, that as the note was executed by a member of the firm who had authority, as a partner, to make and deliver notes in the partnership name, the bank ought to be protected, because it in good faith advanced its money upon the note, in ignorance of the fact that the note was not really given to raise money for the partnership, but for the private benefit of two of its members, to enable them to meet their obligations to it in accordance with their agreement with Mrs. Penniman. If this proposition had any foundation in truth, the position of the plaintiff would be unanswerable; but it is perfectly clear, from the facts recited, that the truth of the matter was fully known to the bank, and therefore it does not occupy the position claimed for it. Lloyd and Cunningham represented the bank in making the loan and taking the note. Lloyd was its alter ego, and Cunningham its special agent for the purpose of negotiating loans. It was within the immediate scope of their business and authority, as the representatives of the bank, to make just such transactions as the one in question; and it follows beyond doubt that whatever they actually knew with reference to this transaction while engaged in the very act of making it must be chargeable to the bank itself. If this is not so, it is quite difficult to conceive of a case in which the doctrine of constructive notice can have application. If the knowledge of Lloyd and Cunningham was not, in this case, the knowledge of the bank they represented, we do

not see how it would be possible for a bank to ever know anything. The only way in which a corporation can have knowledge of a fact is through an officer or an agent. It has not, otherwise, eyes to see, ears to hear, or intellect with which to comprehend. Unless it be true that Lloyd and Cunningham were to see, hear, and understand for the bank, it was blind, deaf, and without mind. It may be true that the conduct of these officials was a fraud upon and a wrong to the bank, whose interests were in their keeping. If so, it had its remedy against them; but neither in law nor in justice can it hold the partnership accountable for what they did.

Although we do not regard citation of authority necessary to support the decision rendered in the case now in hand, the following cases may be found helpful to those desiring to find the correct solution of similar questions arising in cases more involved in perplexity, because of their peculiar facts and circumstances: In *Bank v. Smith* (Tex. Civ. App.) 22 S. W. 1056, it was held that "where plaintiff bank's president and manager purchased from a corporation of which he was also a stockholder and director a note given to the corporation, pursuant to a contract to which he, as such director, was a party, plaintiff is chargeable with notice of the conditions under which the note was given." Justice Head, who delivered the opinion of the court in that case, cites many authorities bearing upon the subject. In *Holden v. Bank*, 72 N. Y. 283, the bank was held chargeable with the knowledge of its president, who, as executor of the estate of a deceased person, entered into negotiations with the bank by which the estate was defrauded. So in another New York case it was held that the bank was chargeable with the knowledge of its cashier, who was also the treasurer of the plaintiff, as to the true ownership of certain securities which he had pledged to secure a loan for the bank. In *Institute v. Bostwick*, 19 Hun, 354. In *Bank v. Irons*, 8 Fed. 1, it appeared that the bank's president was also the president of a railway company, which was the original payee of a note discounted by the bank; and it was held that, if the bank's president had knowledge of the agreement under which the note was given to the railway company, such knowledge would be constructive notice to the bank itself. "The fraud of a bank president in contriving and negotiating in his bank fraudulent notes of a corporation, for his own use, imputes knowledge to the bank, and it has no claim against the corporation." In *re Millward-Cliff Cracker Co.* (Pa. Sup.) 28 Atl. 1072. These cases all proceed upon the idea that as a corporation must of necessity intrust its affairs to officers and agents, and can transact business only through their agency, it must be held chargeable with their acts while in the performance of their duty to it; and,

If its duly-selected servants prove unfaithful to their trust, the corporation itself must suffer, rather than innocent third persons. Surely, as against such persons, a corporation cannot claim the benefits arising from any contract made in its behalf through its officers, when these officers knew that the contract would operate as a fraud upon others, but, nevertheless, participated in or connived at the fraudulent transaction. The corporation would be bound either to repudiate entirely, or adopt unconditionally and without reservation, the acts of its agents in negotiating for and perfecting the contract made in its behalf. It could not elect to ratify and adopt such of the acts and conduct of its agents as operated beneficially to it, and repudiate such conduct (active or passive) as would constitute a fraud upon the parties sought to be charged with the contract. To hold, in the present case, that the plaintiff was entitled to recover upon the note held by the bank, would be to allow the plaintiff to assume such an anomalous position. See, also, *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511, 23 S. E. 503. Judgment affirmed.

(97 Ga. 570)

TERRELL v. STEVENSON et ux.

(Supreme Court of Georgia. Dec. 2, 1895.)

SALE—WARRANTY OF TITLE—ACTION FOR BREACH—PARTIES.

1. Although a plaintiff having a right of action against another may sue for the use of any person whom he may designate to take the proceeds of the action, a plaintiff having no right of action at all cannot recover either for his own benefit or for the use of any one else.

2. A covenant of warranty of title in a bill of sale to personalty is not broken, so as to authorize an action against the vendor by the vendee, merely because a third person, to whom the vendee mortgaged the property, and who had purchased the same at a sale had upon a foreclosure of the mortgage, has been deprived of the property by a seizure and sale thereof under a judgment against the original vendor, of older date than the bill of sale. If, by reason of the facts recited, the purchaser at the mortgage sale acquired any right of action at all against the mortgagor, the mere existence of such right, with no attempt to enforce it, could not, of course, result in any injury to the latter; and in no event could he be legally held to have been damaged by his vendor's alleged breach of warranty before the establishment, by a judgment against him, of liability on his part to the mortgagee.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by W. H. Terrell, for the use of Grabfelder & Co., against Robert Stevenson and wife. There was a verdict for plaintiff, which was set aside, and plaintiff brings error. Affirmed.

Simmons & Corrigan, for plaintiff in error. Clinton Gowdy and H. M. Patty, for defendants in error.

LUMPKIN, J. The material facts of the present case are as follows: Stevenson and

his wife, by a warranty bill of sale, conveyed certain personalty to Terrell, a part of the consideration therefor being an agreement on the part of Terrell to assume a debt due by Stevenson and wife to Grabfelder & Co. At the time this bill of sale was executed, the property was subject to the lien of certain justice's court judgments in favor of Shehan, of which fact Terrell appears to have been ignorant. Terrell gave Grabfelder & Co. a mortgage on the property, to secure the debt he had assumed, and, failing to pay it at maturity, the mortgage was foreclosed, and the property was sold by the sheriff under the mortgage *fi. fa.*; Grabfelder & Co. becoming the purchasers, at the price of \$200. Shehan then had the property sold under his *fi. fas.* against Stevenson and wife, and thus Grabfelder & Co. lost the money they had paid for it at the sheriff's sale. Thereupon Terrell brought an action, for the use of Grabfelder & Co., against Stevenson and wife, in which he recovered a verdict. This verdict the court set aside, on the ground that the suit could not be maintained in the name of Terrell, for the benefit of Grabfelder & Co., as *usees*.

1. If Terrell had any right of action at all against Stevenson and wife, he could undoubtedly sue for the use of any person whom he desired to take the proceeds of the action. *Railroad Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676. If Terrell had no right at all to sue, of course, he could not maintain an action for the benefit of himself, or for the use of any other person. So the real question is: Did Terrell, under the facts above recited, have a cause of action against Stevenson and wife?

2. It is evident that, up to the time he brought his suit, Terrell had sustained no real injury. The only way in which he could be injured would be by being held liable to Grabfelder & Co. for the loss they sustained in being deprived of the property purchased by them at the mortgage sale, in consequence of its resale under the Shehan *fi. fas.* Whether or not Grabfelder & Co. could, in a proceeding at law or in equity, hold Terrell liable for this loss, is a question which need not be decided. Assuming that they could, the mere fact that they had a right of action against Terrell does not, of itself alone, give him a right to sue Stevenson and wife upon their alleged breach of warranty. Grabfelder & Co. might never seek to enforce this right or to hold Terrell responsible; and, if they did not, he would have no cause of complaint against his original vendors. Again, it is an entirely unsettled matter to what extent or for what amount Terrell is liable, if at all, to Grabfelder & Co. No agreement between himself and them, as to amount or otherwise, could be binding upon the Stevensons. As to the latter, the amount of damages sustained by Terrell can only be fixed by a judgment against him in favor of Grabfelder & Co. The rule of law that no person

can bring an action until he has been actually damaged is applicable here. Terrell is out nothing, and no judgment has been rendered against him subjecting him to liability. His action against Stevenson and wife was, to say the least, premature. Whether or not subsequent developments may hereafter give him a right to sue them, is not now in question. If so, the courts will be open to him. Judgment affirmed.

(97 Ga. 531)

BROWN et al. v. BROWN et al.

(Supreme Court of Georgia. Dec. 2, 1895.)

DEED—CONSTRUCTION—ACTION TO QUIET TITLE—PARTIES.

Where an instrument in the form of a deed to realty, and duly recorded as such, after reserving to the maker a life estate in the property therein described, purported to convey a one-sixth undivided interest in such property to each of the maker's children for life, and declared that, upon the death of each of such children, his share should descend to the legal heir or heirs of said deceased party, or to the devisee if said party should make a will and dispose of the same, it was not within the power of the superior court, in the exercise of its equity powers, upon a proceeding instituted by the executors of the maker's will, in which will the instrument first above mentioned was recognized and referred to as a valid deed, and to which proceeding the maker's children alone were made defendants, to decree a cancellation of that instrument as a cloud upon the testator's title, upon the alleged ground that it was never delivered to nor accepted by the latter's children. If such a proceeding was maintainable at all for the purpose stated, the grandchildren of the maker in life at the time it was filed were indispensable parties. The question as to how far a decree therein, even with such grandchildren before the court, would bind unborn grandchildren, is not now before this court for determination.

(Syllabus by the Court.)

Error from superior court Fulton county; J. H. Lumpkin, Judge.

Action by Elizabeth Brown, executrix, and Julius L. Brown and another, executors, of Joseph E. Brown, deceased, against Elijah A. Brown and others, to quiet title. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

The following is the official report:

Elizabeth Brown, as executrix, and Julius L. and Joseph M. Brown, as executors, of Joseph E. Brown, by their petition, alleged: They are the duly-qualified executrix and executors of Joseph E. Brown. In January, 1895, and after his death, they for the first time opened his safe to find his will, and, upon reading it, found a reference to a certain paper, copy of which is attached. Upon search among the papers in the safe, they found said paper. It was in his possession at the time of his death, and had been, so far as they know, from the date of its purported execution. It was never during his life delivered to or accepted by either one or more of his children, but was always kept in his own possession. It is void for want of delivery to or acceptance by any of the purported grantees, and the property therein

sought to be conveyed thereby was never conveyed, and is the property of the estate of Joseph E. Brown, and should be sold, and the proceeds distributed among his heirs by petitioners, in accordance with their several interests as the same appear in said will. Petitioners prayed that said pretended deed be canceled as a cloud upon the title, and, as the same had been put upon record, that a copy of the entry of cancellation be written across the face thereof, so that the same might no longer be a cloud upon the title to the land named therein. They further prayed for process to J. L. and J. M. Brown as individuals, and to Mary V. Connally, Elijah A., Sallie E., and George M. Brown. The copy deed attached was dated September 28, 1883. In consideration of love, by it Joseph E. Brown conveyed to J. L., J. M., Elijah A., George M., and Sallie E. Brown and Mary V. Connally, his children, certain city property in Atlanta, estimated by him to be worth in the aggregate \$120,000, "with the reservations, qualifications, and remainders herein contained." It reserved to the grantor a life estate in the property, and provided: "At the death of said Joseph E. Brown, said property is to go in remainder to the parties of the second part, children of the said Joseph E. Brown, each having an equal share or interest with every other one of said children, and each to have the share to which he or she is entitled for and during his or her natural life; and, at the death of each, then the share to which he or she was entitled—in other words, the one-sixth undivided interest in said property—is to descend to the legal heir or heirs of said deceased party, or to the devisee if said party should make a will and dispose of the same, which each is hereby empowered to do. The said remainder at the death of each is to go in fee simple to the heirs of the deceased, or to the devisee, as above mentioned. The property donated by this conveyance is in no case to be considered or taken as an advancement in favor of or against any one of the heirs of my estate. It is simply a donation from affection, and not intended as an advancement." This deed appears to have been recorded October 11, 1883. There was also made an exhibit (under the circumstances hereinafter to be mentioned) the will of Joseph Brown, dated August 18, 1886, together with various codicils thereto. It does not appear material to set forth all the provisions of the will and codicils, but it seems sufficient to state that various specific legacies were made, none of them of the property mentioned in the deed, and that after the payment of testator's debts and such legacies, and accounting for advancements on the part of his children (the advancements being set forth in the will and none of them referring to the property mentioned in the deed), the property of the testator was directed to go to his children above mentioned. The will contained the following provisions (item 8):

"In addition to the advancement made of \$15,000 to each of children above stated, I conveyed, by deed now of record in the clerk's office in Fulton county, the real estate known as the Brown Block and the Pittman Building, on Wall street, and the building occupied by Lewis, on Alabama street, to my children, reserving a life estate to myself, and then a life estate to each of my children in their respective shares, with a remainder to their children, etc., as set forth in said deed, which is not now before me, but which, I believe, is dated September 26, 1883. I estimated the property at \$120,000 at the time the conveyance was made. Of course, the rents on this property will at my death go to my children. But I desire the rent on all the other buildings I may own in Atlanta at the time of my death to be applied, together with dividends on stocks as above mentioned, to the payment of specific legacies until they are fully paid off, except in the case of the Kiser Building, where my wife is to have \$2,000 per annum, paid in monthly installments, which is to take precedence." The will further provided (item 12): "When the term 'children' is used in this will as legatees to receive legacies or dividends, my intention is in all cases to embrace my children in life at the time. If there be one or more deceased, and such deceased child or children left a child or children, the child or children of such deceased child of mine is to represent the parent, and take the legacy or the distributive share that the parent would have taken if in life. If one of my children be dead, leaving no living child, but leaving a grandchild, the grandchild or grandchildren of the deceased child of mine are to represent the parent, and take as above mentioned. And, when my deceased child has left more than one child, the children are to divide the estate which would have been due their parents if in life, equally among themselves." Each of the parties as to whom process was prayed acknowledged due and legal service, and, together with the petitioners, signed an agreement that the judge below act as judge and jury, and pass upon the petition and the answer thereto, "as there is no question of fact involved," and that he act upon the same at the first term to which the petition was filed, and render his judgment in accordance with the law and facts. The defendants answered, admitting the statements of the petition, and alleging that they are all of full age; that the deed was never delivered to or accepted by any one of them, and they believe that the property belongs to the estate of Joseph E. Brown; and that they believe that said pretended deed is a cloud upon the title to the property therein named, and should be canceled.

The judge below rendered the following decision, which was excepted to by plaintiffs:

"The deed sought to be canceled, signed by the testator, was dated September 16, 1883,

and recorded October 11, 1883, in the records of Fulton county. By this deed (as appears from a copy attached to the petition), the grantor conveyed to his children certain valuable real estate in the city of Atlanta, with the reservation, qualifications, and remainders herein contained. The deed reserved to the grantor a life estate, and then proceeded: 'At the death of said Joseph E. Brown, said property is to go in remainder to the parties of the second part, children of the said Joseph E. Brown, as above mentioned, each having an equal share or interest with every other one of said children, and each to have the share to which he or she is entitled, for and during his or her natural life; and, at the death of each of them, then the share to which he or she was entitled—in other words, the one-sixth undivided interest in said property—is to descend to the legal heir or heirs of said deceased party, or to the devisee, if said party should make a will and dispose of the same, which each is hereby empowered to do, the said remainder at the death of each is to go in fee simple to the heirs of deceased, or to the devisees, as above mentioned.' The petition alleges that this deed was never delivered, during the lifetime of the maker, to, or accepted by, either one or more of his children, but was always kept in his own possession. It was alleged that a reference was made in the will of the grantor to this paper; and a copy of the will which was presented by counsel was, under order of the court, filed as an exhibit to the pleadings, so that the entire matter might be fully presented. In this copy will occurs the following reference to the deed, viz.: 'In addition to the advancement made of \$15,000 to each of children, as above stated, I conveyed, by deed now of record in the clerk's office in Fulton county, the real estate known as the Brown Block and Pittman Building, on Wall street, and the building occupied by Lewis, on Alabama street, to my children, reserving a life estate to myself, and a life estate to each of my children in their respective shares, *with remainder to their children*, etc., as set forth in said deed, which is not now before me, but which, I believe, is dated September 26, 1883. I estimated the property at \$120,000 at the time the conveyance was made,' etc. By this will, numerous legacies to testator's wife and children and others were left. (The italicizing is mine.) The petition made the children of the grantor alone parties defendant. The ultimate remaindermen were not made defendants, nor are they before the court. Thus, the case stands with the executors and life tenants alone before the court, on a proceeding to cancel a deed which by its terms includes a remainder. The defendants who were made parties (i. e. the children, who are named in the deed as life tenants after the death of the grantor) answered, in effect admitting the allegations

of the petition. Both plaintiffs and defendants allege that the deed was found among the papers of testator after his death, and that it had never been delivered to or accepted by any of the children. The plaintiffs and defendants agreed for the case to be submitted to the presiding judge, without a jury, for decree at the first term. I find myself in a somewhat embarrassing position, with the case left for my determination, by agreement, without a jury, and with the very complex questions of law involved; and yet I believe it the duty of a judge who does not think he can render a valid decree of cancellation binding on all the parties in interest, and which, if granted, would be effectual to finally determine the status of the property, to so declare, and to withhold the decree asked for. In doing this, it is without the slightest criticism on the parties to the case, or the case itself. They could hardly themselves wish a decree which might hereafter be open to attack, and possibly be nullified. If I should be wrong in the view I entertain of the law, it would be better to have an adjudication from the supreme court declaring the law governing the case, and thus finally fixing the status of this valuable property, than to pass a decree which the court believes to be open to future attack, and possibly upsetting. I therefore decline to grant the decree prayed for, putting my decision expressly on legal grounds, as the case now stands; and will, as briefly as I can, state my reasons therefor.

"Delivery is essential to the complete execution of a deed, and the conveyance of title thereby; but delivery or nondelivery is a question of fact. It cannot be determined finally or conclusively by either judge or jury, so as to affect or determine the rights of parties in interest who are not before the court. Record of a deed is presumptive, but not conclusive, evidence of delivery. Here the deed sought to be canceled has been recorded. The first life tenant (the grantor who reserved a life estate to himself, as he could lawfully do in this state) was in possession of the property. By the deed, a life estate was conveyed to his children; and, at their respective deaths, the ultimate remainder was left to 'the legal heir or heirs of said deceased party' (that is, in law, to his or her children, or those standing in the place of children), unless otherwise disposed of by will. See Code, § 2249; O'Byrne v. Feeley, 61 Ga. 77. It is evident to my mind, therefore, that, on a petition for cancellation to which the executors and tenants for life are alone parties, it is wholly impossible to frame a decree which will bind any person other than themselves, or which would preclude the children of such life tenants, or descendants of deceased children, from claiming an interest in the property hereafter; and if a judgment or verdict should now be rendered seeking to cancel

the deed, it would in no way conclude these possible future litigants, but the question of delivery and the passing of the title would stand open as a question of fact, so far as they were concerned. So far as the children of the grantor alone are concerned, as defendants, a decree would practically be useless. If they do not desire to claim under the deed, a mere relinquishment or like instrument would as effectually dispose of whatever rights they may have as any decree could; but if the decree should seek to go further, and affect the interests of others, it could not successfully do so without having those others before the court. Whether this remainder is good or not I do not think can [be] determined, so as to bind the ultimate remainder-men, or persons described as remainder-men, without some representation of them. They do not claim under the will, so as to be represented by executors; certainly not in a proceeding by the executors to cancel the deed. Counsel stated frankly to the court that some of the grantor's children had a child or children when the deed was made, and now have children, and some have not. Children have been born to some of the grantor's children since his death. One of his children is unmarried. The copy will exhibited shows at least one grandchild in esse when it was made.

"How can a valid binding decree be now framed which will finally settle this perplexing question. Certainly not with none of the remainder-men present on delivery and record of the deed. See *Gordon v. Trimmer*, 91 Ga. 472, 18 S. E. 404; *Wellborn v. Weaver*, 17 Ga. 267; *Ross v. Campbell*, 73 Ga. 309 et seq. If the grantor reserved a life estate to himself, would his having the deed after record of it be inconsistent with the ultimate remainder, or would it inure to the benefit of his grandchildren, as holding for remainder-men? Still further, the will recites this deed as a conveyance. The parties to the petition take under that will. Can they deny the conveyance? Can they claim under the will, and repudiate the conveyance recited in it? See *Youngblood's Case*, 74 Ga. 614; *Smith v. Wait*, 4 Barb. 28; *Penrose v. Griffith*, 4 Bin. 231. Does not a recital in a will have as much force as to those taking under the will as would a like recital in a deed? *Cruger v. Tucker*, 69 Ga. 557; *Hanks v. Phillips*, 39 Ga. 550. The will recites the conveyance as a good deed. How far this may have affected or entered into the whole testamentary scheme of the testator it is difficult to say. It is urged by learned counsel that, under the doctrine of representation, the remainder-men sought to be made by the deed would be bound by the decree. If there was a trustee in whom the fee was vested, or an executor holding this property under a will creating the estate, and under which the remainder-man would have to

claim, all beneficiaries might be represented by him as against a third party, and contingent remainder-men, especially if not in esse, might be bound if this representation of the property was bound. But here there is no trustee. The instrument in question is a deed, and under it there is and can be no executor to represent this property for the final remainder-men. This is not a proceeding to sell and reinvest a trust estate, and governed by the law of trusts, but a proceeding to cancel and annul the whole instrument, whereby the remainder, which the deed sought to convey would be destroyed. The plaintiffs are executors under a will which recites and impliedly confirms the conveyance. The only defendants made are the first life tenants in remainder named in the deed, being children of the grantor and testator. They, with their mother, are heirs and legatees of the testator, there being also some specific legacies. Upon cancellation of the deed, this property would become a part of the estate, to be administered accordingly.

"The cases in Georgia, so far as I have examined them, seem to recognize this distinction between parties represented by an executor or trustee and those not. *Dean v. Press Co.*, 64 Ga. 670, 676, 677; *Ford v. Cook*, 73 Ga. 215; *Wingfield v. Virgin*, 51 Ga. 139 (as to bar of statute); *Franke v. Berkner*, 67 Ga. 264 (1), (3). In *Schley's Case*, 70 Ga. 64, which at first sight looks somewhat like this, there was a trustee and a sale under order of the chancellor, and the rights of an innocent purchaser for value had intervened. It was held that contingent remainder-men must look to the reinvestment, and could not recover the land sold. Numerous cases have been cited to me by counsel, all of which I cannot discuss. Only a few of those most relied on need be mentioned: *Faulkner v. Davis*, 98 Am. Dec. 698. Here there was a trust estate, and also statutes of Virginia as to selling estates in which minors were interested were relied on. In *Mead v. Mitchell*, 17 N. Y. 210, there was a trustee representing the estate. Not only the trustee and life tenant, but also all persons in esse who might take, were parties, and finally the case was rested on a special statute of New York. In the discussion by the judge rendering the decision, it is said that it has been held that it is sufficient to bring before the court the person entitled to the first estate of inheritance, with those claiming prior interests, omitting those who might claim in remainder or reversion after such vested estate of inheritance. If this be conceded as a correct statement, who is before the court here as one having an estate of inheritance under this deed? Not the executors. They claim nothing under it. Not the life tenants. They have no estate of inheritance. The first estate of inheritance is in the grandchildren of the maker, under the terms of the deed. *Pyke's Case*, 1 Ld. Raym. 730, is cited. It

merely holds that, if several remainders are limited in a deed, a verdict in favor of one may be given in evidence in favor of another. None of the facts are stated. Aside from the question of delivery, already considered, it is suggested that the terms of the will would create an estate tail, and therefore in this state a fee simple in the children. I think not. This conveyance does not fall within the rule in *Wild's Case*, 6 Coke, 17, that a conveyance to A. and his children or issues (there being none in esse) creates an estate tail, and therefore, in Georgia, a fee simple in the first taker. *Wiley v. Smith*, 3 Ga. 551; *Loftin v. Murchison*, 80 Ga. 391, 7 S. E. 322. Here it is a life estate, with remainder over; not a conveyance to A. and his children or issues, but to A. for life, with remainder to his heirs, which falls directly within the terms of Code, § 2249. See, also, section 2248; *Miller v. Hurt*, 12 Ga. 357. The rule in *Shelley's Case* is wholly abolished in Georgia so far as it affects limitations over. As to the difference between a conveyance to one and his heirs and a conveyance to one with limitations over to his heirs, and also as to what is a limitation over, see *Craig v. Ambrose*, 80 Ga. 134, 4 S. E. 1; *Ewing v. Shropshire*, 80 Ga. 374, 376, et seq., 7 S. E. 554. Would the deed create a perpetuity? Clearly not, I think. There is no fee of inheritance, with limitation over, but (after a life estate reserved to the maker) a mere life estate, with remainder over; nor does the time for the vesting of the estate fall within the prohibition against perpetuities. All the limitations do not extend beyond 'any number of lives in being at the time when the limitation commenced, and twenty-one years and the usual period of gestation added thereafter.' Code, § 2267. All the children were in esse, and some of the grandchildren. The grandchildren take at once on the death of the children, subject to be defeated if a will is made. The terms of this section of the Code seem to me to cover this point. Would the defeating of or declining to accept by the children defeat the ultimate remainder? Code, § 2264, says that, 'no particular estate being necessary to sustain a remainder under this Code, the defeat of a particular estate for any cause does not destroy the remainder.' This widely differs from the common law, and wholly abrogates any defeat of remainders by destruction or defeat of the particular estate; and correspondingly, if any doctrine of representation or quasi representation by life tenant of remaindermen, so far as to bind remaindermen by judgment against life tenant, was established, it does not exist under the Code of Georgia. In this state 'an absolute estate may be created to commence in future, and the fee may be in abeyance without detriment to the rights of the subsequent remaindermen. A fee may be limited upon a fee, either by deed or will, where the plain intention of

the grantor requires it, and no other rule of law is violated thereby.' Code, § 2247. What effect has the power of appointment or disposition by will by the children, provided for in the deed? Does it destroy or render nugatory the remainder, or is it a mere possible mode of defeating the remainder, which would otherwise be effective? The section of the Code just cited seems to answer this. The limitation over certainly is not stronger than limiting a fee upon a fee. I don't think it goes as far as the Code might permit. Aside from that section of the Code, where there is a fee simple, with attempted limitation over in a case of nondisposition, it has been held void by many courts, as attempting to take away an incident of ownership; but, where there is a life estate in realty, it is not enlarged by a subsequent power of disposition by will; and a limitation over in case the property is not disposed of by the life tenant may be sustained. 20 Am. & Eng. Enc. Law, 'Remainders,' bottom page 857, subd. d, and note 4; Id. p. 955, subd. f; Id. p. 958, and note, and the many cases there cited; Id. pp. 960, 961. See, also, Gray, Perp. 110, 112, 258. It may work considerable inconvenience to create only a life estate with remainder over. Most remainders do work inconveniences. I have rarely known a remainder, especially if it be a contingent remainder or a remainder in which children born or to be born were to participate, which did not give inconvenience to somebody,—sometimes great inconvenience. But that does not affect the power of the owner nor the validity of the estate which he creates. The case of *Robinson v. Schly*, 6 Ga. 515, 528, was decided before the Code. The real point decided was that the instrument was a will, not a deed, as to certain property. In the discussion, it is said by the judge delivering the opinion that if an estate were given by deed (the property there was money, bank stock, cattle, horses, furniture, and real estate) to A. and his heirs, and if he should die without leaving issue at his death, then so much of the estate as remained undisposed of by A. to B. the limitation over would be void for uncertainty, because of its uncertainty as to the property to go over. Here there is no uncertainty as to the property,—no right of use, with an uncertain remnant; and, if the point had been directly in issue there, it would not apply here. In this case the property is certain, and what has been said above applies. The ruling does not conflict with the principle already announced. Besides, the holding was as to a conveyance to one of his heirs, not to A. for life, with remainder over. See, also, even before the Code, *Burton v. Black*, 30 Ga. 638.

"The petition prays that a copy of the entry of cancellation be entered across the face of the record of the deed. I do not know of any law which would authorize me to

decree this. I have given considerable time and thought to this petition, and, at the outset, was not wholly free from doubt in considering it. If both plaintiffs and defendants are free from estoppel under the recital in the will, it might be possible to decree that, as between the life tenants (the children) and the executors, the deed be canceled, without attempting to affect the ultimate remainder-men. But this is not the decree asked for. As to necessary parties in such a case, see *Wyche v. Green*, 32 Ga. 341; *Bank v. Harris*, 84 N. C. 206. As to the duty of a judge to use care in matters where minors may be involved, the supreme court have expressed themselves in *Dayton v. Bell*, 81 Ga. 382, 383, 8 S. E. 620.

"I have written at length my views, that counsel might see, and the supreme court might know (should the case be carried there), just why a conscientious consideration of the case has led me to differ with counsel as to the law governing it, and to feel impelled not to enter a decree declaring the deed canceled, and the property subject to be dealt with and bought and sold free from it, when that question, in my opinion, would not and could not be concluded by such a decree, with the parties before the court. I called the attention of counsel to the difficulty as to parties, but they were unable to agree with my view of the law, and thought a final decree could be rendered with the parties present, which would conclude any person who might attempt to set up a claim under the deed."

Julius L. Brown, for plaintiffs in error.  
Bishop & Andrews, for defendants in error.

SIMMONS, C. J. Under the terms of the deed, we think a vested estate was created in the maker's grandchildren, subject to be defeated at the will of his children, the life tenants. This being so, they had a right to be represented upon the question whether there was a delivery of the deed or not. If the proceeding was maintainable at all, the grandchildren in life at the time it was filed were indispensable parties. Ample authority in support of these conclusions will be found referred to in the opinion of the learned judge of the court below, which is set out in the report which precedes this opinion. Judgment affirmed.

(87 Ga. 486)

#### CARMICHAEL v. BROWN.

(Supreme Court of Georgia. Dec. 21, 1895.)

#### LEASE OF PINE TIMBER—CONSTRUCTION—PAROL EVIDENCE—BURDEN OF PROOF.

1. A lease of all the "pine timber" on a given area of land, "for the purpose of manufacturing spirits of turpentine," etc., "for the full term of three years from the time boxes are cut," does not necessarily mean that the term of the lease will expire at the end of three years from the date the first trees are boxed.

2. The words, "from the time boxes are cut,"

as used in such a lease, are ambiguous, and cannot be correctly construed by the court without the aid of extraneous evidence to explain their real meaning as understood by the parties.

3. The plaintiff having asserted that the lease had expired, the burden of establishing this assertion rested upon him; and inasmuch as he failed to do so by introducing other evidence to show what the contract embodied in the lease really meant as to the time from which the three years should be computed, and the court, without the aid of such evidence, being unwarranted in holding absolutely that the lease expired at the expiration of three years from the date of the first boxing, it erred in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by Phillip Brown, Jr., against D. O. Carmichael. Judgment for plaintiff. Defendant brings error. Reversed.

J. H. Martin, for plaintiff in error. Hal. Lawson, for defendant in error.

SIMMONS, C. J. In 1889 Young leased to certain parties, who transferred the lease to Carmichael, "all the pine timber" on a certain tract of land in Wilcox county, Ga., "for the full term of three years from the time boxes are cut, \* \* \* to be used and worked and operated for the purpose of manufacturing spirits of turpentine." In 1891 Carmichael boxed the trees on a part of the tract, and used the same for the manufacture of spirits of turpentine. In 1895 he commenced boxing the trees on the remaining portion of the land, whereupon Brown, who had purchased the land from the lessor, sought an injunction to restrain him from doing so, and the court granted the injunction. Upon the hearing of the petition for injunction, it was admitted that the plaintiff bought with knowledge of the lease, but it was contended that the lease had expired; it being claimed that the words, "three years from the time boxes are cut," meant that the lease should expire, as to all the trees on the tract, three years from the time any of the trees should be boxed. The defendant, on the other hand, contended that the limit stated applied only to such trees as were boxed, the purpose being to allow three years' use of the trees, for turpentine purposes, after the trees had been boxed, so that if, for three years after boxing operations were begun, they were confined to a certain part of the tract, the lessee would still, after the lapse of that period, have a right to commence such operations on other parts of the land, unless his delay in so doing had extended beyond a reasonable time; it being conceded to be an implied condition of the contract that whatever boxing was done should be commenced within a reasonable time. The court sustained the contention of the plaintiff, and held that upon its face the contract meant that the terms of the lease should expire at the end of three years from the date the first trees were boxed. In the opinion of a majority of this court, the con-

tract does not necessarily require the construction which was placed upon it by the court below. On the other hand, we are not prepared to concur with our Brother ATKINSON in holding that the contract, upon its face, and without the aid of extrinsic evidence, should receive the construction contended for by counsel for the plaintiff in error. We think the language in question is ambiguous, and cannot be correctly construed by the court without the aid of extraneous evidence to explain its real meaning as understood by the parties; and we are the more impressed with this by the fact that such widely different constructions are placed upon it by our Brother ATKINSON and the learned judge below. The language employed does not exclude either of these constructions. Under our Code (section 3801), where the terms of a contract are ambiguous, whether the ambiguity be latent or patent, parol evidence is admissible to explain it. The plaintiff having asserted that the lease had expired, the burden of establishing this assertion rested upon him; and, the terms of the contract being ambiguous on this point, it was incumbent upon him to show by evidence outside of the writing itself what it really meant as to the time from which the three years should be computed. No such evidence having been introduced, and the court, without the aid of such evidence, being unwarranted in holding absolutely that the lease expired at the expiration of three years from the date of the first boxing, it was error to grant the injunction. Judgment reversed.

ATKINSON, J. (concurring). The terms of the lease, as indicated in the first headnote above, are not ambiguous. Such a lease conveys to the lessee the right of enjoyment for the specified purpose during the term named, dating from the time the boxes are actually cut. If he enter, and cut a portion of the boxes, his term, as to them, begins to run at the date of their cutting, and extends to all the timber, boxed or unboxed, embraced within the area over which his boxing operations have actually extended. If a portion of the leased land remain entirely unboxed, he may thereafter enter and box the same, provided his entry be within a reasonable time, according to the usages of turpentine operators in the ordinary prosecution of their business in that locality.

(97 Ga. 622)

JOHNSON v. SOUTHERN MUT. BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. Dec. 21, 1895.)

USURY—RECOVERY OF MONEY PAID—LIMITATIONS.

Section 5 of the usury act of February 24, 1875 (Acts 1875, p. 105), now embodied in section 2057e of the Code, was not repealed by the usury act of October 14, 1879 (Acts 1878-79, p. 185); and consequently an action for the recovery of money paid as usury must be brought

within one year from the time such payment was made, or the same will be barred.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by E. O. Johnson against the Southern Mutual Building & Loan Association. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Affirmed.

W. H. Terrell and D. W. Rountree, for plaintiff in error. Ellis & Gray, for defendant in error.

**SIMMONS, C. J.** This was an action to recover usury alleged to have been paid by the plaintiff to the defendant. The defendant demurred to the petition, and moved to dismiss it, on the ground that the action was barred by the statute of limitations, it appearing from the petition that the usury sought to be recovered was paid more than one year before the suit was filed. The court sustained the demurrer and dismissed the action, and the plaintiff excepted.

The act of 1875 entitled "An act to regulate and restrict the rate of interest in this state, and for other purposes therein mentioned," after providing that it should not be lawful to reserve, charge, or take any rate of interest greater than 12 per cent. per annum, and that any person, company, or corporation violating this provision should forfeit the interest so charged or taken, provided also that "any plea or suit for the recovery of such forfeiture shall not be barred by the lapse of time shorter than one year." Acts 1875, p. 105. This was an extension of the period of limitation prescribed by the act of 1871, which was six months. Acts 1871-72, p. 75. This part of the act of 1875 was embodied in the Code (section 2057e), and it is conceded that it is still the law, unless repealed by the act of October 14, 1879 (Acts 1878-79, p. 184). In the case of *Lilly v. De Laperiere*, 76 Ga. 348, there was a query by Blandford, J., whether this act repealed the limitation, but the question has not heretofore been decided by this court. The act of 1879 is entitled "An act to regulate and restrict the rate of interest in this state, and for other purposes." It changed the maximum rate of interest to 8 per cent., and among other provisions, some of which are similar to provisions contained in the act of 1875, it contains one providing for a forfeiture of interest charged or taken in excess of that rate, but it says nothing as to the limitation of the time of filing pleas or suits for the recovery of the forfeiture. The contention of counsel for the plaintiff in error was that this act was intended as a substitute for the act of 1875, and repealed by implication such parts of that act as were not re-enacted in the later act. Certain decisions were referred to by counsel for the defendant in error, in which it was questioned whether, in view of the provision of

our constitution which declares that "no law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made," there can be a repeal by implication in this state. *Railroad Co. v. Hamilton*, 71 Ga. 461; *Montgomery v. Board*, 74 Ga. 44. But this is no longer an open question. It is now settled that an act which does not purport to amend or repeal any particular law or section of the Code is not within the inhibition of this clause of the constitution. *Peed v. McCrary*, 94 Ga. 488, 21 S. E. 232. And this view is supported by numerous adjudications in other states where similar constitutional provisions exist. See *Cooley*, Const. Llm. (Ed. 1890) p. 182, and cases cited. Repeals by implication, however, are not favored; and it is only in so far as a statute is clearly repugnant to a former statute, and so irreconcilably inconsistent with it that the two cannot stand together, or is manifestly intended to cover the subject-matter of the former, and operate as a substitute for it, that such a repeal will be held to result. The intention to repeal must be plain and unmistakable. See cases cited from 71 Ga. and 74 Ga., *supra*; *Suth. St. Const.* §§ 138 et seq., 154, 155. It is certainly not clear that the legislature intended by the act of 1879 to repeal the limitation clause of the act of 1875. Indeed, we see no reason whatever for supposing that they did so intend. This provision constitutes a distinct section of the act of 1875, and its subject-matter is wholly different from that of any other part of that act, or of any part of the act of 1879; and there is nothing in the latter act to suggest any reason why the limitation was not intended to stand. Such a limitation is as much in harmony with an act which fixes the minimum rate of interest at 8 per cent. as it is with an act which fixes the maximum rate at 12 per cent. How then can it be inferred that the legislature intended to repeal the limitation? In 1873 an act was passed which, in terms, repealed all laws upon the subject of usury, yet it was held by this court that it did not repeal the limitation clause of the usury act of 1871. *Everett v. Bank*, 61 Ga. 38. We think there is equal reason for holding that the act of 1879 did not repeal the limitation clause of the act of 1875. It has been held that while, as a general rule, a statute which revises the subject-matter of a former one works a repeal without express words to that effect, yet where the later act contains a provision like that contained in the act of 1879, to the effect that all laws and parts of laws in conflict with the act are thereby repealed, there is an implication that parts of the former acts which are not expressed in the new act are not repealed. *Suth. St. Const.* § 155, and cases cited; *Lewis v. Stout*, 22 Wis. 234.

Whether this is so or not, we think it is clear that there can be no repeal by implication of a provision, the subject-matter of which is not dealt with at all in the later act, and which is not in any way inconsistent with or repugnant to that act. The court below was therefore right in sustaining the demurrer and dismissing the action. Judgment affirmed.

(37 Ga. 672)

#### NICHOLSON v. STATE.

(Supreme Court of Georgia. Jan. 27, 1896.)

##### SUBORNATION OF PERJURY.

The offense of an attempt to commit subornation of perjury is not proved unless it affirmatively appears that the accused attempted to procure another to give false testimony, in a matter material to the issue or point in question, in some particular and specified judicial proceeding. A mere attempt to induce another to swear falsely as to a given matter is not, of itself, and without more, sufficient to constitute the offense in question.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Horace Nicholson was convicted of subornation of perjury, and brings error. Reversed.

J. W. Harris, Jr., for plaintiff in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

**LUMPKIN, J.** Perjury consists in willfully, knowingly, absolutely, and falsely swearing (or affirming) as to a matter material to the issue or point in question, in some judicial proceeding, by one to whom a lawful oath or affirmation has been administered. Code, § 4460. Subornation of perjury consists in procuring another to commit this crime. Code, § 4464. An attempt to commit subornation of perjury consists in attempting or endeavoring to induce another to do an act which, if committed, would itself amount to perjury. The indictment in the present case alleged that a barn had been willfully and maliciously burned; that on a day stated the accused attempted "to commit the crime of subornation of perjury, by then and there unlawfully, willfully, wickedly, and feloniously soliciting and offering to John Whittier one hundred dollars to willfully, knowingly, absolutely, and falsely swear that one Henry Pope burned the said barn, when in truth and in fact the said Henry Pope did not burn said barn, and [the accused] then and there well knew it." For the purpose in hand, it may be conceded that the evidence established the truth of the charge as laid, though it certainly did not go further. The state's case, both as to allegation and proof, completely failed, for the reason that it was neither charged nor proved that the accused endeavored to procure Whittier to do the false swearing in a judicial proceeding. Hence, it does not appear that the act which the accused attempted to procure Whittier to

commit would have amounted to the crime of perjury, if such attempt had resulted successfully. It does not appear that Henry Pope had been indicted for the arson, or that any trial of him for this offense was in contemplation, or that the false swearing which the accused wanted Whittier to do was to take place at such a trial. All it was shown that the accused attempted, so far as appears, was simply to get Whittier, at some time, in some manner, and in some place not stated, to swear to something which was false. This does not by any means make out the offense of an attempt to commit subornation of perjury. A mere loose and general attempt to induce another to swear falsely is not sufficient, but the attempt must have reference to some particular and specified judicial proceeding. Judgment reversed.

(37 Ga. 618)

#### RAY v. PEASE et al.

(Supreme Court of Georgia. Dec. 21, 1895.)

##### NEGOTIABLE INSTRUMENTS—ACTION FOR INTEREST—STIPULATION FOR ATTORNEY'S FEES—SCOPE—RECOURSEMENT.

1. Where the principal of a promissory note is payable at the end of a given term of years, but the note stipulates for the payment annually of the interest accruing thereon, any installment of interest past due, together with interest thereon, may be sued for and collected before the note, as to principal, has matured.

2. Where promissory notes executed before the passage of the Act of July 22, 1891 (Acts 1890-91, p. 221), and containing stipulations for the payment of "all cost of collection, including attorney's fees," were placed in the hands of an attorney at law for collection, who brought an action thereon in the name of the owner, the plaintiff was entitled to recover reasonable attorney's fees, although in his contract with the attorney it was agreed that the latter should receive no compensation for his services, other than what might be recovered from the defendant.

3. The maker of such promissory notes was liable for such reasonable attorney's fees as may have been incurred by the owner thereof in defending equitable petitions sued out by the maker to restrain their collection; it appearing that such petitions were without merit, and resulted only in delaying the owner in the enforcement of his legal right to collect the notes.

4. The consideration of the notes sued upon being the purchase price of land held under a bond for title from the seller, to which the latter, as matter of law, had a good legal title, that the defendant, erroneously conceiving there was a defect in that title, had instituted an equitable proceeding to have the question of title adjudicated and settled, and had brought that proceeding to this court, which rendered a decision holding that the title was good, gave the defendant in the action upon the notes no right to recoup against the plaintiffs in that action the expenses incurred by such defendant in the litigation growing out of the proceeding just mentioned.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by P. P. Pease, administrator, and others, against Lavender R. Ray. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

W. R. Hammond, Felder & Davis, and L. R. Ray, for plaintiff in error. King & Anderson, for defendants in error.

SIMMONS, C. J. 1. Ray gave to Mrs. Pease and her trustees his promissory notes for the purchase money of land; due, respectively, as to the principal, in one, two, and three years, and each providing that interest thereon at the rate of 8 per cent. per annum should be payable annually. After two of these notes had matured, the payees brought suit thereon, and also sued for the past-due interest on another of the notes, the principal of which had not yet become due. It was contended on the part of the defendant in the court below that, the principal of the last-mentioned note not being due and sued for, no recovery could be had for the interest thereon; and upon this ground the introduction of the note was objected to when it was offered in evidence for the purpose of proving the interest due thereon. The trial judge overruled the objection, and admitted the note in evidence, and error is assigned upon this ruling. Error is also assigned upon the charge of the court to the effect that a recovery could be had for such interest as might be shown to be due upon the note, together with interest on that at 7 per cent. from the time it became due. The judge clearly was right in overruling the objection to this evidence, and in charging as he did. The maker of the note having expressly contracted therein to pay interest annually, the plaintiffs were entitled to recover it, when due, whether the principal was due and sued for, or not; and they were also entitled to recover interest upon the annual installments of interest from the time they became due. *Scott v. Saffold*, 37 Ga. 384; *Calhoun v. Marshall*, 61 Ga. 275.

2. The notes above referred to were executed before the passage of the act of July 22, 1891 (Acts 1890-91, p. 221), and contained stipulations for the payment of "all cost of collection, including attorney's fees." It appears that the attorneys who represented the plaintiffs in suing upon the notes had an agreement with the plaintiffs that they would look for their compensation to such fees as might be recovered in the suit, and would not make any further charge for their services. It was contended on the part of the defendant that, the plaintiffs not having incurred any expense for attorney's fees, no recovery for such fees could be had against the defendant, and the court was requested to charge the jury to that effect. The court refused to charge as requested, but, on the contrary, charged that under the contract in the notes the plaintiffs were entitled to recover reasonable attorney's fees; and this is assigned as error. There was clearly no error in refusing to charge as requested, nor in charging as the court did, on this subject. If the plaintiffs did not have to pay attorney's fees, it was simply because the defend-

ant had contracted to pay them himself, and because the plaintiffs had agreed that the attorneys should take the fruits of this contract. Certainly the defendant could not escape liability on such a contract upon the ground that the plaintiffs were not themselves liable for such fees, when the contract itself, and the benefit the attorneys were to take under it, constituted the consideration for their agreeing to relieve the plaintiffs from this expense. To hold that this arrangement with the attorneys precluded a recovery of their fees would be to deprive the plaintiffs and their attorneys of the benefit of the defendant's contract because it had been used to effect the very object which it was intended to effect, which was to relieve the plaintiffs from this expense by placing it upon the defendant.

3. After suit was brought upon the notes the defendant filed a petition to enjoin the suit, upon the ground that he had ascertained after the notes were executed that the plaintiffs could not make him a marketable title to the land for the purchase money of which the notes had been given. The court refused an injunction, and this judgment was excepted to, and the case brought to this court, where the judgment was affirmed. 95 Ga. 153, 22 S. E. 190. On the trial of the present case it was insisted on the part of the plaintiffs that the services of their attorneys in resistance to the petition for injunction should be taken into consideration by the jury in fixing the amount to be allowed them for fees; and the court, over the objection of the defendant, allowed evidence to go to the jury as to what would be reasonable fees for such service, together with the service rendered by them in the case on trial. It will be remembered that the stipulation for attorney's fees does not fix the amount of the fees. This being so, the plaintiffs were entitled to recover such an amount as would be reasonable for the services rendered. In order to collect the notes, it was necessary, not only to bring the present suit, but to resist the attempt of the defendant to enjoin the suit; and the services rendered by the plaintiffs' attorneys in the injunction case were therefore properly allowed to be considered by the jury in determining the amount of fees which the plaintiffs were entitled to recover, especially when it appeared from the decision of this court that the petitions sued out by the defendant to restrain the collection of the notes were without merit, and resulted only in delaying the plaintiffs in the enforcement of their legal right to collect the notes.

4. The defendant filed a plea in which he sought to recoup against the plaintiffs the expenses incurred by him in the equitable proceeding above referred to. The court did not err in striking this plea. When that case was before this court, we held that the contention that the title of the plaintiffs was defective was without merit, and that the court

below was right in refusing to enjoin the action upon the notes. This being so, it would be manifestly improper to require the plaintiffs to pay the expenses which the defendant incurred in that case. Judgment affirmed.

(97 Ga. 759)

#### MOORE v. STATE.

(Supreme Court of Georgia. Feb. 14, 1896.)

GAMING — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE — ARGUMENTS OF COUNSEL.

1. There being direct and positive evidence of the guilt of the accused, there was no error in failing to give in charge the rules of law applicable to cases founded solely on circumstantial evidence.

2. Where one of two persons indicted for "gaming in the same game" was on trial, and the other, against whom the indictment was still pending, voluntarily testified in behalf of the accused that the alleged gaming did not occur at all, it was not improper for the solicitor general to argue that the witness was interested in the result of the trial; nor, in such case, was there any error in failing to charge the jury as to the protection given by statute to witnesses who are compelled in gaming cases to testify to acts incriminating themselves.

3. The evidence was sufficient to warrant the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; John D. Berry, Judge.

Steve Moore was convicted of gaming, and brings error. Affirmed.

John W. Cox and Geo. P. Roberts, for plaintiff in error. Lewis W. Thomas, for the State.

SIMMONS, C. J. Moore was indicted for gaming, and, upon his trial, one McCoy testified directly to the commission of the offense by the accused; his evidence being that, at the time alleged, he was present with the accused, and played and bet with him for money himself. This evidence was corroborated as to material facts by the circumstantial testimony of one Culley. Moore was convicted, and made a motion for a new trial, which was overruled, and he excepted.

1. One of the grounds of the motion for a new trial was that the judge erred in failing to give in charge to the jury the law of circumstantial evidence. In view of the direct testimony of McCoy, the judge did not err in giving in charge rules of law applicable to cases founded solely on circumstantial evidence. Where the commission of the offense is shown by direct testimony, it is not the duty of the trial judge to give in charge the law governing circumstantial evidence, although there may be also circumstantial evidence tending to corroborate the other.

2. After the evidence for the state had closed, the accused introduced as a witness for the defense one Smith, who was under indictment for gaming at the same time and in the same game with himself. Smith testified that he and McCoy played cards, but denied that there was any betting, and denied

that Moore engaged in the playing. Counsel for the state argued to the jury that Smith, being indicted for participation in the same offense, was an interested witness, and they should take this into consideration in determining as to his credibility. Counsel for the accused insisted that, under section 4545 of the Code, this fact could not be used against the witness; and it is complained that the court erred in failing to charge the jury, as laid down in that section, that "any other person who may have played and betted at the same time or table shall be a competent witness, and be compelled to give evidence; and nothing then said by such witness shall at any time be received or given in evidence against him in any prosecution against the said witness, except on an indictment for perjury, in any matter to which he may have testified." We do not agree with counsel for the accused in this contention. In the first place, the record does not show that the witness Smith was subpoenaed to appear and testify in the case. So far as the record discloses, he was a voluntary witness. This section of the Code protects the witness only in case he is "compelled to give evidence." Moreover, the protection afforded is that nothing then said by such witness shall be received or given in evidence against him "in any prosecution against the said witness, except on an indictment for perjury in any matter to which he may have testified." There was nothing in Smith's evidence which could have injured him on his own trial, because he positively denied that any gaming was done on the occasion referred to. In all trials, the interest, bias, or prejudice of any witness may be shown to the jury; and the fact that this witness was indicted for participation in the same offense and that it was to his interest to testify as he did, was a legitimate matter for argument to the jury.

The evidence fully warranted the verdict, and there was no error in refusing a new trial. Judgment affirmed.

(97 Ga. 582)

#### CAMP v. SOUTHERN BANKING & TRUST CO.

(Supreme Court of Georgia. Jan. 20, 1896.)

PARTNERSHIP — NOTICE OF DISSOLUTION — NECESSARY — NOTICE TO AGENT — SUFFICIENCY — BURDEN OF PROOF.

1. Where, in the course of its regular business, a partnership had been accustomed to accept drafts drawn upon it by another, and to pay the same to a bank at which they had been regularly discounted, and the bank, within the knowledge of the partnership while yet existing, still held one or more of these drafts which had been accepted, but not paid, the bank was, under these circumstances, such a creditor of the partnership as to be entitled to actual notice of its dissolution.

2. As to this creditor, mere proof of the publication in a newspaper of a notice of dissolution was not, of itself and without more, sufficient to discharge the partnership from liability upon a draft of the kind above indicated, drawn after the dissolution of the partnership, in part renewal of a former one duly accepted by it, and upon

which renewal draft there was an acceptance in the partnership name, although the entering of the same was the unauthorized act of one of the partners, done after the dissolution had, in fact, taken place.

3. In such a case the bank was not affected by information given to one of its messengers by a member of the former partnership, to whom a draft upon which the partnership was confessedly liable, and which was subsequently renewed, was presented, to the effect that the partnership had been dissolved, and that the other partner was liable for its debt; this information not having, in fact, been communicated to the bank itself, and it appearing that this messenger's agency was confined to collecting commercial papers, and also that it was not within the scope of his business or duty either to report the responses of persons who refused to pay papers presented, or to arrange with such persons or with others for a renewal of the same.

4. It is incumbent upon one alleging that the agency of such a collector extended to receiving and communicating to his principal information as to the dissolution of a particular partnership to affirmatively prove the authority or duty of the collector so to do.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by the Southern Banking & Trust Company against J. A. Clarke and M. P. Camp, partners as Clarke & Camp, and another. There was a judgment for plaintiff, and defendant Camp brings error. Affirmed.

Mayson & Hill, for plaintiff in error. Brandon & Arkwright, for defendant in error.

LUMPKIN, J. The Southern Banking & Trust Company brought an action against Hudgins, as drawer and indorser, and J. A. Clarke and M. P. Camp, partners under the firm name of Clarke & Camp, as acceptors, upon a draft dated June 5, 1893, drawn by Hudgins, payable to his order, and indorsed by him to the plaintiff, and purporting to have been accepted by Clarke & Camp on June 6, 1893. The action was defended by Camp, who alleged in his pleas that the firm of Clarke & Camp was dissolved May 22, 1893, and proper notice of the dissolution published; also, that the draft upon which the action was brought had never been accepted by himself; that neither Clarke nor any one else was authorized to accept the same in the firm name; and that he (Camp) had never ratified the act of acceptance. At the conclusion of the evidence, the judge directed a verdict for the plaintiff. Camp moved for a new trial, and, his motion being overruled, excepted.

The facts of the case are about as follows: It appears that, while the firm was yet in existence, Hudgins had drawn numerous drafts upon it, payable to his order, and duly accepted, most, if not all, of which he had discounted with the plaintiff at its bank. At the time the firm was dissolved, the plaintiff (certainly within the knowledge of Clarke, and most probably that also of Camp) held a number of these drafts which had been previously drawn and accepted as stated. The draft involved in the present case, though

drawn after the dissolution of the partnership, was in part renewal of a former one which it had accepted. The acceptance upon the renewal draft was executed by Clarke in the name of the partnership. This was an unauthorized act on his part; but, at the time it was done, the bank itself had no actual knowledge of the dissolution. Before this acceptance was signed by Clarke, a messenger of the bank had presented to Camp, for payment, a draft upon which the partnership was confessedly liable, and of which the draft now in controversy was, in part, a renewal. This seems to have occurred some time before the dissolution actually took place; but, nevertheless, Camp informed the messenger that the firm had dissolved, and directed him to take the paper to Clarke, who had assumed all its debts. After this, Camp heard no more of the matter until the acceptance now sued on was presented to him. A newspaper published in the city of Atlanta, May 22, 1893, contained a notice of the dissolution of the partnership; but it does not appear that the same was ever read or seen by any one, notice to whom would be imputable to the bank.

Creditors of a partnership are entitled to actual notice of its dissolution. This doctrine is well settled, and was distinctly recognized in *Askew v. Silman*, 95 Ga. 678, 22 S. E. 573. See remarks of Simmons, C. J., in this connection, pages 680, 681, 95 Ga., and pages 573, 574, 22 S. E., and authorities there cited. It seems clear that this rule is applicable in the present case. At the time of the dissolution of the firm of Clarke & Camp, it was actually indebted to the plaintiff upon its own acceptances, and this fact was well known to the firm. We are at a loss to perceive why the plaintiff should not at that time have been regarded as a creditor, and entitled to all its rights as such. So far, therefore, as it was concerned, mere publication in a newspaper of the notice of dissolution, of which it had no knowledge, actual or constructive, would not be sufficient. In the absence of any notice of the dissolution, the bank had the right to treat the partnership as still existing, and to assume that the act of either partner, within the scope of the partnership business, would be binding upon the firm. Certainly, it was justified in believing that Clarke could properly accept a new draft given partly in renewal of one for which the partnership was confessedly liable.

The only remaining question is, did the statement made by Camp to the bank's collecting messenger amount to notice to the bank itself of the fact of dissolution? We think not. In the first place, it seems from Camp's testimony that he stated to this messenger that the dissolution had taken place before this event really happened. But, without attaching special importance to this apparent incongruity, we will simply remark it is manifest that, in the very nature of things, this messenger's agency was of a special and

limited character. It cannot, with any sort of fairness, be asserted that he was a general agent of the bank. It affirmatively appeared that it was not within the scope of his business or duty either to report the responses of persons who refused to pay papers presented, or to arrange for a renewal of papers in his hands for collection. While Camp may not have been aware of the limited sphere within which this agent was authorized to act, he certainly must have known that the collector was in no sense a general agent of the bank. Under these circumstances, could he rightly assume that this collector had authority to receive for the bank notice of the fact of dissolution? Unless he could thus assume, then he was bound to inquire into the extent of the agent's authority. Under the facts appearing, we think this duty devolved upon Camp, and that he acted at his peril in assuming that what he told the collector would be actually communicated to the bank. It was not so communicated, and therefore Camp cannot be said to have complied with the legal obligation resting upon him to see to it that the bank was really informed of the fact that the dissolution had taken place. We avail ourselves of this (our first) opportunity to make a citation from the new edition of the American & English Encyclopedia of Law, the first volume of which far exceeds in merit its predecessor, though the latter, at the time of its issue, was so well prepared, and so thoroughly full and comprehensive, that improvement seemed scarcely within the reach of human attainment. It is there said that "the principal is bound to the extent of the apparent authority he has conferred upon the agent, and not by the actual or express authority, where that differs from the apparent authority; and in either case, if the agent exceeds the authority conferred, his acts will not bind his principal." And again: "Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power." See pages 986 and 987. In the notes referred to in the above text, the rule is stated to be that: "It is the duty of all having transactions with an agent in his representative character to inquire into the extent of his authority;" citing *Vanada's Heirs v. Hopkins' Adm'r*, 1 J. J. Marsh. 287; *Tidrick v. Rice*, 13 Iowa, 214. "Especially is this the case with one dealing with an agent whose authority he knows to be special;" citing *Michael v. Eley*, 61 Hun, 180, 15 N. Y. Supp. 890; *Nester v. Craig*, 69 Hun, 543, 23 N. Y. Supp. 948. As no duty devolved upon the bank to make any effort to ascertain that the firm of Clarke & Camp had dissolved, and Camp utterly failed to take reasonable and proper

steps to meet the obligation resting upon him of giving due notice of this fact, the rule above announced operates very justly in the present case. Judgment affirmed.

(97 Ga. 690)

#### SKINNER v. STATE.

(Supreme Court of Georgia. Feb. 7, 1896.)

##### INTOXICATING LIQUORS—WHAT CONSTITUTES SALE.

Where one, bona fide, and with no criminal intent, "lends" a pint of whisky to another, to be consumed by the latter, he agreeing to return, and in fact returning, to the "lender," another pint of the same kind of whisky, this transaction does not violate a statute prohibiting and making penal the sale of spirituous liquors. While, under section 2125 of the Code, the "loan" of the first pint was, as between the parties, a "sale" as distinguished from a mere bailment, it was not a sale within the meaning of the statute referred to, which, because of its being penal in its nature, must be strictly construed.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

J. M. Skinner was convicted of an illegal sale of liquor, and brings error. Reversed.

B. G. Griggs, for plaintiff in error. W. T. Roberts, Sol. Gen., for the State.

LUMPKIN, J. The question presented in this case is whether or not "lending" a pint of whisky to another, to be consumed by the latter, who agrees to return, and does in fact return, to the "lender," another pint of the same kind of whisky, it appearing that the transaction was made in the utmost good faith, and with no criminal intention, amounts to a violation of a statute which forbids and makes penal the sale of spirituous liquors. We do not think it does. There was no bargaining between them into which the element of trafficking entered. It was only an act of neighborly accommodation on the part of the lender, and it would be a strain to call it a "sale." It is quite true that if one lets another have whisky in exchange for goods, for services, or for any other thing of value,—such, for instance, as the hire of a vehicle (*Paschal v. State*, 84 Ga. 326, 10 S. E. 821),—the transaction could very properly be characterized as a sale of the liquor. But the present case is altogether different, for the reason that it had in it none of the elements which inhere in what is familiarly designated as a "trade." The trial judge was probably governed in the view he entertained of this case by the language of section 2125 of the Code, which provides that a "loan" of goods for consumption shall be construed to be a sale, and not a bailment. This section was specially designed for the protection of lenders as to the enforcement of their rights, and therefore very properly and wisely provided that transactions of this kind should take the legal character of sales when any question arose as to the borrower's liability to account for the goods. But this sec-

tion had reference exclusively to civil remedies, and affords no basis for arriving at the meaning of a criminal statute, which, under all the rules, must be strictly construed. To pursue a different course in the present case would, in our judgment, directly contravene the legislative intention. We cannot believe that the general assembly ever contemplated that the act for which the accused was indicted should render him a criminal. Judgment reversed.

SIMMONS, C. J., not presiding.

(97 Ga. 625)

### FAMBLES v. STATE.

(Supreme Court of Georgia. Jan. 13, 1896.)

#### HOMICIDE—NEW TRIAL—EXTRAORDINARY GROUNDS.

1. Where, after the adjournment of the term at which a criminal trial was had, the person convicted filed a motion for a new trial, upon alleged "extraordinary grounds," although the judge certified to the correctness of recitals in the motion as to what occurred at the trial, ordered the motion and the brief of evidence to be filed, and granted a rule nisi calling upon the state's counsel to show cause why the motion should not be granted, these facts did not amount to an adjudication that the motion was in law good as an "extraordinary" motion, or estop the judge, upon investigation at the hearing, from deciding that it was not good as such a motion, or prevent dismissing it for the reason that it could not be legally entertained as such.

2. Where one accused of crime was upon his trial defended by an attorney at law appointed for this purpose by the presiding judge, it will, unless there be clear and convincing proof to the contrary, be presumed that this attorney did his duty in the premises, and properly represented his client.

3. The mere facts that such counsel also, by appointment of the court, defended another person jointly indicted and tried with the accused, it being perfectly consistent for him to represent both, and that he failed to move for a new trial or to take the case to the supreme court, would not constitute grounds upon which to base an "extraordinary motion" for a new trial after the adjournment of the term at which the verdict was rendered; it not appearing that there was anything to prevent moving for a new trial during such term, or filing a bill of exceptions to the ruling of the judge within the time prescribed by law, if the counsel appointed as above stated had seen proper to do so.

4. The facts disclosed by the record in the present case do not show that the counsel representing the accused at his trial neglected any duty imposed upon him, or that, because he failed to take steps to have the verdict of guilty reviewed, he improperly "abandoned" the case; and there was no error in dismissing the alleged "extraordinary motion" for a new trial.

(Syllabus by the Court.)

Error from superior court, Twiggs county; C. O. Smith, Judge.

Gus Fambles was convicted of murder, and brings error. Affirmed.

John R. Cooper and T. R. R. Cobb, for plaintiff in error. Wm. Eason, Sol. Gen., J. M. Terrell, Atty. Gen., and John M. Stubbs, for the State.

SIMMONS, C. J. 1. It appears from the record that William Nobles was killed on June 21, 1895. Elizabeth Nobles, his wife, Debby Nobles, his daughter, Gus Fambles, Mary S. Fambles, and Dalton Joiner, were arrested and charged with the homicide. The judge of the superior court called a special term of the court for their trial, and at this term, which was held in July, 1895, they were indicted for murder. On account of their poverty, the accused were unable to employ counsel; and the court appointed two members of the bar, Messrs. O. R. Warren and W. Custis Nottingham, to represent them as counsel. The accused were tried jointly, and Elizabeth Nobles, Gus Fambles, and Mary Fambles were found guilty of murder. No motion for a new trial was made for any of the accused. At the next regular term, which was held in the following October, Elizabeth Nobles made a motion for a new trial, upon alleged "extraordinary grounds"; and, at the same term, Gus Fambles, through his counsel, Messrs. John R. Cooper and Thomas R. R. Cobb, who were employed subsequently to the trial, made a similar motion. The motion of Mrs. Nobles is dealt with in another opinion. When the motion of Gus Fambles was presented to the judge, he approved the grounds thereof as true so far as they related to what occurred upon the trial before him, ordered the motion and the brief to be filed, issued a rule nisi calling on counsel for the state to show cause why the motion should not be granted, and granted a supersedeas until the motion could be heard and disposed of. When the motion came on to be heard, counsel for the state moved to dismiss it, because the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion for a new trial. The motion to dismiss was sustained, and to this ruling the defendant excepted.

It was contended by his counsel in the argument here that after the judge had certified to the correctness of the recitals in the motion, and had ordered the motion filed, etc., he had no right to dismiss the motion for the reason assigned in the motion to dismiss; in other words, that these acts of the court amounted to an adjudication that the grounds were sufficient, and the court was bound by this judgment. We do not agree with counsel that these acts of the court involved an adjudication that the motion was sufficient in law as an extraordinary motion for a new trial, or would estop the judge, upon investigation at the hearing, from deciding that it was not good as such a motion, or prevent dismissing it for the reason that it could not be legally entertained as such. In approving the grounds of a motion for a new trial, and granting the rule nisi, the judge does not decide as to the sufficiency of the motion, or as to whether it is

made in time. He decides simply whether the recitals of fact as to what took place at the trial are true. At the hearing, he may determine that none of the grounds have any merit in them; or, if the motion has not been made and filed in the time prescribed by law, he may dismiss it, although he has approved the grounds and issued the rule nisi. The Code provides that "all applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had" (section 3719); and that, "in case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court"; and, "when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall ever be made or received unless the same be an extraordinary motion or case," etc. (section 3721). This motion having been made after the adjournment of the term, the court, under these sections of the Code, had the right to determine at the hearing whether or not the reasons urged therein were sufficient to sustain such a motion.

2-4. The only reasons assigned why the motion was not made during the term were that the accused did not have the benefit of counsel who could fairly represent him; that the counsel assigned to him were assigned also to Mrs. Nobles; that their defenses were inconsistent; and that, after the verdict and sentence, his counsel did not consult with him as to the making of a motion for a new trial, but, on account of the popular feeling against him, abandoned him,—abandoned his case. Attorneys are officers of court, and such officers are presumed to do as the law and their duty require them. When an attorney is appointed by the court to defend a person accused of crime who is unable to employ counsel, it is his duty to do so, and it is to be presumed that he will discharge his full duty in the premises. It is also to be presumed that the court, in appointing counsel for this purpose, will appoint attorneys who have sufficient skill and learning to defend the accused properly. Instances in which counsel prove unfaithful to the duty thus imposed upon them, if they occur at all, are very exceptional. Attorneys are generally men of upright character. In order to be admitted to practice, they are required to satisfy the court that they are of good moral character, as well as that they have the requisite learning. The writer has never known an instance in which an attorney appointed to defend an accused person has willfully abandoned the case, and failed to apply for a new trial where such an application ought to have been made. We think that, before a court should grant a new trial upon the ground that counsel have failed to do their duty in this respect, there should be strong and convincing proof to overcome the pre-

sumption to the contrary. The evidence presented to the trial judge in support of this motion fails to show that the counsel representing the accused neglected any duty imposed upon them. From our reading of the record, we think they might properly have concluded that there was no sufficient ground for a new trial, and, where this is so, it is not the duty of counsel to move for a new trial. Why should counsel obstruct the administration of justice, and occupy the time of the courts with such motions, when there is no reason for supposing that a new trial will be granted? There was no such conflict in the defense of Gus Fambles and that of Mrs. Nobles as would render it inconsistent or improper for the same counsel to represent both when tried jointly. So far as disclosed by the record, both had one and the same defense. It is true that Mrs. Nobles appears to have been, as contended by counsel, "a keen, shrewd white woman," and Fambles an ordinary negro farm laborer; but it does not appear, nor was it claimed, that Mrs. Nobles, by duress or persuasion, caused him to commit the crime. The testimony shows that he did so in consideration of \$10 paid him by her. Upon the whole, therefore, we are satisfied that the court did not err in dismissing the alleged "extraordinary" motion for a new trial. Judgment affirmed.

(97 Ga. 653)

#### MILLER v. STATE.

(Supreme Court of Georgia. Jan. 20, 1896.)

WITNESS—IMPEACHMENT—JURORS—DISQUALIFICATION BY RELATIONSHIP—HOMICIDE—EVIDENCE—DECLARATIONS OF THIRD PERSON.

1. Where the credibility of a witness was open to attack because upon a previous occasion, when it was apparently his duty to speak out, he had not disclosed any knowledge whatever as to certain very material matters, but at the trial testified that he did have knowledge of the same on the occasion referred to, it was competent to sustain the witness by proving that he kept silent on that occasion because he was advised to do so.

2. A juror whose deceased wife had been a second cousin of the accused in a criminal case was not disqualified from serving on the trial thereof unless the deceased wife left issue; and where, on such trial, the state alleged the incompetency of the juror, on the ground that he was related by affinity to the accused, it carried the burden of showing that the former relationship was still subsisting, by proving affirmatively that the deceased wife did in fact leave issue.

3. It was error, upon the trial of an indictment for murder, to admit in evidence against the accused declarations made by a third person before the homicide was committed, which, though uttered in the presence of the accused, amounted at most to no more than an implied threat by the person making them against the life of the deceased, and contained nothing tending to incriminate the accused, or call for a repudiation of them upon his part, and which—there being no evidence of any conspiracy between him and the declarant to commit the murder, nor any

legal reason rendering them admissible—were totally irrelevant to the issue on trial.

(Syllabus by the Court.)

Error from superior court, Paulding county; O. G. Jones, Judge.

Clabe Miller was convicted of homicide, and brings error. Reversed.

The following is the official report:

Clabe Miller and Howard Parton were jointly indicted for the murder of Wesley H. Roberts. They severed. Howard was tried, convicted, and sentenced to life imprisonment, and his motion for a new trial was overruled. The material grounds of the motion are sufficiently apparent from the opinion, excepting those referred to in the third division, which are as follows: Error in refusing to exclude, on motion of defendant, the following testimony of W. J. Parris: "I was trying to advise Howard Parton to go home and work with his father. Work was scarce, and bad weather, and he was not getting any work to do. And he just said he would go home, or go home to his father, if it was not for one or two things. Miller, the defendant, was present at the time. I said, 'What is it?' He said, 'If I go home, there is two or three I will be obliged to kill,' or bound to kill, if he should go home. Liza Jane, my daughter, said, 'Howard, if I was to guess, would you tell me?' He said, 'Yes.' She said, 'Is Oscar Campbell one?' He said, 'Yes; that is one'; and she guessed two or three more, —I don't recollect who they were. And in this talk he said: 'There is old Hogan Roberts. The damned old rascal ought to have been killed several years ago. He don't do anything but undermine people. He runs to Dallas, and undermines people, and reports them for dealing in whisky and toating concealed weapons.' That is what he said about Mr. Roberts. Clabe Miller turned to my wife and said, 'Mrs. Parris, did you ever know anybody to get rich by work?' She said: 'No, I don't know that I did; but have known people to make a living by work.' He said, 'I am not able to make a living by work, and there is a living here on this earth for me, and I am going to have it.' That is all I heard Miller say in my presence." Defendant moved to exclude the testimony as to Parton's sayings to Parris on the ground that the evidence failed to show any conspiracy between said Parton and defendant, and for that reason Parton's sayings were not admissible on the trial of Miller: Error in not excluding, on motion made upon the ground just stated, the following testimony of Eliza Parris: "Pa, he commenced talking to Howard, and told him to go home to his pa; he said he thought it was the best place for him; and Howard said he would if it was not for one thing. He said, if he should go back to Hulssetown,—he called it,—there were two or three he would be bound to kill; then he was ready to die. I said, 'Howard, if I guess, will

you tell me?' He said, 'Yes,' and I guessed Oscar Campbell. He said, yes, he was one. I guessed Bill Mosley. He said nothing. And I never thought to guess anybody else, and he never said, anyhow. He said: 'Old Hogan Roberts, the damned old rascal! he ought to have been killed some years ago. He is always ready to undermine people,—reporting them for toating concealed weapons and selling liquor.' That is all I heard him say. Clabe Miller said to Ma, 'Mrs. Parris, did you ever know a poor man to get rich by work?' Ma told him, no, they always could make a good living if they tried. He said he was not able to work, and there was a living here on earth for him, and he was going to have it. That is all I heard him say. The time that Miller had this conversation with my mother was not at the time Parton had the conversation with father and me. Miller's conversation with mother was that evening, and Parton talked it that night. When Miller had the conversation stated, with mother, Parton was sitting over there in the corner. When Parton was talking that night, Miller was there in the room. I don't know whether Miller heard Parton's conversation or not. I guess he did, but I don't know." Error in charging the jury: "The statement of Parton is not evidence against Miller, and it was only admitted without objection, but objection afterwards made; but I only allow it to stay in to explain the remark of Miller, or remark that he is charged to have made from the testimony of one of these witnesses,—that these remarks were made together. If these remarks were made at different times,—if Parton remarked that he intended or wanted to kill the deceased, or that the deceased ought to be killed, or anything of that kind, at one time, and Miller made any remarks about not making a living by work, or any such remarks, afterwards, or at a different time,—you could not consider it all in this investigation. If you believe that these remarks were made at different times, then it ought not to weigh anything against Miller; and, if you believe that these remarks were made at the same time, it is only admitted to explain the remarks of Miller. And, in the same connection, what Parton said, if he said anything of this sort, could not hurt Miller, unless Miller assented to it in the same way." This charge is assigned as error, because, the evidence failing to show any conspiracy between Parton and Miller, or that they were engaged in a common enterprise against the deceased, of any character whatever, the remarks of Parton were not evidence against Miller for any purpose whatever, and because the charge as to the purpose of the admission of said remarks of Parton is an expression of an opinion by the court that a connection existed between the remarks of Parton and the remarks of Miller, and that Parton's remarks would explain, or tend to explain, the remarks of Miller.

Washington & Moon, W. E. Spinks, and J. J. Northcutt, for plaintiff in error. W. T. Roberts, Sol. Gen., J. M. Terrell, Atty. Gen., and A. L. Bartlett, for the State.

**LUMPKIN, J. 1.** The evidence in this case discloses the perpetration of a terrible assassination. W. H. Roberts was shot and killed in his own house, at night, while sitting by his fireside in the presence of his family. Two persons (the plaintiff in error, Clabe Miller, and another) were indicted for the murder. The material question at issue upon the trial of Miller was one of identity,—whether or not he was one of the persons who actually committed or participated in the homicide. A daughter of the deceased testified at the trial that on the night of the killing she recognized the accused as one of her father's assailants. It was shown that on a previous occasion, when the circumstances were such as to render it incumbent on her to disclose what she knew as to the identity of the person or persons by whom her father was murdered, she remained silent. This fact, unexplained, would undoubtedly have left her credibility open to attack, and the court therefore very properly allowed her to testify that she had maintained silence on the previous occasion referred to because she was advised to do so. Indeed, it appears that her father, before dying from the wounds inflicted upon him, had enjoined her to pursue this course.

2. At the trial, one Johnson, after he had qualified, and had been accepted by both the state and the accused as a juror, stated that his first wife, who was dead, was a second cousin of the accused. The court, over the objection of the latter, directed that the juror go off for cause. It did not appear whether or not the deceased wife left issue. Under these facts, the court erred in holding that the juror was incompetent. The general rule is that relationship by affinity is dissolved by the death of either party to the marriage which created the affinity, provided the deceased party left no issue living. *Thomp. & M. Jur.* p. 181; *Dearmond v. Dearmond*, 10 Ind. 191. "Affinity is a principal ground of challenge, either to the array or to the polls, and it continues if there be issue of the marriage." *Vannoy v. Givens*, 23 N. J. Law, 201. See, also, *Cain v. Ingham*, 7 Cow. 478, and note at the bottom of page 479. The state having set up the incompetency of the juror, carried the burden of proving that the former relationship between him and the accused was still subsisting, by proving affirmatively that the deceased wife left issue. *State v. Shaw*, 3 Ired. 534, and authorities there cited.

3. The main ground upon which we rest our judgment granting a new trial in this case is stated in the third headnote. We have directed the reporter to set forth the evidence which we there ruled was improperly admitted. A perusal of it will show that

it ought to have been rejected, and the note in question sufficiently discloses the correctness of our judgment in holding it inadmissible. Judgment reversed.

(97 Ga. 706)

**GEORGIA RAILROAD & BANKING CO.  
v. CLARKE.**

(Supreme Court of Georgia. Feb. 7, 1896.)

**RAILROAD TICKET—CONSTRUCTION.**

1. In construing a special contract embodied in a railroad ticket, and limiting the purchaser's rights, language of uncertain or doubtful meaning should generally be taken in its strongest sense against the company by which the ticket was issued and sold, and in favor of the purchaser.

2. If the meaning of the contract embraced in the ticket below described is not, plainly and unequivocally, that which is there ascribed to it, the same result is properly reached by the application of the above-stated rule of construction.

3. A railroad ticket entitling a designated person to a stated number of single continuous trips, for each of which a separate coupon is attached, "between" two specified stations, and stipulating that "passage shall be taken only on such trains as stop at the above-named stations," and also that "this ticket shall be good only for continuous trips between" these stations, confers upon that person, upon surrendering one of the coupons, the right to ride from an intermediate station to either of the two stations mentioned in the ticket, or from either of those stations to the intermediate station, provided he boards a passenger train which, upon its regular schedule, stops, not only at the two specified stations, but at the intermediate station also.

(Syllabus by the Court.)

Error from city court of Dekalb; H. C. Jones, Judge.

Action by Ernest F. Clarke against the Georgia Railroad & Banking Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. B. & Bryan Cumming and M. A. Candler, for plaintiff in error. Clarke & Lowe and Arnold & Arnold, for defendant in error.

**LUMPKIN, J. 1.** The rule of construction announced in the first headnote is in accord with common sense. The principle upon which it is based was well recognized at common law, and is abundantly supported by precedent. This principle was invoked in the recent cases of *Railroad Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290, and *Railroad Co. v. Bussey*, 95 Ga. 584, 23 S. E. 207. Those cases, it is true, deal with the construction of regulations prescribed by railroad companies for the government of their employes; but the reasoning upon which they are founded is alike applicable to the construction of tickets sold and issued by such companies. It may be fairly presumed that one who himself writes or prepares a written contract in which he is interested will be sure to use language which he conceives is best adapted to secure to himself the full benefit of everything he could claim under the agreement the writing is intended to evidence. It is

therefore allowable and just, at the instance of the opposite party, to scan critically the phraseology employed. It can hardly be doubted that, before placing on sale tickets of the kind which the plaintiff in the present case purchased, the form to be used was carefully prepared and deliberately adopted by the company. There being a presumption that this form was thoroughly considered, the tickets (in the language of Chief Justice Bleckley, on page 83, 92 Ga., and page 202, 18 S. E.) "ought to be construed more strongly against the party who made them and adopted them than against one who merely assented to and agreed to be bound by them when they were presented to him as a basis of contract." This is obviously right for the additional reason that as the purchaser had nothing whatever to do with preparing the ticket, and had no voice in the wording of it, it was his right to claim under it the benefit of the strongest interpretation which could be made in his favor. Certainly, it was his undoubted right to insist that the words used in the ticket should be taken in their plain and literal significance, and not extended by mere implication.

2. It is, perhaps, hardly necessary in the present case to invoke the rule of construction we have above discussed; but, if there is any doubt as to the meaning of the contract in the ticket, the application of this rule relieves the case of all difficulty.

3. The ticket in question entitled the plaintiff to a stated number of continuous trips between Atlanta and Covington, and the contract embraced in the ticket stipulated that it should be good only for continuous trips between these stations, and provided passage should be taken on such trains only as stopped at the points designated. The extent of the restriction really imposed by this last stipulation was that the holder of the ticket had no right to demand that a train should be stopped at any intermediate station between Atlanta and Covington for the purpose of allowing him to board it, or to leave it in case he happened to be riding thereon. So, the only question really at issue is: Could he, upon this ticket, ride upon a train from a station between Atlanta and Covington, where it had stopped, and at which he had boarded it, to either of the terminal points? A similar question, though not directly involved in this case, would be: Could he ride on the ticket from Atlanta or Covington to an intermediate station, at which the train he had taken stopped, irrespective of the contract between the company and himself? The solution of both or either of these questions depends simply upon the proper answer to the inquiry: Is a ride from a station situated between Atlanta and Covington, to either of these places, a ride "between Atlanta and Covington"? Plainly and literally, it is. The railroad extends from Atlanta to Covington. Atlanta is in one direction from the moving train, and Covington in the opposite. The track is be-

tween these two points, and the ride is taking place upon that track. This is as much a ride between Atlanta and Covington as would be the case if the passenger got on the train at one of these points, and rode all the way through to the other. This the plaintiff was undoubtedly entitled to do under the ticket; and the greater right necessarily includes the less, viz. to ride a portion of the distance only, in the absence of express restriction to the contrary. Although entitled to ride the whole distance upon tendering one of the coupons of his ticket, why could he not waive or relinquish this right in part, and accept only a portion of the ride his coupon called for? So far as we can perceive, the exercise of this privilege could work no possible harm or inconvenience to the railroad company. The nearest case in point we have been able to find upon the subject is that of *Auerbach v. Railroad Co.*, 89 N. Y. 281, which sustains our present decision, both as to the rule of construction appropriate in a case of this kind and as to its application to the facts presented. Judgment affirmed.

(97 Ga. 802)

## PARKS v. OSKAMP et al.

(Supreme Court of Georgia. Feb. 29, 1896.)

## ACTION ON ACCOUNT—SPLITTING CAUSES.

1. Where one sold to another, on credit, two bills of merchandise on different days, in two consecutive months of the same year, the presumption, in the absence of any proof to the contrary, was that the demand arising upon the two sales constituted one entire and indivisible account in favor of the seller against the purchaser; and, this being so, the former could not divide the same into two separate accounts, predicated, respectively, upon the two sales, so as to bring actions thereon within the jurisdiction of a justice's court.

2. Where two such actions were brought, and a plea in abatement for want of jurisdiction was filed, the burden of proof was upon the plaintiff to show that the two alleged accounts were not one and the same account, but that they arose upon distinct and separate transactions.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Separate actions by Oskamp, Nolting & Co. against Eugene H. Parks, in magistrate's court. There were judgments for plaintiffs, and defendant sued out a writ of certiorari to the superior court, where it was overruled, and he brings error. Reversed.

S. F. Garlington, for plaintiff in error. F. W. Capers, for defendants in error.

SIMMONS, C. J. Two suits were brought by Oskamp, Nolting & Co. against Parks, in a magistrate's court,—one upon an open account for merchandise sold to the defendant on April 23, 1893; and the other for \$40.39, for merchandise sold to him on May 1, 1893. The defendant entered in each case a plea to the jurisdiction, averring that the two actions were on one and the same account; that the plaintiffs had unlawfully divided the same;

that the sum exceeded \$100, and was beyond the jurisdiction of the magistrate's court; and that the superior court of Richmond county had jurisdiction. In support of the pleas, the defendant put in evidence the two statements of account. The pleas were overruled, and judgments rendered in favor of the plaintiffs, upon testimony that the defendant had admitted his indebtedness to them in the amount sued for in each action. The defendant took the case by certiorari to the superior court, alleging that the magistrate erred in "dismissing" the pleas to the jurisdiction, and giving judgment in favor of the plaintiffs. The certiorari was overruled, and the defendant excepted.

Where sales of merchandise are made at different times by one person to another, and credit extended therefor, the question whether the several items are to be considered as a single running account, or whether they are to be treated as forming separate accounts, so that separate actions may be maintained thereon, is one of agreement or understanding, express or implied, to be determined by the ordinary mode of business, or by direct agreement of the parties. Where no such agreement or understanding appears, the whole should be treated as constituting an entire and indivisible account; the presumption in such cases being "that an agreement existed, in pursuance of which the plaintiff, for a definite period of time, or at the will of both parties, was to furnish goods, \* \* \* and that the amount due under the agreement should constitute but one cause of action." "Generally, where a creditor seeks to recover two or more judgments for items of indebtedness due him when the first action was brought, he must show some reason why such indebtedness should be treated as divisible." 1 Freem. Judgm. § 239, and cases cited. Certainly, this is so where the sales are by a merchant to a customer, and consist of two bills of merchandise sold within three days of each other, as was the case here. It does not appear from the evidence in the record that there was any agreement that the two bills should be treated as separate accounts, and nothing appears from which such an agreement can be inferred. It follows that the court below erred in overruling the certiorari. Judgment reversed.

(97 Ga. 798)

**PETERSON v. GEORGIA RAILROAD & BANKING CO.**

(Supreme Court of Georgia. Feb. 29, 1896.)  
LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION—COMPUTATION.

Following the rule for computing time laid down by this court in the cases of *Jones v. Smith*, 28 Ga. 41, *English v. Osburn*, 59 Ga. 392, *Barrett v. Devine*, 60 Ga. 632, and *Railroad Co. v. Carson*, 70 Ga. 388, which rule was discussed and recognized in the case of *Blitch v. Brewer*, 83 Ga. 333, 9 S. E. 837, an action brought on the 24th of October, 1893, for injuries to the person alleged to have been sus-

tained on October 24, 1891, was barred by the statute of limitations (Code, § 3060), and therefore properly dismissed on demurrer.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Bas Peterson against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Boykin Wright, for plaintiff in error. Jos. B. & Bryan Cumming, for defendant in error.

**LUMPKIN, J.** The alleged cause of action set forth in the plaintiff's declaration was an injury to his person inflicted on the 24th day of October, 1891. The action was brought on the 24th of October, 1893, and the only question for our determination is whether or not the plaintiff's right of action is barred by the statute of limitations, under section 3060 of the Code, which provides that actions for injuries done to the person, excepting injuries to the reputation, shall be brought within two years after the right of action accrues. This question, if an open one in this state, would not be altogether free from difficulty; but, in principle, it has been definitely settled, we think, by previous adjudications of this court. It is proper to remark, in the first place, that a right of action "accrues" as soon as the party is entitled to apply to the proper tribunal. Ang. Lim. (6th Ed.) § 42. It can scarcely be doubted that the plaintiff in this case might properly have filed his declaration against the defendant on the very day he received the injuries of which he complains. If, then, the computation of time is to be made from that day, more than two years had elapsed before he filed his action. In *Jones v. Smith*, 28 Ga. 43, it was said that, commencing with the 28th of November, six months would be out at the end of the 27th of the following May. In *English v. Osburn*, 59 Ga. 392, it was held that full three months had elapsed from the 2d of January to the 2d of the ensuing April. A similar ruling was made in *Barrett v. Devine*, 60 Ga. 632, in which it was decided that from June 12th to September 12th more than three months had elapsed; and this decision is cited approvingly in *Railroad v. Carson*, 70 Ga. 388, in which it was held that the period of time elapsing between October 12, 1880, and January 12, 1881, was more than three months. In all of these cases, save that in 59 Ga., the question was whether or not a writ of certiorari had been sued out in time. All of them are cited, and the basis of computation employed therein recognized as correct, in *Blitch v. Brewer*, 83 Ga. 336, 337, 9 S. E. 837. That case turned upon the proposition that a suit could not be brought upon a promissory note on the day upon which it became due, and Chief Justice Bleckley very clearly points out the distinction between the case then under consideration and those previously decided. He says the latter are not "applicable to the question now

before us, for the reason that certiorari can be brought upon a judgment or verdict upon the same day of its rendition; whereas we think that, in the absence of an express demand and refusal, no action can be brought upon an ordinary promissory note until the day after its maturity." It would seem, therefore, following the rule above announced, that, as the plaintiff had the right to sue on the day he was injured, the computation of time against him should begin on that day. We are aware that there is a contrariety of opinion in other jurisdictions as to the proper method of computation to be adopted in such cases, but the law for us has been settled. In *Rex v. Adderley*, 2 Doug. 463 (cited in section 44 of the above edition of *Angel on Limitations*), the rule was laid down that, "where the computation of time is to be made from an act done, the day on which such an act is done is to be included." See, also, 13 Am. & Eng. Enc. Law, p. 72, citing *Bank v. Waterman*, 26 Conn. 324, in which it was held that "when the injury, however slight, is complete at the time of the act, the statutory period then commences." Judgment affirmed.

(97 Ga. 592)

FLANNERY et al. v. HIGHTOWER et al.  
(Supreme Court of Georgia. Dec. 13, 1895.)

INJUNCTION AGAINST TRESPASS—SUFFICIENCY OF PLAINTIFF'S POSSESSION—ADVERSE POSSESSION—SUFFICIENCY—QUESTION OF FACT—ATTORNEY BY TENANT—WILLS—IDENTITY OF PROPERTY DEVISED—QUIETING TITLE—SUFFICIENCY OF PLAINTIFF'S TITLE.

1. Even as against a wrongdoer, an injunction will not, at the suit of a stranger to the title or possession, issue to restrain a trespass and stay waste about to be committed by cutting timber upon land; and one is such a stranger who neither claims the legal title or the right of possession thereunder, nor is in the actual possession of the premises, or some part thereof, by himself or another, under such claim of right as might ripen into a title by prescription.

2. A mere entry upon premises, followed by the erection of a house and the inclosure of a small portion of the land, even where the original entry was under color of title, when unaccompanied by an actual occupancy, is not such a prior possession as that, if the improvement be destroyed by fire, the person so entering can, by proof of such prior entry only, maintain as against any person a petition to enjoin the commission of trespass thereafter about to be committed by cutting the timber growing upon such land. In such a case, the sub modo right acquired by such entry, as against even a wrongdoer, extends only to the improvement made, and creates in him no title, legal or equitable, to any portion of the premises covered by such color of title. It would be otherwise were the entry followed by occupancy.

3. Whether or not the cultivation of a turpentine farm upon a tract of land is such an occupancy as may be the basis of a prescriptive title to the land itself is a question of fact, dependent upon the character of the possession, the extent of the visible signs of occupancy, and its continuance; and a charge is not erroneous which submits such question for the consideration of a jury.

4. One who enters as a lessee of timber for turpentine purposes, in subordination to the title of another, can neither attorn to a third person, nor, by accepting a concurrent lease from

such third person, otherwise recognize a claim of the latter adverse to that of his original lessor, without first surrendering to him the possession; and therefore, while the possession of such a lessee continues, it is, in contemplation of law, in right, and inures to the benefit, of him under whom he originally entered.

5. A devise of "all of one's estate," or of a certain "plantation," described as being in a given county, is not void for uncertainty; and extrinsic evidence is admissible to show that a particular tract constituted a component part of the land intended to be embraced within such general descriptive terms.

6. A decree of cancellation can only be had at the suit of one holding the perfect legal or statutory title, and against an outstanding claim of title which operates as a cloud upon that of the rightful owner. Hence, even though a plaintiff fall in his action, for the want of a perfect title, a defendant may not, upon the prayer of a cross bill, obtain a decree of cancellation as against the plaintiff, unless he show a perfect title in himself. By evidence of possession only, or of an inchoate prescription, he may defeat a recovery by the plaintiff; but such evidence does not entitle him to the extreme affirmative relief afforded by the cancellation of the plaintiff's evidence of title.

7. The verdict, upon the substantial merits of the case, was right in so far as it found generally for the defendants; but the finding of the jury that the deeds of the plaintiffs be delivered up for cancellation was without evidence to support it, and contrary to law. Direction is therefore given that the judgment denying the motion for a new trial be affirmed, but that the verdict and decree be amended in the court below in accordance with the view above indicated, and the costs of this writ of error be taxed against the defendants in error.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by John Flannery & Co. against J. W. Hightower and others. There was a decree for defendants, and plaintiffs bring error. Affirmed with directions.

De Lacy & Bishop, for plaintiff in error.  
E. A. Smith and D. M. Roberts, for defendant in error.

ATKINSON, J. Flannery & Co. filed a petition in Dodge superior court against Hightower et al. to restrain them from cutting the timber growing on certain lots of land in that county. The plaintiffs alleged that they were the owners of the lots, claiming title under and by virtue of certain deeds. Their paper title originated in a deed from Nicholas Rawlins to McVay & Choate, dated January 17, 1882, and from the latter through a succession of conveyances, which appear to be regular, to John Flannery & Co., by deed dated 21st day of May, 1886. In addition, plaintiffs based their claim of title upon a claim of prior possession, alleging that they had actual prior possession of the lots of land in dispute by means of a building erected thereon about the year 1887 or 1888, and before any of the timber was boxed for turpentine purposes, and before there was any kind of possession thereof, by any person whatever; that they had constructed and placed a fence around said building, the same being a dwelling house, and were preparing to continue and

enlarge said improvements, when the house and buildings were burned and destroyed by some persons unknown; that thereafter they followed up the possession above referred to, by leasing the land for the purpose of having the same worked for turpentine purposes, and by putting persons in possession of said land who are now in the actual possession of said lots, clearing and improving them. Plaintiffs amended their petition, by charging one William Ragan as a co-defendant with the original defendants, and as a confederate, aiding and abetting them in their wrongful act. The original defendants filed an answer to the petition, denying that Flannery & Co. were the owners of the lots of land, or that they had ever been in possession of either of the lots; not admitting that the plaintiffs had leased the property for turpentine purposes to J. A. Williams & Co.; denying that Williams & Co. worked the timber for turpentine purposes under such a lease; but alleging, on the contrary, that Williams & Co. had, previous to any lease which they may have accepted from Flannery & Co., leased the two lots of land and timber thereon for turpentine purposes from Lloyd Smith, and that, under and by virtue of this latter lease, they had entered and boxed the timber for turpentine purposes, and were in possession under such lease at the time they accepted the alleged lease from Flannery & Co. The defendants further claimed that they entered upon the land in the right of J. W. Hightower, in his capacity as receiver of the Empire Lumber Company, which latter company claimed its right of entry, and to cut the timber, under and by virtue of a lease from William Ragan, in whom, it was alleged, was the true legal title to the premises, and not in the plaintiffs. William Ragan filed a petition, praying that he be made a party, alleging that Hightower, the receiver of the Empire Lumber Company, being in possession in subordination to his title, he was bound upon his warranty, and therefore desired to be a party. He was made a party; alleged (1) that he held title to the property under and by virtue of a chain of title originating in one James Graham, who, on the 1st day of March, 1856, conveyed to Lloyd Smith. (2) Possession of Lloyd Smith during his lifetime, and at his death by his tenants, Williams & Co., who boxed and worked the timber on said two lots of land under a lease from the said Lloyd Smith, bearing date January 22, 1887. (3) The will of Lloyd Smith, bequeathing the land to Eliza J. Smith during her life or widowhood, and at her death or marriage to William Ragan. (4) A deed from Eliza J. Smith to William Ragan. Thereafter William Ragan amended his cross petition filed in the case, alleged that the plaintiffs' claim of title to the land in dispute was a cloud upon his title; prayed that the plaintiffs be perpetually enjoined from further interfering with him in his possession of the land, or from further claiming

title thereto, and that their deed be declared null and void, and be canceled.

Upon the trial of the issues made in the cause, under the pleadings above outlined, the plaintiffs introduced the following documentary evidence, to wit: (1) Warranty deed from Nicholas Rawlins to McVay & Choate, to lots of land Nos. 10 and 11 in Nineteenth district of Dodge county, dated January 17, 1882, consideration \$400, recorded May 10, 1882. (2) Mortgage, with power of sale, public or private, from McVay & Choate to John Flannery & Co. on said lots of land and other property therein described, dated May 4, 1882, to secure four promissory notes of same date, for \$3,000 each, recorded May 13, 1882, and constituting John Flannery & Co. attorneys in fact for McVay & Choate. (3) Deed from John Flannery & Co., as attorneys in fact for McVay & Choate, to Patrick F. Gleason, to said lots and other property therein described, dated September 30, 1885, consideration \$850, and transfer thereof from P. F. Gleason to John Flannery & Co., dated May 31, 1886, for value received; said deed and transfer recorded August 9, 1886. (4) Lease from John Flannery & Co. to J. A. Williams & Co. to said lots 10 and 11 in Nineteenth district for turpentine purposes, for two years from February 17, 1890, and recorded March 1, 1892. (5) The wild land and general tax digest of Dodge county for the years 1875 to 1887, inclusive, showing that Lloyd Smith never returned either of said lots 10 or 11 in Nineteenth district for taxation in any year during the period covered by said digests, though he returned other lands and property, and showing, further, that said lots 10 and 11 were returned for taxation during said period by Nicholas Rawlins, McVay & Choate, and John Flannery & Co., respectively. Walker, a witness for the plaintiffs, testified: "That he was acquainted with the lots in question; had known them 8 or 10 years; first saw them in 1882 or 1883 or 1884. It was then pine land, with timber on it, and no one living on it. Never saw any possession on it only what I put on it before it was boxed. I had a building put on it, on No. 11, I think. I got David Darsey to put it there by contract for John Flannery & Co. That was near two years before it was boxed. The house was burned down soon after it was built. No one lived in it. Don't know who burned it. We had nothing but very little fencing around there. That was before the boxing. J. A. Williams and Co. boxed both lots. The Empire Lumber Company cut part of the timber. I saw the timber on the ground,—50,000 or 60,000 feet. A great deal of it was hauled off. Bass and Bryan are in possession of these two lots now, and have been nearly two years. They went in since this suit. They have a fence on the land, and are cultivating it. I sold it to them as the agent of John Flannery & Co., and gave them a contract to make them a title if we recover in this suit. I had the house built

on the land. Nobody ever lived in it. It was burned soon afterwards. There was a little fencing. None of it was ever cultivated." Morgan testified for the plaintiffs: "That about ten years ago he went to the two lots in controversy, to trace the lines. At that time the land had not been boxed. He went there with Lloyd Smith. He was not in possession, and was not setting up any claim to these two lots at that time, but told me they belonged to Choate and Flannery." Johnson testified for the plaintiff: "I have known the lots in controversy for five or six or seven years. They were then not boxed. They were original forest, and no improvements on them. We had a house built on them afterwards by Mr. Walker, agent for Flannery & Co. I suppose it was on the line between 10 and 11. I did not see it. It was burned when I went out there. I saw the remains. That was before the land was boxed. Flannery & Co. had a deed to the land, and put it in the hands of Walker to look after, as well as other lands in the adjoining county and in this county. Flannery & Co. paid taxes on these lands, and looked after them, to see whether they were intruded on, and to see that the timber was taken care of. Walker went there with me. I saw Lloyd Smith occasionally when he was living. Had a conversation with him at Eastman about these two lots. The first time I met him was in the store of W. F. Harrell. He was a partner of Mr. Harrell's who introduced me to him. I learned in the conversation that Mr. Smith had been living a good while in the 19th district, and had lands in that district. As we owned lots 10 and 11 in that district, I proposed to Mr. Smith to sell them to him. He said: 'I have got plenty of land, and don't want to buy. I have got as much land as I want.' He did not set up any claim to these two lots. These lots have since been boxed for turpentine purposes. When I went out there, I saw the remains of the house that had been burned. I went out there two or three times. We paid Walker for building the house, who was our agent to build the house. The house was built on the line of the two lots. It was a log house. I made the lease for Flannery & Co. to J. A. Williams & Co. I think we had information then that Williams & Co. had leased the land from Lloyd Smith. J. A. Williams represented J. A. Williams & Co. Mr. Carson, of the firm, was the man we negotiated the contract with. I think we then had information that it had been leased, and that J. A. Williams & Co. had the management of it. We did not get the information from Williams & Co. Don't remember what they said at the time. They have not paid for the lease. They are waiting until this litigation is settled to pay us. They are perfectly solvent, and could give a sight check that would be honored at any time."

The defendants introduced the following documentary evidence: (1) Deed from James

Graham to Lloyd Smith to lots 10 and 11 in the Nineteenth district of Pulaski county, dated March 1, 1859, consideration \$100, recorded in Dodge county, September 22, 1887. (2) Lease from Lloyd Smith to J. A. Williams & Co. for said two lots for turpentine purposes, for a term of three years, to commence when the timber is boxed, dated January 22, 1889, consideration \$300. (3) Will of Lloyd Smith, dated January 29, 1890, who devised as follows: "I give and bequeath to my wife, Eliza J. Smith, my entire estate during her widowhood; and all of my property, both real and personal, I devise to her during her natural life if she remain unmarried and a widow. Said property, all of which I now bequeath and can mention, is as follows: One plantation, known as the old 'Lloyd Smith Plantation'; \* \* \* also, the Darsey plantation; and all other lands are included herein which I bequeath and devise as herein mentioned, and said plantations being in the 19th district of Dodge county. And if she does marry, and is no longer a widow, I desire all of my property herein mentioned, and all I own, both real and personal, to go to William Ragan and his heirs, which I devise all my property, both real and personal." (4) Deed from Eliza J. Smith to William Ragan, dated November 21, 1891, and recorded November 27, 1891, which conveyed as follows: "All her life interest and title as conveyed by the will of Lloyd Smith, dated on the — day of February, 1890, now of record in the ordinary's office of Dodge county, to the real and personal property therein mentioned and described, except certain property, which property so excepted having been this day deeded by William Ragan to Mrs. Eliza Jane Smith, in consideration of her surrender of her interest, right, and life estate to all the property under the will of Lloyd Smith, deceased, made in February, 1890, and recorded in the ordinary's office; and the said Eliza J. Smith conveys all of said real and personal property not herein excepted to the said party of the second part, as fully and completely described in the will of said Lloyd Smith, deceased, and deeds held in his name." William Ragan testified: "The deed from Eliza Jane Smith to myself was intended to convey these two lots of land, and the land in dispute is part of the land conveyed to me in the deed, and by the will of Lloyd Smith. I signed the lease from Lloyd Smith to J. A. Williams & Co. as a subscribing witness, and saw the other witness sign it, and saw Lloyd Smith make his mark there. Walter Hartman signed, 'J. A. Williams & Co.' They boxed the timber under that lease. The lease was made in the fall, and it was boxed in the spring following. Lloyd Smith died in 1890. He was in possession then. He had it boxed for turpentine under the lease. These lots were wild in the woods before they were boxed. No house on them that I knew of. Think I would have known if

there had been. There was no cleared land. Can't tell whether any house was ever built on it or not. If there was, I did not see it. Suppose I have known the lots 10 or 20 years, ever since I was a yearling boy. Lloyd Smith, in his life, paid taxes on it, and leased it to J. A. Williams & Co. They boxed it all, I think; boxed one lot that year, and that fall they boxed the other. Lloyd Smith was a poor scribe, and, while he could write his name, he generally signed his name to notes, and to other papers he made his mark. I was in possession when the suit was brought." Hightower, sworn for the defense, testified: "Hosford had bought this timber before I knew anything about it. I was operating the Empire Mill, as receiver in the case of Kliser et al. v. Empire Lumber Co. et al. We had to buy timber to operate it. Hosford bought timber, and it was paid for in the office. Hosford was acting under me as receiver. We paid Ragan \$70.25. We were to pay Ragan fifty cents per 1,000 feet for the timber. Hosford bought the timber before this suit, under orders from me to buy timber. There was \$91.25 in all paid Ragan. The timber is not all cut. We were enjoined. Hosford was authorized to buy timber from Ragan or Flannery either." Hosford, for the defense, testified to the same effect. It was admitted that Hightower was appointed receiver by the court, and that he was authorized to buy timber for the purpose of carrying on a sawmill business. J. A. Williams, sworn as a witness for the defendant, testified: "I know the lots in question. I boxed them for turpentine purposes for J. A. Williams & Co., one lot in the spring of 1889, and the other in the fall of the same year. We leased it from Lloyd Smith. We boxed them before the lease from Flannery & Co. to J. A. Williams & Co. It was wild land when I boxed it. If there was any clearing on it, I did not see it. I saw no indications of it. If there was any deadening, I never saw it. We remained in possession under Lloyd Smith's lease four years. We were in possession when he died. T. A. Williams, J. P. Williams, and J. A. G. Carson compose the firm of J. A. Williams & Co. The lease from Flannery & Co. was made in Savannah; the signature is Carson's writing. I knew of the lease some time afterwards. They, J. P. Williams and Carson, knew of the Lloyd Smith lease at the time they took lease from plaintiffs. I think it was 1887 I first knew of the land. I think some time after that I saw a shanty on it, but don't remember seeing it after 1887. Don't know who put it there. It was close about the line between 10 and 11. It was afterwards burned. I saw Mr. Darsey up there. Lloyd Smith had no possession except the turpentine trees. Turpentine possession is boxing the trees in winter, and working them in summer. Worked them 3 or 4 years. We commence about this season, and work them until October. Have to go there in the fall, and rack around the

trees, to protect the boxes from fire. From March to October it takes about one chipper to the lot, and one dipper to two lots. They are there all the time. Woodsman is there. They haul the gum out, chip it every week, dip it about every four weeks. Unless he is a blind man, it is not possible to go through a lot of land that has been turpented without seeing that it is being used for turpentine purposes, and any improvements that might be made on it. We chip the trees about five feet from the ground. The faces of the boxes are about 14 inches on large trees, and 10 inches on small trees. By boxing, we mean cutting a notch in the tree with an ax, to hold the turpentine. By dipping, we mean going over it every week, and gathering the crude turpentine in boxes. By hacking, we mean cutting a fresh streak from the tree, which we take off with a hack with low boxes, and a puller with high boxes. That cuts a streak in the side of the tree 14 inches wide and 5 feet high. In a very large tree we cut as many as 5 boxes. In a small tree we generally average about two boxes. I gave Lloyd Smith a draft for \$300 for the lease from him for the two lots." Witness knows nothing about the consideration of the Flannery & Co. lease. Witness worked No. 11 4 years and No. 10 3 years; paid Ragan for the fourth year.

1. In the case of Nethery v. Payne, 71 Ga. 379, this court recognizing the general rule prevailing in courts of equity touching the power of such courts, by injunction, to restrain trespass and stay waste, has stated the rule broadly to be: "It may be laid down as a general rule that equity will not restrain waste except upon unquestionable evidence of the plaintiff's title; nor will equity interfere by injunction to prevent waste when plaintiff's title is not clear; and, when there is grave doubt whether an action at law could be sustained for the alleged waste, it is proper to refuse the injunction." This rule is a simple recognition of the general principle that one is not entitled to invoke the extraordinary powers of a court of equity unless he can establish in a manner satisfactory to the law the fact that he will suffer an irreparable injury in his estate. Unless the estate be his, he can suffer no injury, and, unless the title be in him, there is no estate; and hence, in the absence of title to the property upon which the trespass is about to be committed, the courts cannot extend to him any aid, and will not, at his suit, interfere to inquire whether another who is in possession and enjoyment of the estate be rightfully so or not. If such other person be a wrongdoer,—a mere trespasser,—it can be a matter of no concern to one who is not himself the owner, and who has no interest in the estate, resting either upon absolute title or such a possession as may amount to an inchoate prescription. A person in possession under color of title, or in the actual possession of premises, though he be not the owner of the

strict legal title, if his possession be not in good faith, might be, under certain circumstances, entitled to maintain a petition for injunction against a bare trespasser, who was himself insolvent, and who could not answer in damages for his wrongful act in interfering with a person holding such possession. But, if a person be a stranger both to the title and possession, then injunction will not issue at his instance to restrain a trespass or to stay waste about to be committed upon land occupied by another; and if such person neither claims the legal title or the right of possession thereunder, nor is in the actual possession of the premises, or some part thereof, by himself or another, under such a claim of right as might ripen into a prescription, he cannot be other than a stranger to the title or possession. The institution of a suit by such person would be wholly gratuitous, and courts of equity will not grant relief upon the prayer of such a volunteer.

2. In the present case, it appears from the evidence that the plaintiffs, under color of title, entered upon the premises in dispute, and, upon the line between the two lots, erected a small house, and made a small inclosure, including a very small portion of each of said tracts of land. The house was never occupied by them, or any person for them. Soon after its erection, and before its occupancy, it was destroyed by fire, and with it the inclosure surrounding it. The plaintiffs do not claim the legal title to the premises, but rest their title to the land upon a prescription based upon this entry; and, upon the faith of such prescription, they pray an injunction against the defendants, who claim likewise to have entered under a prescriptive title. An actual possession of some portion of a tract of land is indispensable to the creation of a title by prescription. It is the outward visible sign of occupancy, and not the mere intention to occupy, which, coupled with an entry in good faith, constitutes the elements of a prescriptive title. A mere entry, unaccompanied by an actual occupancy, is no possession at all. It indicates a purpose to occupy, which purpose, if carried into actual execution by a continuous occupancy for the period of time prescribed by law, will give a prescriptive title; but, if the possession itself be discontinued, the person entering cannot, by proof of such prior entry only, maintain against another person a petition to enjoin the commission of a trespass thereafter about to be committed by cutting the timber growing upon such land. In such a case the right acquired by such entry, even as against a wrongdoer, extends only to the improvement actually made. Of course, whether rightfully or wrongfully, if one build a house upon the land of another for the purpose of occupying it, and a stranger should come along and destroy the house, while the builder of the house would have no title to the land and no title to the house as against the true owner, he would still, as

against a mere wrongdoer, be entitled to the possession, and would be entitled to recover, as against such wrongdoer, any damages for his interference with that possession. But a mere entry under color of title, if the entry be not prosecuted or supplemented by an actual occupancy, would give no right in favor of the person entering against any other person who might likewise choose to enter upon the land. The sub modo title of one squatter in actual occupancy will prevail against the claim of another one who attempts to squat; and hence that rule of law recognized by our Code, that a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever. It will be observed, however, that the right of the plaintiff to recover in such a case is dependent upon his prior possession, and does not arise upon his prior entry only. In the present case, had the original entry of the plaintiffs been followed up by subsequent occupancy and possession, they might have prevailed against one who sought to enter under no better title; but their misfortune is, they are in the position of showing no title to the land in dispute, either by title or possession.

3. The defendants claimed a prescriptive title to the premises, based upon an occupancy, evidenced by a continuous working of the timber growing upon the land in dispute for turpentine purposes; and, upon the question as to whether or not an occupancy of such a character could be the basis of a prescriptive title, the court charged the jury as follows: "If you find from the testimony that this land was used for turpentine purposes by the defendant Ragan, and that was such use and occupation of it, under this provision of the law, which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another,—if you find from the testimony that the cultivation of the trees for turpentine purposes; that the land was boxed, or that the timber was boxed; that, for a considerable portion of the time during the year, they chipped and hacked, and the hands were continually dipping turpentine from the trees, and the employes were hauling the turpentine away; and that the trees were racked around to protect them from fire,—I charge you that this would be actual possession, if you find it to be true." Exception was taken to this charge, as amounting to an expression of an opinion upon the weight of the evidence. While we do not entirely approve the exact form of expression employed by the circuit judge, we are not prepared to say that this charge violates the provision of our Code against the expression of an opinion by the circuit judge upon the evidence submitted in a case. It will be observed that the charge of the court first submits to the jury the question as to whether the land was used for turpentine purposes by

the defendant Ragan, and whether such use and occupation of it, under the provisions of the law, were so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another. If this were true, that would be an actual occupation of the premises; and the mere fact that the judge thereafter enumerates in his charge certain circumstances which might indicate an actual occupancy or possession is not erroneous, in view of his correct statement of the general proposition left to be determined by the jury from the evidence. The question as to whether or not a possession was held under such circumstances as to be the basis of a prescriptive title is always a question of fact for the jury, and our law does not undertake to say what amounts to actual possession, except in so far as it says that actual possession is evidenced by inclosure or cultivation. Inclosure and cultivation are specific acts, indicating occupancy of the premises; but occupancy may be evidenced by means other than inclosure or cultivation, for the same section of the Code provides that any use and occupation of the premises which are so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupancy by another, will be sufficient upon which to found a title by prescription. Whether or not the cultivation of a turpentine farm upon a tract of land is such an occupancy and so notorious is a question of fact, dependent upon the character of acts relied upon to constitute such a possession. In determining this question, the jury are to look to what are the visible signs of occupancy. In the present case, according to the evidence, as it is disclosed by the record, it appears that every pine tree upon the tract of land available for that purpose had been boxed and worked for turpentine purposes; that, in the process of boxing, hacking, dipping, scraping, and racking round the trees, there was scarcely a day in the year upon which there was not some servant of the defendants actually employed upon this tract of land, at work in such a manner as to indicate to the most casual observer a purpose upon the part of the person in possession to appropriate the land to his own exclusive use, rather than as indications of mere predatory invasions of the property by a casual trespasser. Upon this evidence, the court submitted to the jury the question as to whether such occupancy was so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another; and we think that the evidence not only justified the instruction of the court upon that point, but justified a finding by the jury of such an occupancy in accordance with the instruction.

4. It appears from the record in this case that Williams & Co. entered upon the premises in dispute under a written lease from Lloyd Smith, and boxed the timber for turpentine purposes under such lease; that thereafter, without surrendering the property to

their lessor, they accepted a lease from the plaintiffs in this case, and continued to work the timber thereafter under both leases. Upon this possession of Williams & Co., claiming them as their tenants, the plaintiffs seek to found a prescription. We think this cannot be allowed, for, Williams & Co. having entered under and in subordination to the title of Lloyd Smith, their possession was his possession until a formal surrender by them to him. No rule of law is better settled than that a tenant cannot atone to a person other than his landlord; and it would be a strange anomaly if Williams & Co., entering under the lease from Lloyd Smith, could, by the acceptance of a concurrent lease from these plaintiffs, recognize such a claim of the latter as to make their possession under such lease superior to that of their original lessor. We are constrained to hold, then, that, so long as Williams & Co. remained in possession without surrendering to the original lessor, their possession was the possession of such original lessor. It is, in contemplation of law, in his right, and inures to his benefit, and to the benefit of those who hold under him.

5. Upon the trial, the will of Lloyd Smith was offered in evidence, and was objected to, upon the ground that the devise to Eliza J. Smith, under whom these defendants claim, if intended to convey the property in question, was void, because of uncertainty. This objection was overruled, and the will admitted. The devise, it will be observed from the statement of the contents of the will, as it hereinbefore appears, bequeathed to Eliza J. Smith the entire estate of the testator, both real and personal, during the time she remained unmarried. The testator undertook further to describe the property, "all of which I now bequeath and can mention, is as follows: One plantation, known as the old 'Lloyd Smith Plantation'; also, the plantation known as the 'Rockmore Plantation'; also, the Darsey plantation; and all other lands are included herein which I bequeath and devise as herein mentioned, and said plantations being in the 19th district of Dodge county. \* \* \*" So, it will be observed that he devised all of the property, both real and personal, of which he died possessed. The next question is, did he die seised and possessed of the premises in dispute? The evidence answers this question in the affirmative. It is not essential to the validity of a deed or grant that it should describe with absolute mathematical precision each piece of property intended to be conveyed. If the conveyance be such as to distinguish the property intended to be conveyed from other property remaining in the testator, general words will suffice. If the intention of the devise be to convey all of the property of the testator, such general description will suffice, and extrinsic evidence is admissible to show such property as was in the testator, and such as was necessarily included in the general terms employed

by him in devising it. At least, the question of description is one of degree only; and, if the conveyance be of an entire estate, parol evidence is admissible to ascertain the geographical extent and limit of the property covered thereby.

6. The defendants filed an amendment to their answer, in the nature of a cross bill, by which they prayed that the deeds of the plaintiffs be delivered up for cancellation; and, the jury having found in their favor, the court decreed a cancellation of the deeds under which the plaintiffs claimed title to the premises in dispute. Neither the plaintiffs nor the defendants in this case claimed under a grant from the state, nor showed themselves in privity with the original grantees. Both claimed by prescription only. The claim of title in the defendants, through Lloyd Smith, rested upon a deed made by James Graham to Lloyd Smith in the year 1859, and upon a possession in Lloyd Smith through Williams & Co., who entered in subordination to his title. Before a prescriptive title had ripened in favor of Lloyd Smith and those holding under him, this petition was filed. The claim of title in the plaintiffs rested upon a deed made by Nicholas Rawlins to McVay & Choate, dated January 17, 1852, and upon a regular succession of conveyances from McVay & Choate to the plaintiffs in the present case, supported by an alleged entry upon the part of the plaintiffs, under and by virtue of which, upon the line between the two lots, they constructed a small house, to which we have heretofore referred, and further supported by their claim of possession through Williams & Co., as their tenants. As we have heretofore shown, a mere entry, even by the erection of the house in question, unsupported by an actual occupancy or possession thereafter, was not of itself a sufficient basis for a prescription. Upon the point of actual possession, the defendants, from the evidence, seem to have the higher and better right. At all events, the jury have found against the claim of prior possession by the plaintiffs, and in favor of the claim of prior possession upon the part of the defendants. Neither the plaintiffs nor the defendants, at the time of the institution of the action, had either a perfect paper or prescriptive title, and therefore neither were, as against the others, entitled to a cancellation of the papers of their adversaries as a cloud upon their title. Having no title, there could be no cloud upon it. It may menace the prior possession, but, until such a time as the prior possessor acquires a good prescriptive title, he cannot, upon the theory of his possession, obtain a decree of cancellation as against an outstanding claim of title in another person. As to what constitutes a cloud upon the title of another, see *Thompson v. Iron Co.*, 91 Ga. 533, 17 S. E. 663. In the present case, the prior possession of the defendants was sufficient to protect them against a verdict for the plaintiffs, but it gave to them no right to the affirmative relief prayed for in

their answer. It is one thing to show such a state of facts as will defeat a plaintiff's right of recovery, and entirely a different thing to show such a state of facts as would entitle a defendant himself to recover over against the plaintiff. Whether or not the title of the plaintiffs can hereafter avail them anything is not a question now for consideration. We only hold that, in this proceeding, the defendants, upon the prayer of their cross bill, were not entitled to have it canceled.

7. Looking through the entire record in this case, we are fully persuaded that the verdict, upon the substantial merits of the controversy, was right in so far as it found generally in favor of the defendants, but we do not approve the finding of the jury that the deeds of the plaintiffs be delivered up for cancellation. This finding was without evidence to support it, and contrary to law. In affirming the judgment of the court below, direction is given that the judgment denying the motion for a new trial be affirmed, but that the verdict and decree be amended in accordance with the view above indicated, with costs of this writ of error to be taxed against the defendants in error. Judgment affirmed, with direction.

(97 Ga. 663)

#### ATLANTA CONSOL. ST. RY. CO. v. OWINGS.

(Supreme Court of Georgia. Jan. 20, 1896.)

ELECTRIC RAILWAY COMPANIES—DUTY TO GUARD  
FEED WIRE—ACTION FOR DEATH—NEGLIGENCE  
—PROXIMATE CAUSE—INSTRUCTIONS—DAMAGES.

1. Where, in the prosecution of its business, a corporation employs a wire which, because of its being charged with a powerful and dangerous current of electricity, is liable, upon coming in contact with the wires of other corporations, to cause injury or death to employees of the latter while engaged in the performance of their duties, the corporation first referred to is, relatively to such employees, under the duty of observing at least ordinary diligence, not only in preventing such a contact, but also in discovering and preventing its continuance, even when occasioned by the negligence of others, including that of a corporation whose employees are thus exposed to danger.

2. The declaration alleging that the defendant's "feed wire" (it being a wire charged with a high potential current of electricity) was, at the time of the killing of the plaintiff's husband, "negligently and carelessly permitted by the defendant to rest upon and be in immediate contact with" a call wire of a company which was the master of the deceased, and the charge, as a whole, making it sufficiently clear to the jury that the plaintiff must prove the negligence thus alleged, and also that it occasioned the death of her husband, before she would be entitled to a recovery, the defendant's request to charge that she could recover only upon some act or acts of negligence alleged in the declaration was fairly covered.

3. If, while upon a pole a considerable distance above the ground, a person is so burned, shocked, and put in pain by a current of electricity as to lose his strength or consciousness and the control of his movements, and, in consequence, falls to the ground, and dies, it may be safely asserted that his death was caused by the electric current, whether, in case there had been no fall from the pole, death would have ensued or not.

4. Although the declaration alleged nothing as to any "prospect of increased earnings" on the part of the deceased, it was not, under the facts of this case, improper for the judge, while instructing the jury as to the measure of damages, to state to them, in a general way, that they might consider such prospect, if any; he at the same time, and in the same connection, appropriately instructing them that they might also consider his "diminution of capacity to earn money as the result of growing years and infirmities of age."

5. There was no material error in rejecting evidence. The law as to contributory negligence was, in substance, fairly submitted by the judge to the jury; and, even if the damages ought to have been apportioned on account of such negligence on the part of the deceased, the amount of the verdict was not so large as to show with complete certainty that this was not done. The verdict found was warranted; and, on the whole, there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by Susie A. Owings against the Atlanta Consolidated Street-Railway Company to recover for the death of her husband. There was a judgment for plaintiff, and defendant brings error. Affirmed.

N. J. & T. A. Hammond, for plaintiff in error. M. J. Clarke, for defendant in error.

LUMPKIN, J. 1. This case, in some respects, resembles that of *Railway Co. v. Andrews*, 89 Ga. 853, 18 S. E. 203, although in one essential feature the two cases are materially different. In the former it appeared that Andrews, who was injured by an electric current, was, at the time he received the shock, a trespasser upon the fire-alarm system of the city of Augusta, having, without permission, climbed a pole upon which he had no right to go; and it was accordingly held that he took the risk incident to the trespass. In the present case the deceased husband of the plaintiff, who was killed by a current of electricity emanating from the plant of the defendant railway company, was not a trespasser, but was engaged in the performance of his duties as a lineman of the telephone company, and was in the strictest sense where he had a perfect right to be at the time he received the fatal shock. The railway company employed, in the conduct of its business, a subtle, dangerous, and death-dealing agency. It consisted of a high potential electric current, which traversed wires stretched upon poles, and running through the city of Atlanta and its suburbs. These wires were liable, upon coming in contact with other wires belonging to the telephone company, the electric light company, and perhaps other corporations, to cause injury or death to employees of these other companies while engaged in performing their duties as linemen. Under these circumstances, it is to all minds a clear proposition that the railway company was bound to exercise at least ordinary diligence, not only to prevent contacts from which the above-mentioned consequences might reasonably be ex-

pected to ensue, but also to discover and take measures to prevent a continuance of such contacts even when occasioned by the negligence of any other persons. To hold otherwise would be to allow this company to maintain its deadly agency with no responsibility whatever for consequences which, in the natural course of things, might in all probability occur. Those who employ, in the prosecution of their business, a palpably and highly dangerous agency, such as electricity, are bound to exercise such precautions to prevent injury to others as the emergency would reasonably seem to require. In this connection, we refer to the interesting case of *Ahern v. Telegraph Co. (Or.)* 33 Pac. 403. It cannot be doubted that the owner of a ferocious lion would be bound to keep him securely caged in order to prevent harm to others; and even if a negligent or malicious person should open the door of the lion's cage, and allow him to escape, there should be no unreasonable delay on the part of the owner in discovering this fact, and in taking diligent steps looking to the recapture of the animal. The feed wire of the railway company, from the very subtlety and intangible form of the danger that lurks therein when it is charged with a powerful current of electricity, is much more dangerous than a score of lions. Its death-dealing power is not discoverable by exercising the senses of sight, hearing, or smell. Imperceptibly and noiselessly it strikes down its victim, and he is either mutilated or killed before he has the slightest warning of the terrible danger so near at hand. The duty of preventing, if possible, a contact between this dangerous feed wire and the wires belonging to other companies can hardly be denied. The duty of providing against its continuance, when occasioned solely by the act of others, is, of course, less stringent; but nevertheless, where such a contact exists, the company ought to discover it within a reasonable time, and take prompt and efficient measures to correct and remedy the evil. Exactly what period will constitute a reasonable time cannot be accurately defined. Each case must depend almost entirely upon its own peculiar facts and attending circumstances; and whether or not the proper degree of diligence has been observed will, in every instance, be a question for determination by the jury.

2. It is no longer a debatable question that, in order to recover for injuries occasioned by the negligence of the defendant, the plaintiff can recover only upon some act or acts of negligence alleged in his declaration. In the present case, counsel for the defendant requested that an instruction to this effect be given to the jury. The court declined to charge in the precise language of the request, but we think its substance was fully covered by the charge actually given. Among other things, the declaration alleged that the defendant's feed wire was "negligently and carelessly permitted by the defendant to rest upon and be in immediate contact with" a call wire of the telephone company. The charge,

as a whole, made it sufficiently clear to the jury that the plaintiff must prove the negligence thus alleged, and also that it occasioned the death of her husband, before she would be entitled to a recovery.

3. It was argued that the deceased was not actually killed by the electric shock; that, while he was stunned and injured by it, his death was really occasioned by his fall to the ground from the top of the pole upon which he was at work. There is no merit at all in this contention. It was proved beyond question that the deceased was so burned, shocked, and put in pain as to lose his strength or consciousness and the control of his movements, and, in consequence, fell to the ground, and was killed. Certainly, under such circumstances, it could not be inaccurate to say that the electric current was the proximate cause of his death.

4. In charging the jury with reference to the measure of damages, the presiding judge stated that they might take into consideration any "prospect of increased earnings" on the part of the deceased. This charge was complained of as erroneous, on the ground that it alluded to a matter as to which nothing was alleged in the declaration. In the same connection, however, the judge also instructed the jury that they might consider the deceased's "diminution of capacity to earn money, as the result of growing years and infirmities of age." Taking the charge altogether, it was not unfair to the defendant. The court was simply holding up both sides of the question with reference to the earning capacity of the deceased in the event he had not been killed. No point was raised that there was no evidence as to a probable increase of earning capacity on the part of the deceased upon which to predicate the charge complained of. Assuming that it was necessary for the plaintiff to make specific allegations in her declaration as to this element of damage she had suffered, in order to enable her, as matter of right, to introduce evidence in support thereof, it seems clear that the proper course to be pursued by the defendant would have been to object to the introduction of such of the evidence as was not covered by the allegations of the plaintiff's declaration. If evidence as to the probable increased earning capacity of the deceased was, without objection, allowed to go to the jury, it certainly would seem proper for the judge, if not incumbent upon him, to instruct the jury what they were to do with such evidence. *Railroad Co. v. Attaway*, 90 Ga. 659, 16 S. E. 956, and authorities there cited.

5. Error was assigned upon certain rulings of the judge in rejecting evidence, but, after carefully and thoroughly examining the record, we do not discover that any material error in this respect was committed. It was strenuously insisted that the evidence showed that the deceased was guilty of such contributory negligence as to require an apportionment of the damages, and that the verdict ought to be set aside for the reason that the jury evi-

dently deducted nothing on this account. The record before us does not, however, sustain this contention. The amount of the verdict is not so large as to show with certainty that no apportionment was in fact made; for, under the evidence, the verdict might have been for even a larger amount than that found by the jury. This being so, and the law as to contributory negligence having been fully and fairly submitted to the jury, we do not feel authorized to disturb their verdict on the ground that it is excessive. Unquestionably, there was evidence upon which a finding for the defendant could have been safely predicated; but the jury, as was their right, accepted that version of the evidence as a whole, which operated favorably to the plaintiff. In this view, the verdict found was fully warranted. We have no right to interfere with the functions which the law devolves upon juries; and, upon a full review of the whole case, we find no legal reason for directing that the case undergo another investigation. Judgment affirmed.

(97 Ga. 683)

# STRONG v. ATLANTA CONSOL. ST. RY. CO.

(Supreme Court of Georgia. Feb. 7, 1896.)

## WRIT OF ERROR—DEFECTIVE RECORD—DISMISSAL.

Where, in obedience to the act of December 22, 1892, this court ordered the clerk of a trial court to certify and send up portions of the record which, though specified in the bill of exceptions, were not originally transmitted, and which were necessary in order to fairly and fully adjudicate the questions at issue and the alleged errors, and the clerk, in obeying this order, certified to facts showing that his failure in the first instance to send up the omitted portions of the record was due to the fault of counsel for the plaintiff in error, the writ of error will be dismissed.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by O. S. Strong against the Atlanta Consolidated Street-Railway Company. Judgment for defendant. Plaintiff brings error. Dismissed.

Dorsey, Brewster & Howell, for plaintiff in error. N. J. & T. A. Hammond, for defendant in error.

LUMPKIN, J. When this case was called in its order, counsel for the defendant in error moved to dismiss the writ of error, on the ground that what purported to be the brief of evidence sent up in the record disclosed the fact that certain material documentary evidence was introduced at the trial; yet this evidence was not embodied in the bill of exceptions, or in any paper sent up as a part of the brief of evidence, nor did the record anywhere contain a copy or abstract of, or give any statement as to, the contents of such documentary evidence. These documents consisted of certain orders issued by the superintendent of the defendant company

to its conductors, and of printed rules adopted by the company. It appears from recitals in the bill of exceptions that these orders and rules constituted a part of the brief of evidence filed with the motion for a new trial, and they are distinctly specified as portions of the record material to a clear understanding of the errors complained of. Their materiality is beyond question, for without them this court cannot possibly review the legal questions presented for consideration, or pass upon the merits of the case according to the evidence as it appeared before the trial court.

Our judgment upon the motion to dismiss was reserved, with the purpose of ordering the clerk of the trial court to certify and send up the omitted portions of the brief of evidence. This we did in obedience to the act of December 22, 1892 (page 113), in order that we might be enabled, by having the full record before us, to intelligently pass upon and fairly adjudicate the errors assigned. The clerk of the trial court, in obeying this order, certified to facts showing that his failure in the first instance to send up the omitted documentary evidence as a part of the record was due to the fault of counsel for the plaintiff in error. Upon ascertaining this, no proper course was left open to us except to order that the writ of error be dismissed. At the time the motion to dismiss was made and argued, counsel for the plaintiff in error tendered an affidavit explaining the absence from the transcript of the record of the documents in question. This affidavit we were constrained to decline to consider, for the reason that this court has no authority to receive aliunde evidence as to facts transpiring in the court below, not certified to in the record sent to this court. There is no law authorizing an original issue of fact to be tried and passed on in the supreme court, it being a tribunal created solely for the purpose of correcting errors committed in lower courts. *Jones v. Rountree*, 96 Ga. 230, 232, 23 S. E. 311. As to all matters affecting the correctness or completeness of the record, we must look solely to the certificate of the clerk, whose duty it is to properly transmit the same, and certify to its authenticity. To this effect have been numerous and unvarying rulings of this court delivered from the bench, and in no instance has any departure therefrom been made. It is fair, however, to say in this connection, that the affidavit referred to, without being inconsistent with the facts to which the clerk certifies, was sufficient to exonerate the counsel for the plaintiff in error from the imputation of personal negligence in attending to his business, and shows that the fault attributable to him was really that of another, or the result of a misunderstanding. With this, however, we have nothing to do, so far as our decision upon the facts properly before us is concerned.

As the case now stands, it appears that

counsel for the plaintiff in error, and not the clerk, was responsible for the failure of the latter to transmit in due time to this court vitally important portions of the record. This omission amounts to practically the same thing as though the entire record had been thus delayed, for the reason, above stated, that the missing documents are indispensably necessary to a proper consideration and determination of the case. Without them the record is really no better than no record at all. Section 4272e of the Code distinctly declares that no person shall be entitled to the benefits of the provisions of the preceding section (which provides that no case shall be dismissed by the supreme court on account of any failure of the clerk below to duly transmit the bill of exceptions and transcript of the record) who, by his own act or that of his counsel, has been the cause of a delay on the part of such clerk to properly perform his duty in the respect indicated. The provisions of these sections were enacted in 1877, and though many acts have since been passed with the view of providing against the dismissal of cases in this court, and securing, as far as possible, a hearing of all cases upon their merits, none of these acts have undertaken to repeal or modify the above recited provisions of the act of 1877. The act of November 17, 1893 (Acts 1893, p. 51), the purpose of which was to prohibit the dismissal of what are popularly known as "fast writs of error" on account of a failure by the clerk of the trial court to transmit the record within the time prescribed by law, is itself rendered inoperative where "such failure is due to the neglect or fault of the plaintiff in error or his counsel"; thus showing that the general assembly had not up to that time manifested any disposition to protect litigants who were themselves responsible for the failure to have their cases properly brought to this court. Nor are we aware of any legislation, even up to this date, exonerating plaintiffs in error from the consequences of such neglect. Upon the question of retaining the case for a hearing on its merits, we have no discretion; and, in granting the motion to dismiss, we have simply performed our plain duty in the premises. Writ of error dismissed.

(97 Ga. 697)

#### SCHOEN et al. v. CITY OF ATLANTA.

(Supreme Court of Georgia. Feb. 7, 1896.)

#### CITY ORDINANCE—REMOVAL OF DEAD ANIMALS—VALIDITY.

1. A city may by ordinance lawfully prescribe that unless the owner of a dead animal, even though the carcass may be of some value, shall remove it, or cause it to be removed, beyond the city limits, within a specified reasonable time, and to a specified reasonable distance, the municipal authorities may deal with such carcass as a nuisance per se, and as such take charge of it, and make such disposition thereof as will best conserve the public health.

2. It is not, however, lawful to require that such owner, upon removing the carcass, or caus-

ing its removal, within the time allowed him for this purpose, shall deposit it beyond the city limits at such place only as may be designated by the municipal authorities, or that upon his refusing so to do the city will have it removed at his expense to that particular place, provided the removal intended by the owner contemplates the deposit of the carcass at some other place outside of the city not itself within a prohibited distance from the city line, and such disposition of it, when so deposited, as will in any event prevent its becoming a nuisance to, or otherwise injuring, any of the inhabitants of the city.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Schoen Bros. against the city of Atlanta. Judgment for defendant, and plaintiffs bring error. Reversed.

Rosser & Carter, for plaintiffs in error. J. A. Anderson and W. M. Davis, for defendant in error.

SIMMONS, C. J. An ordinance of the city of Atlanta provided as follows: "Whenever the chief of police or sanitary inspectors shall be informed of any dead horse, mule, cow or other animal being within the corporate limits of the city of Atlanta, he or they shall cause said carcass to be removed beyond said limits and then properly buried or disposed of so as not to create a nuisance, and any person or persons other than those employed who shall remove the carcass of any such animal shall, on conviction, be fined not more than one hundred dollars or imprisonment not exceeding thirty days, in the discretion of the court; provided, the owner or his authorized agent may remove such carcass from the city under the direction of the sanitary inspector." An ordinance subsequently adopted provided that the board of health should be authorized to contract for the removal of all dead carcasses of animals, such as horses, etc., from within the corporate limits, and to authorize the contractor to charge for and collect from the owners of such carcasses not more than a dollar per head; the carcasses to be removed, whether by the owner or the contractor, to such lands or place outside the city limits as should be designated from time to time by the board of health, or the sanitary inspector, acting for the board. The ordinance further provided that it should be the duty of any person owning such animal, or any person on whose premises such animal might die, or be found dead, to notify the sanitary inspector of the district, or the chief sanitary inspector's office, of the location of such dead animal, in order to its removal by such contractor, within three hours after its death or the discovery thereof, unless the owner should within that time remove or cause the removal of such carcass to the place designated by the board or inspectors; and, further, that it should be the duty of the contractor to provide neat and proper vehicles and appliances for the removal of such carcasses without offense to persons living or passing along the

routes traveled in such removal, and the board of health should have power at all times to regulate the removal of such carcasses. In pursuance of this ordinance a contract was entered into between the board of health and Kirkpatrick, Fogg & Co., in which it was agreed that the latter should have the exclusive right to remove all such dead animals as died or were killed within the city limits, "over the bodies of which the city has any authority," during the three years beginning November 15, 1894, and should have the right to charge and collect a dollar per head for each carcass of horses or like animals, from the owner thereof, unless the owner elected to remove such himself within three hours from the death of the animal or time of the discovery of its death. In March, 1895, Schoen Bros., a firm engaged in the business of dealing in hides and tallow, and of rendering the carcasses of animals, were notified by the owner of a horse which had died at a livery stable in the city of Atlanta that if they would send for the carcass, and remove it out of the city, they could have it. They accordingly sent a vehicle for the animal, and, within three hours after its death, removed it outside of the city. They did not take it to the place designated by the sanitary inspector for the deposit of dead animals, to wit, the place of business of Kirkpatrick & Co., beyond the corporate limits, but took it to their own works, which were situated at a distance of several miles from the city. The animal was not offensive at the time of its removal. The owner turned it over to them in order to save the sum of one dollar, which he would have been required to pay if the animal had been removed by the contractors employed by the city. Subsequently Schoen Bros. were tried in the recorder's court of the city of Atlanta upon the charge of having violated the ordinances above referred to, in having removed the animal to a place other than that designated by the city authorities. Upon the trial the facts above stated appeared in evidence. The defendants were found guilty and fined, and took the case by certiorari to the superior court. In the recorder's court, and in their petition for certiorari, they attacked the ordinances in question as illegal, unconstitutional and void. They also filed a petition for injunction, in which the foregoing facts were stated, in substance, and it was alleged that the petitioners had theretofore been in the custom of obtaining the carcasses of animals in the city of Atlanta before they became a nuisance, and of hauling them, without charge to the owners, to the works of the petitioners, some three miles beyond the city limits, where the petitioners made use of them in their business of rendering dead stock, and that for this purpose they were of considerable money value to the petitioners, and that, notwithstanding the pendency of the writ of certiorari in the case above mentioned, other prosecutions under the ordi-

nances therein alleged to be void had been brought against the petitioners, and the municipal authorities were threatening to bring other like charges against them unless they ceased to remove the carcasses of animals in their course of business, and by that means were seeking to force the petitioners to abandon their said business. The petitioners prayed that the ordinances in question be declared unconstitutional and void, and that the city of Atlanta, its officers and agents, be enjoined from proceeding further with the prosecutions against them, or from instituting other charges against them, or interfering with their property rights or business. A petition was also filed by Kirkpatrick & Co., asking for an injunction against Schoen Bros. All the cases, by agreement, were consolidated and heard together. At the hearing numerous affidavits were introduced by Schoen Bros. in support of the allegations of their petition for injunction. The grounds of attack upon the ordinances in question were that they created a monopoly for the benefit of Kirkpatrick, Fogg & Co.; that they provided for the taking of private property of citizens without compensation, and required them to pay one dollar for the removal of the same, when such carcasses should be removed free of charge; that the city had no jurisdiction to prescribe that certain carcasses of animals be deposited at any particular point beyond the corporate limits; that the city could not prescribe any point of deposit beyond the corporate limits; and because the ordinances prescribed no penalty. The judge dismissed the certiorari, and sustained the judgment of the recorder, and denied the injunction sought by Schoen Bros., whereupon they excepted and brought the cases to this court.

Where property has become a nuisance dangerous to the public health, municipal authorities, when invested with power to abate nuisances, have a right to make such disposition of it as may be necessary for the protection of the public, and they may do this without making compensation to the owner. *Dunbar v. City Council of Augusta*, 90 Ga. 390, 17 S. E. 907; *Mayor, etc., of Savannah v. Mulligan*, 95 Ga. 323, 22 S. E. 621. A dead animal is not necessarily a nuisance, and, until it does become one, due regard must be had to the property rights of the owner; but, since it must necessarily become a nuisance of a very offensive and dangerous character unless some disposition is promptly made of it which will prevent its becoming so, the municipal authorities need not wait until it has actually reached that stage before undertaking to deal with it as a nuisance. They may by ordinance prescribe that where an animal dies, or is found dead, within the corporate limits, it shall not be allowed to remain there beyond a specified reasonable time, and that the owner shall within that time remove it, or cause it to be removed, beyond such limits, and to a specified

reasonable distance, and that unless he does so the carcass shall be taken charge of by the agents of the corporation, and dealt with as a nuisance per se. We do not think, however, that they have a right to prescribe that, after the owner or his agent has removed the carcass beyond the corporate limits within the time allowed, it shall be deposited at such place only as shall be designated by the municipal authorities. When the owner has, within the prescribed time, removed it to a distance sufficiently remote to prevent its becoming in any way a nuisance to persons residing within the corporate limits, we think the municipal authorities have no further concern with it. If its removal beyond the territorial limits of the corporation is lawfully accomplished, there is clearly no ground upon which the corporate authorities can claim any right to interfere then with what the owner does with his property, so long as he does not deposit it at a place so near the corporate limits as to be a nuisance to persons residing within those limits. In the case in the recorder's court it appeared that the animal was removed within the time prescribed by the ordinance, and to a place several miles beyond the city, where, so far as appeared, it was in no wise offensive, or a source of danger, to persons in the city. The conviction was therefore illegal, and the judge of the superior court erred in overruling the certiorari. We think he erred also in not granting an injunction. *Gould v. Mayor, etc., of Atlanta*, 55 Ga. 678, 688(4); *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106, 126(5). As to the right of the municipal authorities to prescribe the mode and agency of removal in such cases, and to grant to particular contractors the exclusive right to conduct such removals at the expense of the owner of the animal, see the following cases cited by counsel: *In re Lowe* (Kan. Sup.) 39 Pac. 710; *Smiley v. MacDonald*, 42 Neb. 5, 60 N. W. 355, and see note to this case, and cases cited, 27 Lawy. Rep. Ann. 540; also, *Rendering Co. v. Behr*, 77 Mo. 91, reversing 7 Mo. App. 345. Judgment reversed.

(97 Ga. 733)

# DEMENT v. DEKALB COUNTY.

(Supreme Court of Georgia. Feb. 7, 1896.)

## ACTION AGAINST COUNTY—PRESENTATION OF CLAIM.

Where an action for damages to realty was brought against a county within 12 months from the time the claim for such damages arose, the plaintiff's action was not barred because he failed, before bringing the action, to present such claim to the proper county authorities. The bringing of the suit within the time limited was a sufficient presentation of the claim, within the meaning of section 507 of the Code.

(Syllabus by the Court.)

Error from superior court, Dekalb county;  
R. H. Clark, Judge.

Action by Albert Dement against Dekalb

county. Judgment for defendant. Plaintiff brings error. Reversed.

John C. Reed and H. B. Moss, for plaintiff in error. John S. Candler, for defendant in error.

LUMPKIN, J. Dement brought an action against the county of Dekalb for damages to certain realty, alleged to have been occasioned in the manner set forth in his declaration, the particulars of which are immaterial. He did not, before bringing the action, present any claim to the county commissioners or other county authorities, but his declaration was filed within 12 months from the time his claim for damages arose. The question is: Was the bringing of the suit, as stated, a sufficient presentation of the claim, within the meaning of section 507 of the Code, which provides that "all claims against counties must be presented within twelve months after they accrue or become payable, or the same are barred," except in the case of minors, etc.? The cases of *Powell v. Muscogee Co.*, 71 Ga. 587, *Murphey v. Educational Board of Burke Co.*, Id. 856, and *Maddox v. Randolph Co.*, 85 Ga. 216, are not in point, because they relate to actions commenced after the expiration of the 12 months, with no previous presentation of the claim. In fact, the identical question now under consideration has never, so far as we have been able to ascertain, been definitely decided by this court. Section 491 of the Code declares, without qualification, that every county may be sued in any court. Section 506 makes it the duty of the ordinaries to audit all claims against their respective counties, which duty, of course, would devolve upon officials who, by operation of law, took the place of the ordinary in managing the county's affairs; as, for instance, where the ordinary is superseded as to these matters by a board of county commissioners, as in the present case. The material portion of section 507 has already been quoted. It will be observed that this latter section was a part of our law a very long time before the provisions of section 506 (taken from the act of December 15, 1871) constituted a part of the Code. The requirement that all claims shall be presented within 12 months, or else be barred, was made without imposing upon the claimant any burden whatever with respect to the auditing of the same by the county officials. All he had to do was to present his claim within the 12 months prescribed by law. The subsequent act of 1871 merely directed the county officials as to what they should do with such claims when presented, and in no way sought to change the pre-existing law as contained in section 507, or to impose upon claimants any additional burden or duty. The provisions of the latter section, therefore, now stand as they have always stood, and are to be construed by them-

selves, and not in connection with the provisions of the preceding section, which has subsequently found its way into the Code. Its requirements, addressed alone to the county officials, as to auditing claims, are not relevant, and cannot be considered as in any way affecting the rights or duties of the claimant. In some of the above-cited cases, and perhaps in others, the matters of presenting and auditing claims have, nevertheless, been discussed in connection with each other, under the apparent misapprehension that sections 506 and 507 related to one and the same matter, and should be construed together. There has, however, been no binding or authoritative decision contrary to the conclusion herein announced. Nothing material to the present discussion was decided in those cases except that, where a claim against a county was not presented within 12 months, it was barred. The opinion of Chief Justice Jackson in the *Powell Case*, 71 Ga. 589, contains a clear intimation that the bringing of an action within 12 months would dispense with a previous presentation; and the real purpose of section 507 is probably correctly indicated by Justice Crawford in his opinion in the *Maddox Case*, supra, when he suggests that, as the business of counties is managed and controlled by officers who are chosen for only short periods of time, to allow delays in bringing forward claims until those who were in office, and had knowledge of the facts, had been displaced by others, who were ignorant as to the merits of such claims, would be prejudicial to the county's interests. In other words, the main object of the law was, doubtless, to provide that the county officials should have timely notice of all demands against the county, in order that they might intelligently and advisedly take the proper action concerning the same. The giving of such notice is as effectually accomplished by the filing of a declaration against the county, and having the same duly served, as could be done by handing to the ordinary or board of commissioners a written statement setting forth the nature of the claim. Indeed, it is more than likely that the information contained in a declaration would be fuller and more satisfactory than in a less formal document tendered by the claimant in person. Section 507 does not provide in what form the claim shall be presented, nor does it warrant the construction that a formal presentation of the claim shall be a condition precedent to the bringing of the suit. It is enough, we think, if the claim be presented in the shape of an action. Indeed, at most, section 507 is only a statute of limitations. See *Neel v. Commissioners of Bartow Co.*, 94 Ga. 216, 21 S. E. 516. We therefore conclude that the trial judge erred in granting a nonsuit on the ground that the plaintiff failed to show he had presented his claim within 12 months, as required by law. Judgment reversed.

(97 Ga. 727)

**KILLIAN v. GEORGIA RAILROAD & BANKING CO.**

(Supreme Court of Georgia. Feb. 7, 1896.)

**RAILROAD COMPANIES—ACTION FOR INJURIES—EVIDENCE—CHARACTER AND WEIGHT—BURDEN OF PROOF—NEGLIGENCE—PROVINCE OF JURY.**

1. One of the questions in issue being as to how long a train stopped at a given station, the plaintiff contending that the stop was not sufficiently long to allow him time to alight safely from the train, and the defendant insisting that the stop was long enough for this purpose, evidence that the train was behind time was admissible as tending to show the existence of a reason or motive for making only a short stop, and therefore as supporting the plaintiff's contention.

2. On the trial of an action against a railroad company for personal injuries, it was improper to admit parol evidence tending to show that the plaintiff had been charged with or tried for a criminal offense.

3. It was not incumbent upon the plaintiff in such a case, where the injury complained of was caused by the running of the defendant's cars, to prove the alleged negligence of the defendant by a preponderance of the evidence. Upon showing that he was injured in this manner, the legal presumption arose that the injury was due to the company's negligence; and in such case the law embraced in section 8083 of the Code ought to have been given in charge, as a part of the general law of the case, without any request to that effect.

4. The evidence of a witness who testified that a given thing occurred is positive testimony. The evidence of another witness that he was present on the occasion referred to, and did not see or hear the occurrence in question, is negative testimony; nor is such testimony rendered positive by a mere statement of the witness that such an occurrence could not have taken place without his seeing or hearing it. To entitle his evidence, other things being equal, to as great weight as that of the former witness, it must appear that his opportunities for seeing or knowing what occurred were at least equal to those of that witness, and that his attention was specially directed to the matter in question.

5. Whether or not a passenger about to alight from a train, and incumbered with hand baggage or parcels, was, under the circumstances, afforded by the company reasonable time and opportunity to leave the train in safety, is a question for determination by the jury, and not by the judge.

(Syllabus by the Court.)

Error from city court of Dekalb; H. O. Jones, Judge.

Action by M. A. Killian against the Georgia Railroad & Banking Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Arnold & Arnold, for plaintiff in error. Jos. B. & Bryan Cumming and M. A. Candler, for defendant in error.

**SIMMONS, C. J.** Killian sued the railroad company for damages for personal injuries, alleging in brief that on March 16, 1895, he was a passenger on the defendant's west-bound passenger train, his destination being Stone Mountain; that, when the train arrived at Stone Mountain, he prepared to disembark as soon as the train came to a stop, but it did not stop long enough for him to alight in safety, as ordinary care required; on the contrary,

it scarcely stopped at all, and, as soon as it did stop, it started again; that he was down on the steps of the platform, preparing to alight, when the train jerked suddenly and negligently, and he was thrown to the ground, and greatly injured; that, on account of the short time the train stopped, he was not allowed an opportunity to get off until the train was in motion; that he was not guilty of any negligence, and, when he attempted to alight, the speed of the train was slow; that his ticket entitled him to ride no further, and the circumstances were such that any person of ordinary prudence would have attempted to alight as he did. There was a verdict for the defendant, and the plaintiff made a motion for a new trial, which was overruled, and he accepted.

1. It is complained in the motion for a new trial that the court erred in refusing to allow the plaintiff to prove by a certain witness that, at the time the train reached Stone Mountain, it was behind time over an hour. We think the court ought to have allowed this fact to be shown. One of the questions in issue being as to how long the train stopped at Stone Mountain, the plaintiff contending that the stop was not sufficiently long to allow him to alight safely from the train, and the defendant insisting that the stop was long enough for this purpose, evidence that the train was behind time was admissible, as tending to show the existence of a reason or motive for making only a short stop, and therefore as supporting the plaintiff's contention.

2. The defendant's counsel asked one of the witnesses if he did not know that the plaintiff had been charged and tried before the municipal court of Stone Mountain for the offense of selling liquor without license. The witness replied that the plaintiff had been charged with that offense, and had been tried therefor. The plaintiff's counsel objected to this evidence, on the ground that it was irrelevant, and threw no light on the issue in the case, and did not fix any time when the plaintiff was alleged to have sold liquor, and upon the ground that the best evidence was the record of the charge and the trial. The court overruled these objections, and admitted the evidence; and this is complained of in the motion for a new trial. This testimony was clearly inadmissible. A witness may be discredited by showing this conviction for an offense, but it is not competent to discredit him by showing merely that he has been charged with and tried for an offense. Until there is proof of conviction, he is protected by the legal presumption of innocence. Moreover, the judgment of conviction must be proved by the record. Rap. Wit. § 201, and cases cited; *People v. Elster* (Cal.) 3 Pac. 884; *Van Bokkelen v. Berdell*, 130 N. Y. 145, 29 N. E. 254, and cases cited. And see *Gardner v. State*, 81 Ga. 144, 7 S. E. 144.

3. The court charged: "The preponderance of the evidence must be with the plaintiff in order to entitle him to recover. \* \* \* If the

scales balance evenly, he cannot recover. He must have enough of evidence to make it come down in his favor, the burden being upon it." It is complained that the court erred in charging thus, and in failing to give in charge the principle that, where an injury was shown to have occurred by the running of the defendant's cars, the presumption was against the defendant. The rule given in charge by the court is correct, and is applicable in all civil cases. When it appeared, however, that the injury was caused by the running of the defendant's cars, it was not incumbent upon the plaintiff to prove the alleged negligence of the defendant by a preponderance of the evidence. Upon showing that he was injured in this manner, the legal presumption arose that the injury was due to the company's negligence; and the law embraced in section 3083 of the Code ought to have been given in charge as a part of the general law of the case, without any request to that effect. The charge, as it stood, placed upon the plaintiff the burden of showing that the defendant was negligent, notwithstanding it was shown that the injury was caused by the running of the defendant's cars.

4. It is complained that the court erred in charging thus: "If a witness testifies that if a certain thing took place, or certain things were stated, he did not see them or hear them while he was there, unless he testified that it could not have taken place, or that words could not have been spoken without his hearing them, that would be negative testimony; but, if he does so testify, then it would amount to positive testimony, and has the same weight as positive testimony." This charge is inaccurate and misleading. It is not true that, where a witness swears that he did not see or hear a certain thing take place, his mere statement that it could not have taken place without his having seen or heard it will entitle his testimony to the same weight as positive testimony, or that of a witness who testifies that he did see or hear it. To entitle the testimony of a witness that he did not see or hear a certain thing occur at a particular time and place to the same weight upon the question of whether it did occur or not as that of an equally credible witness that he saw or heard the occurrence in question, it must appear that the opportunities of the former were at least equal to those of the latter, and that his attention was specially directed to the matter; and whether this was so or not is to be determined, not merely from his own opinion or statement that the occurrence could not have taken place without his seeing or hearing it, but from all the evidence bearing on the subject. See, on this subject, 1 Whart. Ev. § 415; Railroad Co. v. Johnson, 66 Ga. 271.

5. It is complained that the court erred in charging as follows: "It is claimed by the plaintiff in this case that, at the time he alighted from the cars at Stone Mountain, he was incumbered with some baggage; that he

had an overcoat and a box containing some pigeons, and perhaps a satchel and some other baggage; and he was partially deaf at that time. I charge you that if he had unchecked baggage in his arms or in his hands, which incumbered his egress from the car, the railroad is not chargeable with that, and that is not to operate against them, if that had anything to do with his failing to get off the car in safety." In determining whether reasonable time and opportunity for leaving the train in safety were afforded the plaintiff, the jury had a right to take into consideration his condition at the time; and it was for them, and not for the court, to say whether the fact that he was incumbered with hand baggage and parcels called for greater care in his behalf than was exercised by the defendant's agents in charge of the train, and ought to have caused them to allow him more time for leaving the train than they did. Where a railroad company takes upon its train a passenger incumbered with hand baggage and parcels, it must have due regard to his condition in this respect when the time comes for the passenger to leave the train. It was accordingly error to instruct the jury that the fact that the plaintiff was so incumbered could not operate against the defendant. It was contended by counsel for the railroad company that the evidence demanded the verdict, and that, for this reason, the error complained of was harmless. We do not think so. There was sufficient evidence to have upheld a verdict in favor of the plaintiff. See *Suber v. Railway Co.*, 96 Ga. 42, 23 S. E. 387, and cases cited; *Railroad Co. v. Smith*, 81 Ga. 620, 8 S. E. 446. Judgment reversed.

(97 Ga. 795)

#### MITCHELL v. MITCHELL.

(Supreme Court of Georgia. Feb. 29, 1896.)

##### RES JUDICATA—DIVORCE—ALIMONY.

1. Where the defense of *res judicata* was made in resistance to a petition for temporary alimony by a wife against her husband,—the same not having been instituted in connection with a pending libel for divorce, but in connection with a suit for permanent alimony, based upon the ground that she had been abandoned and driven off by her husband, and was living in a state of separation from him,—such defense was not sustained by evidence showing no more than that in an action for divorce brought by the wife against the husband after the alleged abandonment, etc., there was a verdict in his favor; it not appearing upon what ground or grounds the divorce suit was predicated, nor that any judgment or decree was ever entered upon such verdict.

2. It does not appear in the present case that there was any abuse of discretion in passing the order allowing temporary alimony.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Action by Ida Mitchell against W. H. Mitchell for divorce. Decree for plaintiff, and defendant brings error. Affirmed.

H. B. Strange, for plaintiff in error. J. G. & D. H. Clark, for defendant in error.

**LUMPKIN, J.** In 1890 Mrs. Mitchell brought an action of divorce against her husband, and, during its pendency, made an application for temporary alimony, which was granted. It does not appear upon what ground or grounds the divorce suit was predicated. It does appear that a verdict therein was rendered in favor of the husband, but, so far as the record before us discloses, no judgment or decree was ever entered upon that verdict. Afterwards, in 1896, Mrs. Mitchell instituted, under the provisions of section 1744 of the Code, a proceeding against Mr. Mitchell for permanent alimony, based upon the ground that, against her will, she had been abandoned and driven off by him, and was living in a state of separation from him. In connection with this suit for permanent alimony, she presented to the judge a petition for temporary alimony, the judgment upon which, allowing her \$5 per month, and \$25 as counsel fees, is now the subject-matter of review. This petition for temporary alimony made no reference whatever to any libel for a divorce, pending or otherwise. It was predicated upon so much of section 1737 of the Code as authorizes an application for temporary alimony whenever a suit by the wife for permanent alimony is pending; and the petition distinctly alleges the pendency of her suit for permanent alimony, to which reference has been made above. The answer of the respondent embraced two defenses: First, that of *res judicata*, based upon the verdict which had been rendered in his favor in the divorce proceeding; and, second, a denial of the petitioner's right to alimony, upon the merits of her claim.

It is clear that this verdict could not, in any possible view, amount to more than an adjudication that Mrs. Mitchell was not entitled to a divorce from her husband upon the ground or grounds alleged in her libel (whatever the same may have been), the nature of which are not disclosed. Treated as a judgment, it could hardly be held an estoppel to her present proceeding. But in our opinion this verdict, standing alone, really adjudicated nothing. "It is only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies." *Webb v. Buckelew*, 82 N. Y. 555, 560, cited in 1 *Van Fleet*, Former Adj. p. 118. "No finding nor verdict will bar another suit until judgment is rendered upon it." *Id.* 119, 120. There is nothing novel in this announcement. It is a rule of law announced by the courts and standard text writers throughout the length and breadth of this country, and even in far-off India. It is thus stated, in a very admirable treatise on the subject of *Res Adjudicata*, by *Hukm Chand, M. A.*: "And in the United States the general rule is that a verdict, or other finding, not followed by judgment, is not binding; and, though doubts used to be entertained about it in England,

the rule there now appears to be the same." See *Chand, Res Adj.* § 62, and authorities there cited, many of them being cases decided by the courts of this country. See, also, *Carstarphen v. Holt* (decided at the present term) 96 Ga. 703, 23 S. E. 904. Nothing here said conflicts with the decision in *Burns v. Lewis*, 80 Ga. 591, 13 S. E. 123, holding that a final verdict in favor of a total divorce was sufficient of itself to dissolve the marriage, though no judgment declaring the marriage dissolved was ever actually entered up. That decision was expressly based upon the provision in our present constitution devolving upon the jury rendering the final verdict in a divorce suit the function of regulating the rights and disabilities of the parties, subject only to a power of revision by the court. A final verdict in favor of a total divorce admits of no construction other than that the jury intended the dissolution of the marriage, and the revisory power of the court would not extend to this element of the verdict. The above-mentioned provision of our constitution has, however, no application whatever to a verdict denying a divorce; and therefore such a verdict clearly falls within the general rule above stated, and must be followed by a judgment, in order to become conclusive.

After carefully examining the evidence, we are unable to perceive, so far as the merits of the case are concerned, that there was any abuse of discretion in allowing temporary alimony in the amounts stated. Judgment affirmed.

(97 Ga. 748)

#### HIGHTOWER v. WALKER et al.

(Supreme Court of Georgia. Feb. 10, 1896.)

##### LIABILITY OF MARRIED WOMAN—GOODS SOLD.

The mere fact that a wife got the benefit of goods bought by her husband on his own credit would not, whether he was solvent or insolvent, make her liable in law to the seller for the price of such goods.

(Syllabus by the Court.)

Error from superior court, Johnson county; C. C. Smith, Judge.

Action by W. T. and W. A. Walker against Jennie Hightower. Judgment for plaintiffs, and defendant brings error. Reversed.

J. E. Hightower and Evans & Evans, for plaintiff in error. A. F. Daly, for defendants in error.

**LUMPKIN, J.** Irrespective of other questions made in the record, there must be another trial of this case for the reason that the presiding judge charged the jury, "If the husband bought goods of the plaintiff, and the wife got the benefit of them, and the husband was insolvent, then she would be liable for them." We are quite sure that our brother of the circuit bench has never, since his admission to the bar, believed that the above proposition, just as it stands, is a correct ex-

position of the law upon the subject with which he was dealing in the present case. Giving this instruction to the jury was manifestly the result of inadvertence on his part. The error thus committed would doubtless have been corrected by the granting of a new trial by the presiding judge, had he not evidently entertained the opinion that the evidence demanded the verdict. In the argument before this court, counsel for the defendant in error very properly conceded that the charge above quoted was erroneous, but insisted upon an affirmance of the judgment below on the ground that the error thus committed was harmless, as the verdict rendered was the only outcome, from the evidence, legally possible. We have therefore directed our attention particularly to the brief of evidence sent up in the record. After a careful examination and consideration of the same, we are unable to sustain counsel in this conclusion. Without expressing any opinion as to what the verdict ought to be, we feel constrained to order a resubmission of the case to a jury. Judgment reversed.

(97 Ga. 728)

## DUGGAN v. HARRISON et al.

(Supreme Court of Georgia. Feb. 10, 1896.)

## WILLS—CONSTRUCTION—JOINT DEVISEES—DUTY OF ONE IN POSSESSION TO ACCOUNT FOR RENTS AND PROFITS.

Where a testator, after making in his will several specific bequests, disposed of all his land and other property which might remain after the settlement of these bequests in the following words: "I give and bequeath [the land, etc.] to my five children that remain with me, to wit [here designating by name five persons, including his executor and executrix], to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can take such as is given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place. No one shall sell, lease, rent, or in any way convey, to any other than those that remain on the place, without the signature of the five named in this item," held that, whatever may be the interest of one of these devisees, a daughter of the testator, either in the realty itself, or in its income during a period of many years while she was absent from the land, and the other four remained upon and used and enjoyed the same in common, she is not entitled to require the executor and executrix, as such, to make a return of the rents, issues, and profits of the land during the time of her absence.

(Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

Action by Martha W. Duggan against W. T. Harrison, executor, and Seleta Harrison, executrix, of W. D. Harrison, deceased. From a judgment for defendants, plaintiff brings error. Affirmed.

The following is the official report:

On May 10, 1894, Martha W. Duggan, a daughter of W. D. Harrison, cited W. T. and Seleta Harrison, the executors of the will of W. D. Harrison, to make return of their as-

sets as such. On appeal the case was submitted to the judgment upon agreement of facts, the case turning on the construction of the will. This was dated February 19, 1877, and the testator died in the same year. After providing for the payment of debts, and devising sundry portions of personality and money to his children, including the plaintiff, the testator directed: "That all my lands and other property, after the above-named bequests have been settled, I give and bequeath to my five children that remain with me, to wit, Seleta B., Emma S., Martha W., Mary J., and William T., to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can take such as is given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place. No one or more shall sell, lease, rent, or in any way convey, to any other than those that remain on the place, without the signature of the five named in this item." At the time of the testator's death, all the legatees named in this item were living with the testator in Washington county, plaintiff having four minor children living with her. She lived there until 1881 or 1882, but has since been there only at long intervals, and for a few days at a time, though some of her personal property is there now; she spending her time mainly with her children, her daughters having married. She and her three sisters were dependent on their father; she being a widow, and they elderly, unmarried ladies. W. T. Harrison was unmarried until 1893. The estate conveyed by the item before quoted consists of about 400 acres of land in Washington county, on which testator and these legatees resided, and about 200 acres in Johnson county, and some personal property. The Johnson county land was appraised at \$500, and is estimated to be worth about \$1,000 now. Plaintiff has received nothing as rents and profits from said place since 1881, or from the estate, except the special legacy given her in a previous item of the will. The four remaining have received the entire income of the estate. All of these legatees are over 50 years of age. The court ruled as follows: "The intention of the testator was that his five children should equally enjoy his realty, and he contemplated that they would live together on the old homestead, and enjoy its usufruct, as well as that derived from the Johnson county lands. If any of said legatees should abandon said place, said legatees so leaving would have the right to return, but during their absence would have no voice in the control and management of the property, and would not be entitled to any of the income during said absence, without the written consent of those remaining. If any of them should leave, and then return, they would have the same rights after returning as they had before. By leaving the homestead they

did not forfeit all interest in the property. By the written consent of the five legatees, the property can be sold to a stranger, and each legatee would have a fee-simple title to his share. Each has the power to sell his share to either of the others without any written consent from the others, but no sale of a share could be made to a stranger without the written consent of all. The plaintiff has a right to return to the premises and enjoy the income and participate in its management along with those remaining on the premises, but she cannot compel a partition of the same. If no sale should be made by the legatees as authorized by the will, upon the death of the survivor the property would revert to the estate of the testator, and descend to his heirs at law. I say "revert." I should rather say, the estate would be left in the testator's estate, and go to his heirs at law; the estate created being an executory devise, and not an estate in remainder or reversion." To this decision the plaintiff excepted.

J. A. Harley, for plaintiff in error. R. H. Lewis, for defendants in error.

**LUMPKIN, J.** The facts of this case appear in the official report. The only question really presented for our determination is whether or not Mrs. Duggan was entitled to maintain, in the court of ordinary, a petition for a citation against W. T. Harrison as executor, and Seleta Harrison as executrix, the purpose of which was to require them to make a return of the rents, issues, and profits of the land devised to herself and the other four children by their father, W. D. Harrison. The terms of the will, so far as it relates to this land, are peculiar; and it is quite a difficult matter to determine what is the precise interest of Mrs. Duggan, either in the land itself, or in its income, during the period while she was absent from the premises, and the other devisees remained upon, used, and enjoyed the property in common. We are quite certain, however, she has no right to demand of W. T. Harrison and Seleta Harrison, in their representative capacity, an accounting as to the income of the land during the time she was absent. The executor and executrix, by living upon the land and permitting the other devisees to do so, assented to the legacy, in so far as the income was concerned; and all of these parties accepted the legacy, to this extent, by thus enjoying its fruits. If Mrs. Duggan was entitled to any of the rents and profits which accrued during the period of her voluntary absence, her claim is surely not against the estate of the testator, but is a claim against the other four in their individual capacities. We are not now called upon to decide whether or not, as individuals, they are liable to her, and accordingly we make no ruling whatever upon that question. The effect of the order passed by the trial judge before whom

the case came on for a hearing upon an appeal from the court of ordinary was to dismiss the plaintiff's application, and the judgment rendered was unquestionably right. We have not, however, undertaken to decide as to the correctness of the construction placed by the judge upon the will under which this litigation arose. Judgment affirmed.

(97 Ga. 692)

#### SEALES v. STATE.

(Supreme Court of Georgia. Feb. 7, 1896.)

#### CRIMINAL LAW—INSTRUCTIONS—INTIMATION OF OPINION—RULES OF EVIDENCE.

1. The court, in its charge, having at least intimated an opinion as to what had been proved, the provisions of section 8248 of the Code require the granting of a new trial.

2. It was improper, in the trial of a criminal case, to charge the jury: "Your purpose is to find out what is the truth of this transaction, and you use the same rules of evidence in this case—the same reasoning—that you would anywhere else on any question outside the courthouse or inside the courthouse, only you give the defendant the benefit of any reasonable doubt in the case."

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Will Seales was convicted of burglary, and brings error. Reversed.

A. L. Bartlett and W. A. James, for plaintiff in error. W. T. Roberts, Sol. Gen., for the State.

**LUMPKIN, J.** An indictment was returned against Seales and two other persons for the offense of burglary. Seales was convicted, and made a motion for a new trial, to the overruling of which he excepted.

1. Among other things, the court charged: "The evidence as to stolen property—as to recovering possession of any property—was offered by the state to show that the defendant had possession of stolen property, and is only to fix the crime upon him." The language quoted contains at least an intimation that the evidence in question would serve to fix the crime upon the accused if the jury should believe that he was in fact in possession of the property alleged to have been stolen. If the court had said that the state's purpose in offering this evidence was to show guilt on the part of the accused, accompanying this statement with proper instructions with reference to the possession of stolen property, the charge would have been unobjectionable; but the precise language used was calculated to mislead the jury into the belief that the fact as to possession of the stolen property was a conclusive test of guilt, when, accurately speaking, it was only a circumstance from which guilt might be inferred.

2. The court also gave a charge to the jury in the language quoted in the second headnote, which we do not think was a proper instruction. In the trial of a criminal case the

jury ought not to use the same rules of evidence, or the same reasoning, they would use "anywhere else on any question outside the courthouse." None but the Infinite can know what rules of evidence, or what methods of reasoning, persons serving as jurors may invoke in transacting their business, or in dealing with other affairs, at their homes or any other places. Criminal cases must be tried by the rules of evidence prescribed by law, and the reasoning of the jury should be in accord with these rules, under proper instructions from the bench. Judgment reversed.

SIMMONS, C. J., not presiding.

(97 Ga. 648)

### BROYLES v. PRISOCK.

(Supreme Court of Georgia. Jan. 13, 1896.)

**ACTION FOR INJURIES—DAMAGES—EVIDENCE—EXCLAMATIONS OF PAIN—ADMISSIBILITY—INSPECTION BY JURY—NEGLIGENCE—INSTRUCTIONS—WITNESSES.**

1. It was competent for the plaintiff in an action for damages resulting from personal injuries to testify that, when injured, he was earning a stated monthly salary as assistant jailer; it appearing that, because of the injuries, he was deprived of this situation, and his salary in connection therewith, for three months. The evidence was admissible, not only to show the actual loss of salary for that period, as a basis for computing in part his damages, but also to throw light generally upon his capacity to earn money.

2. What instructions should be given to witnesses by the trial judge upon their separation during a suspension of the trial is a matter for his discretion, which this court will not control unless plainly and palpably abused, which was not done in the present case.

3. Even if it be within the discretion of the trial judge, over objection by either party, to allow the jury, in the trial of an action for damages, to inspect the place where an alleged injury occurred, this court will not reverse his action in refusing so to do when it affirmatively appears that material physical changes had occurred in the character of the premises between the time of the injury and the time of the trial.

4. Exclamations or complaints made by a person undergoing physical examination by a physician, with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, though such person was not under the treatment of this particular physician, and the examination was being made solely for the purpose indicated. Whether or not the exclamations were involuntary, or the complaints were bona fide, is for determination by the jury, under all the evidence submitted.

5. The reasonableness or unreasonableness of a city ordinance, with reference to its application to a particular locality, not being involved in the case, and there being no request to charge on this subject, an omission to do so was not error.

6. The standard of ordinary care and diligence by which the conduct of a particular person under given circumstances is to be judged is one which the jury must derive from their observation, their common sense, and their common knowledge and experience. The charge in this case was in accord with this rule.

7. There was no error in admitting evidence, nor in refusing to charge as requested, nor in the charges complained of. The evidence war-

ranted the verdict, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by M. J. Prisock against Arnold Broyles, receiver of the Metropolitan Street-Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

N. J. & T. A. Hammond, for plaintiff in error. B. B. Blackburn and Arnold & Arnold, for defendant in error.

SIMMONS, C. J. Prisock sued the receiver of the Metropolitan Street-Railroad Company for damages which he alleged were sustained by him in consequence of his having been struck and run upon by an engine and cars operated by the defendant, while he was in the act of crossing the railroad track at the intersection of Hunter street and Frazier street, in the city of Atlanta. He obtained a verdict for \$800, and the defendant made a motion for a new trial, which was overruled, and the defendant excepted.

1. It is complained in the motion for a new trial that the court erred in allowing the plaintiff to testify that, at the time of his injury, he was making a monthly salary of \$50, as assistant jailer of Fulton county jail, over objection that this did not show, or tend to show, how much he could earn by his labor. The court did not err in admitting this testimony. It appeared that, because of the injuries complained of, the plaintiff was deprived of the situation referred to, and his salary in connection therewith, for three months; and the evidence was admissible, not only to show the actual loss of salary for that period, as a basis for computing in part his damages, but also to throw light generally upon his capacity to earn money.

2. When the trial began, the witnesses were sworn and put under the rule, those not examined being required to remain out of the hearing of the witness testifying. When the court was about to adjourn, on Friday to Monday, defendant's counsel requested the court to instruct all the witnesses not to talk among themselves or to any one in reference to the case during the adjournment. Plaintiff's counsel objected. The court had all the witnesses called in, and instructed them not to allow any witness who had testified to communicate anything to them that had been testified to on the stand, and specially instructed the plaintiff not to say anything to the witnesses in reference to what he had testified. No witness but the plaintiff had been examined, and his examination had not been concluded. It is alleged that the court erred in instructing the witnesses as requested, and in restricting the instructions within the limits mentioned. What instructions should be given to witnesses under such circumstances is a matter within the discretion of the trial judge, and this court will not control his discretion in such a case unless plain-

ly and palpably abused, and this was not done in the present case.

3. The plaintiff's testimony having been concluded, counsel for the defendant moved that the jury be permitted to go to the place where the injury occurred, and view the premises. It appeared from the evidence that, since the time of the injury, material physical changes had occurred in the character of the premises; and, upon this ground, plaintiff's counsel objected to the granting of the request. It was further objected that there was no power in the court to grant such a request over the protest of the opposite party. The court stated that for the present he would overrule the motion; but that if counsel could find authority in point thereafter, and show it to the court, he would reverse his ruling. The defendant complains that this was error, and that the examination ought to have been allowed before defendant's testimony was opened. There is some conflict of authority as to whether, in the absence of a statute authorizing a view of the premises by the jury, it is competent for the court to order a view against the objection of a party. See 1 *Thomp. Trials*, § 882; *Springer v. City of Chicago*, 35 Am. & Eng. Corp. Cas. 183. In the case of *Mayor, etc., of Milledgeville v. Brown*, 87 Ga. 590, 13 S. E. 638, it appeared that the jury were permitted to visit the scene of the injury, and make a personal examination of the premises, and Justice Lumpkin, in referring to this as showing that the jury had a good opportunity for arriving at a correct conclusion as to whether the city authorities were negligent or not, remarked incidentally that it was a good practice; but in that case counsel on both sides consented to the view of the premises by the jury, and no question was made as to the power or duty of the court in such cases. Assuming, however, that it is within the power of the trial judge to allow the jury to inspect the premises, over objection by either party, this court will not reverse his action in refusing to do so, when it affirmatively appears, as it did here, that there have been material changes in the premises between the time of the injury and the time of the trial.

4. A physical examination of the plaintiff, for the purpose of ascertaining the extent of his injuries, was made by Dr. Hurt, a physician employed by the defendant. At the trial, a physician who assisted in the examination was introduced as a witness, and was asked by counsel for the plaintiff: "What, if any, complaint did Mr. Prisock make at the time that Dr. Hurt examined him?" Counsel for the defendant objected to the complaints of the plaintiff, because Dr. Hurt was not then treating him. The court replied that it was admissible to show whether, when the arm was moved, he did complain. The witness was then asked: "At the time that Dr. Hurt was moving the arm of Mr. Prisock backward and forward, or trying to do so, trying to straighten it, what

complaint did Mr. Prisock make at that time relative to the movement that Dr. Hurt was trying to give in the operation, as to pain and suffering?" The witness answered: "On pressure, he complained of pain in the operation of the supposed fracture in the upper part of the arm. We can't say whether it was fractured or not. There seems to be remnants of callus at present. He complained that there was great pain there, on pressure; and also, in raising the arm up over the shoulder, that there was pain in the same region." Counsel asked: "What evidence of suffering did he show when Dr. Hurt examined him in the side?" The witness answered: "He said it pained him when he pressed on the side." Counsel for the defendant contended that such complaints were not admissible, and that the court erred in allowing this testimony. We think the court was right in overruling the objection to this testimony. Complaints of pain which are made apparently in response to manipulation of the person do not come within the rule which excludes hearsay and self-serving declarations, and it is not necessary, in order to render them admissible, that they should be made to a physician for the purpose of treatment. Such complaints are regarded as manifestations of pain, as a part of the res gestae of the pain, and are not classed with mere descriptive statements. They are received as original evidence, and may be testified to by any person in whose presence they are uttered. In the case of *Railroad Co. v. Walker*, 93 Ga. 402, 21 S. E. 48, which was relied upon by counsel for the plaintiff in error, it did not appear that the complaints were of this character. In the opinion of the court, Bleckley, C. J., refers to the case of *Roche v. Railroad Co.*, 105 N. Y. 294, 11 N. E. 630, the reasoning of which, he says, is "entirely satisfactory"; and in that case it was said that although declarations of the party injured made some time after the injury simply to the effect that he is suffering pain, when not made to a physician for the purpose of professional attendance, are not competent, the rule is different as to involuntary and natural exhibitions of pain, such as exclamations indicative of pain when the person is touched, etc. See, also, *Hagenlocher v. Railroad Co.*, 99 N. Y. 136, 1 N. E. 536, where such evidence was held admissible. Numerous other authorities could be cited to the same effect. Such expressions of pain, it is true, may be simulated, and, when made after the party has instituted suit on account of the alleged injury, may well be distrusted; but this goes to the weight of the evidence, and not to its competency. Whether or not the exclamations were involuntary, or the complaints were bona fide, is for determination by the jury, under all the evidence submitted. See, on this subject, an instructive article, entitled "Declarations of Pain and Suffering," 22 *Cent. Law J.* 509, in which numerous cases are cited and discussed.

5. Certain ordinances of the city of Atlanta, touching speed of cars, ringing of bells, etc., were in evidence; and the court charged the jury, in substance, that if the defendant's servants in charge of the engine and car violated these ordinances, and ran over the street crossing at a speed greater than that allowed by the ordinances, this would be negligence. The defendant contends that this was error, because it took from the jury the consideration of the reasonableness or unreasonableness of the ordinances, or either of them. It appears from the certificate of the judge that no charge on this question was requested on the part of the defendant, and no such question was raised on the trial. Besides, it appears from the evidence that the place where the injury occurred was near the center of the city, and in a populous locality; and there could be no question of the reasonableness of the ordinances as applied to that locality. See *Railroad Co. v. Johnson*, 90 Ga. 506, 507, 16 S. E. 49.

6. The court, in charging the jury as to the degree of care required of a person when about to cross the track of a railroad, said: "The precise thing that every man is bound to do before stepping upon a railroad track is that which every prudent man would do under like circumstances. If you believe from the evidence that every prudent man would look and listen, so must every one else, or take the consequences, so far as the consequences might have been avoided by that means," etc. It was contended that the instruction that, if the jury believed "from the evidence that every prudent man would look and listen, so must every one else," etc., was erroneous, as the jury are supposed to know what prudent men would do under such circumstances, and are not required to ascertain it from the evidence. It is true, the question of what prudent men would do under given circumstances is to be determined by the jury from their own observation, their common sense, and their common knowledge and experience; but we do not think the charge of the court was calculated to mislead the jury on this point. What the court doubtless meant, and was doubtless understood by the jury to mean, was that if they believed that, under the circumstances shown by the evidence, prudent men would look and listen, so must every one else, etc. In addition to the language above quoted, the court charged at considerable length on this subject, and we do not think there could have been any room for the jury to infer that they were precluded from relying upon their general knowledge and experience in arriving at a conclusion as to what would have been the conduct of prudent men under the circumstances in evidence.

7. Several of the remaining grounds of the motion for a new trial were not insisted upon, and others are so clearly without merit that it would be unprofitable to deal with them specifically. The requests to charge, so

far as they were proper, were covered by the charge given. There was no error in admitting evidence. The evidence warranted the verdict, and there was no abuse of discretion in denying a new trial. Judgment affirmed.

(97 Ga. 719)

#### ARCHER v. BLALOCK et al.

(Supreme Court of Georgia. Feb. 7, 1896.)

NEGLIGENCE—DANGEROUS PREMISES—PLEADING.

The declaration, as amended, alleging in substance that the plaintiff suffered personal injuries because of the defective and dangerous condition of certain steps attached to a storehouse belonging to the defendants, which they had rented to another; that the plaintiff, when injured, was using these steps in the due course of his business with the tenant; that the steps constituted a platform used in common with other storehouses belonging to and occupied by the defendants; and that the defective and dangerous condition of the steps was well known to the defendants, and they had sufficient opportunity to have the same repaired, but had neglected to do so,—a cause of action was set forth, and it was error to dismiss the case on general demurrer.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

Action by J. M. Archer against Blalock & Morrow. From a judgment dismissing the petition, with demurrer, plaintiff brings error. Reversed.

John B. Hutcheson and Wm. Cousins, for plaintiff in error. Dorsey, Brewster & Howell, for defendants in error.

SIMMONS, C. J. J. M. Archer, on the 15th of February, 1892, filed his petition against Blalock & Morrow, in which he alleged: Defendants have damaged him \$1,000. On the first Tuesday in March, 1891, they owned a storehouse in Jonesboro, on Main street, and running back to a street on the west end of the storehouse, which storehouse was then and is now occupied by W. S. Archer, as their tenant. On the west end of the storehouse the defendants had erected a platform, from which a set of steps led to the street, up and over which customers were invited to enter the store, for the purpose of trading therein. Defendants were bound to furnish a safe way to enter the store, and to keep the same in repair and safe for customers to enter and go out. On said day he entered the store, and, after transacting his business there, went out, and attempted to descend said steps. He stepped on a plank in the steps which was rotten and broke, whereby he fell through the steps, and sustained certain injuries to his person, the nature and extent of which are set out in the petition. Defendants well knew of the defective condition of the steps, and their attention was called to it the day before petitioner was hurt. It could have been remedied in 10 minutes, and yet, well knowing the facts, defendants neglected to have the necessary repairs made. Petitioner

did not know of any defect in the steps or plank, but thought it was safe, and did not have any idea of danger, and walked on it, and was hurt, as above mentioned. "The steps leading from the street to the platform by which plaintiff was seeking to enter was a platform used in common to reach the storehouse occupied by W. S. Archer and other storehouses" of defendants, and occupied by them. The court dismissed the petition on the general demurrer, and the plaintiff excepted.

Where the owner or occupier of land, by invitation, express or implied, induces others to come upon his premises for a lawful purpose, he is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its approaches; and, under such an express or implied invitation, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. *Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759; *Banking Co. v. Robertson*, 95 Ga. 430, 22 S. E. 551. Under our Code, the duty of keeping rented premises in repair rests primarily upon the landlord. Code, § 2284. According to the allegations in the plaintiff's petition, the injury complained of was occasioned by a defective step in a platform erected by the defendants upon premises owned by them; and the platform and steps were intended to be used, not only for the purpose of entering the storehouse occupied by their tenant, where the plaintiff had been transacting business on the occasion referred to, but for the purpose also of reaching other storehouses owned by them, and occupied by the defendants themselves. It appears that the defendants knew of the defect which caused the injury, and had been notified of it in time to have made the necessary repairs before the injury occurred. It further appears that the plaintiff did not know of any defect in the steps, but supposed they were safe. Under the facts alleged, the plaintiff had a good cause of action, and the court erred in sustaining the demurrer.

Cited by counsel for plaintiff in error: *White v. Montgomery*, 58 Ga. 206; *Freidenburg v. Jones*, 63 Ga. 612; *Lewis v. Chisholm*, 68 Ga. 40; *Folsom v. Lewis*, 85 Ga. 146, 11 S. E. 606; *Guthman v. Castleberry*, 49 Ga. 272; *Oil Mills v. Coffey*, 80 Ga. 145 (2), 4 S. E. 759; Code, § 2284; *Readman v. Conway*, 126 Mass. 374; *Scott v. Simons*, 54 N. H. 426; *Buckingham v. Fisher*, 70 Ill. 122; *Samuelson v. Mining Co.*, 49 Mich. 164, 13 N. W. 499; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257; *Busw. Pers. Injur.* § 90; *Id.* § 81. See 1 *Tayl. Landl. & Ten.* § 175; *Inhabitants of Milford v. Holbrook*, 9 Allen, 17.

Cited for defendants in error: Code, §§ 2277, 2284; *White v. Montgomery*, 58 Ga. 204; *Whittle v. Webster*, 55 Ga. 180; *Driver v. Maxwell*, 56 Ga. 20, 21; *Vason v. City of Augusta*, 38 Ga. 542 (4); *Busw. Pers. Injur.* § 90; *Id.* §§ 79, 80; *Id.* §§ 83, 115; *Bish. Noncont. Law*, § 852; *Kohn v. Lovett*, 44 Ga. 251;

*O'Brien v. Capwell*, 59 Barb. 497; *Jaffe v. Hartean*, 56 N. Y. 398; 2 C. P. Div. 311; *Driver v. Maxwell*, 56 Ga. 14. Judgment reversed.

(97 Ga. 624)

# FIDELITY & CASUALTY CO. v. GATE CITY NAT. BANK.

(Supreme Court of Georgia. Jan. 13, 1896.)

FIDELITY INSURANCE—CONSTRUCTION OF POLICY—CHANGE OF EMPLOYMENT—KNOWLEDGE OF DISHONESTY—PROOF OF LOSS—WAIVER—PLEADING.

1. Under a contract by which a fidelity and casualty company binds itself to make good to a bank, to a specified extent, such pecuniary loss as the latter may sustain by reason of the fraud or dishonesty of a named employé in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer," it is the right of the bank, without notifying the company, to confer upon this employé the office of assistant cashier, in addition to that of receiving teller; and, upon this being done, the company is as much bound to make good to the bank losses occasioned, during the period covered by the contract, by reason of the employé's fraud or dishonesty while acting in the capacity of assistant cashier, as in that of receiving teller.

2. Although the contract may have required the bank, upon the discovery of any fraud or dishonesty on the part of such employé, to give notice thereof to the company, and also, immediately after knowledge by the bank of the occurrence of any act on his part involving a loss to the company of more than \$100, to notify the company of the same, yet where such contract contained no stipulation making it in the least degree incumbent upon the bank to exercise any diligence or care in inquiring into or supervising the conduct of this particular employé, or of any of his co-employés in its service, and imposed upon it no duty of vouching for the fidelity or efficiency of the latter, or of requiring them to watch and report upon his actings and doings, information or knowledge on the part of the bank's cashier—he being only such a co-employé—as to the matters concerning which the company had stipulated for notice would not, relatively to it, be, under these circumstances, imputable to the bank itself.

3. Where, to an action by the bank upon such a contract, the defendant filed an amendment to his plea, which amendment alleged that the employé had, within the knowledge of the bank, been guilty of a specified default, such amendment, not being legally complete without further alleging that the plaintiff had failed to duly notify the defendant of the default in question, was properly stricken on demurrer.

4. The contract stipulating for proof of loss satisfactory to the company's officers, and that full particulars of any claim arising upon the contract should be given in writing, addressed to the secretary of the company, within a specified time, and the declaration alleging compliance with the foregoing terms of the contract, but not alleging that there had been any waiver of the requisite proof of loss, and the evidence entirely failing to show that the same had been duly furnished, the plaintiff did not prove its case as laid, and it was error to refuse a nonsuit. This is true although the plaintiff introduced evidence for the purpose of proving a waiver by the defendant of such proof of loss, and it is immaterial whether this evidence was or was not legally sufficient to establish the alleged waiver.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by the Gate City National Bank against the Fidelity & Casualty Company. From a judgment for plaintiff, defendant brings error. Reversed.

John L. Hopkins & Son, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

LUMPKIN, J. In view of what we consider the controlling questions in this case, it is not essential to deal specially with the numerous assignments of error contained in the record, and we shall therefore confine our remarks to the points upon which we have found it necessary to rule.

1. The Fidelity & Casualty Company (to which we shall hereinafter refer as the "Company") undertook, by its bond, to make good to the Gate City National Bank of Atlanta (which will hereinafter be called the "Bank") such pecuniary loss, not exceeding \$10,000, as it might sustain by reason of the fraud or dishonesty of Lewis Redwine in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer." He was afterwards appointed assistant cashier, and as such was guilty of conduct which caused loss to the bank in an amount far exceeding the face of the company's bond. One of the questions for decision is whether or not the company was surety for him in the latter capacity. In view of the comprehensiveness of the above-quoted language, it would be difficult to hold it was not. He was certainly appointed, subsequently to the execution of the bond, to the office of assistant cashier; as such, had duties to perform in his employer's service, and by a violation of those duties brought loss to his master. We think the plain language of the contract covers the precise state of facts which arose, and that the company is as much bound to answer to the bank for the consequences of Redwine's dishonesty in the latter capacity as in the former.

2. The main question in the case is whether or not, under the stipulations expressed in the contract, the knowledge of the bank's cashier of fraud or dishonesty on the part of Redwine, or of any act done by him involving a loss to the company of more than \$100, was imputable to the bank itself. This case does not fall within the general rule applicable to banks in their dealings with the general public. Much of a bank's business is necessarily intrusted to its subordinate officials or servants, and in a large number of instances it will, upon the doctrine of constructive notice, be held to know what comes to their knowledge. This rule is founded upon necessity, and has for its object the protection of those who deal with and trust the bank. The transaction out of which this bond grew was of an altogether different kind from those usually occurring between a bank and

its customers. The contract was not made for the purpose of protecting the company in any dealings it might have with the bank; but, on the contrary, the company undertook to protect the bank in the matter of delegating some of the duties it owed to others to Redwine for performance in its behalf. In other words, the company agreed to save the bank from loss, to a limited extent, by reason of its thus trusting Redwine. As naturally incident to a contract of this nature, the company stipulated that the bank should gain no benefit thereunder if it continued in its service an employé known to be unworthy of trust, without prompt notice to the company after he had been discovered by the bank to be untrustworthy. There is not a syllable in the contract, however, bearing the construction that the bank should exercise any degree of diligence in inquiring into or supervising the conduct of Redwine, in order that the company might be saved from loss through his misconduct. The bank did not undertake to exercise reasonable care and diligence to find out if Redwine had become untrustworthy, but as to this matter the company, in effect, invited the bank to repose in peace, for it guaranteed that Redwine would remain honest and faithful. Only after knowledge had actually come to the bank that he was, or had become, otherwise, was it under any duty to the company; and then it was only required to immediately notify the company of what it had ascertained. This bank, it seems, was conducting its business in the manner usual with such institutions; having a cashier, assistant cashier, receiving and paying tellers, bookkeepers, etc. It was not, so far as the company was concerned, under any duty of keeping itself informed as to the conduct of Redwine. The company must have known and contemplated that the bank's business was to be carried on through its employés, including Redwine; and yet it entered into a contract which does not even suggest that it should be protected if any of these employés other than Redwine should fall in the duty they undoubtedly owed the bank, of informing it of any misconduct on his part. Evidently the company chose to rely solely upon the care which the bank would most probably exercise in protecting itself, and consequently did not require any fixed supervision over Redwine; being willing to content itself with the assurance that the interests of the bank would necessarily require such a supervision of him as would in all probability enable the bank to obtain actual knowledge of any fraud, dishonesty, or negligence of which he might be guilty. In the light of the foregoing considerations, we cannot think that the parties to this contract contemplated that the bank would be bound to act upon mere constructive notice of Redwine's shortcomings. The "knowledge" referred to meant actual knowledge. Constructively, whenever Redwine—he being an employé of the bank, handling its money

—misapplied the same, the bank itself would have immediate notice of the fact; for his knowledge, as a servant of the bank, would, if the doctrine of constructive notice were applicable, be its knowledge. Surely the contract cannot be construed as contemplating any such result as this. Again, suppose another employé was colluding with Redwine in concealing his shortage; the knowledge of such other employé would be, constructively, the knowledge of the bank. Or suppose Redwine and another employé, also under bond, were both misappropriating the bank's funds, and each found the other out; could it be said, in defense to a suit on Redwine's bond, that the other employé's knowledge was the knowledge of the bank? or, when suit on the other employé's bond was entered, that Redwine's knowledge was constructive notice to the bank, and the legal equivalent of the "knowledge" referred to in the company's bond? In the absence of any guaranty on the part of the bank that its other employés would be honest and faithful, and in view of the purpose of the condition inserted in the bond, it would seem that the bank only obligated itself to act in good faith, and impart only actual knowledge on its part. The bond would, indeed, be of no practical protection, if, in order to realize its benefits, the bank had to insure, not only the honesty and fidelity, but the faithful and conscientious attention to duty, of a dozen others of its employés. Stupidity of an employé, in not comprehending ordinarily apparent facts and circumstances, which would be equivalent to actual knowledge if within the knowledge of the bank itself, might lead to a forfeiture of the bond, while forgetfulness or mere negligent inattention to duty on the part of such employé would bring about the same result. The cashier, according to the undisputed testimony in this case, was a mere employé. Unless the bank obligated itself to use his eyes and ears, it had no knowledge of Redwine's misconduct.

The following cases throw much light upon the subject under consideration: In *Railway Co. v. Shaeffer*, 59 Pa. St. 350, it was held that, where an officer of a corporation violates his duty, knowledge on the part of other officers of the corporation of the default, or even connivance in it, does not discharge the sureties. In that case the defaulting employé had given a bond, with sureties, for the faithful discharge of his duties. In delivering the opinion of the court, Sharswood, J., says: "Corporations can only act by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, become responsible for the fidelity of their principal. It is

no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from the responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by the conspiracy of the officers of a bank, or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences should be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank was held to be no defense. *Taylor v. Bank*, 2 J. J. Marsh. 564." In the latter case it would seem that a mother bank established a branch, putting it into the hands of a directory for management, and itself appointing a cashier, requiring of him a bond. In speaking of a plea filed in defense to a suit upon the bond, Judge Robertson said (pages 569, 570): "It imputes to the directory of the branch bank only a knowledge of the delinquencies of the cashier, and a connivance at them. It was their duty, if they had any such knowledge, to communicate it to the mother bank. And if they failed to do it there would be more reason for charging them with fraud on the mother bank than for imputing to it any fraud on the sureties of the cashier. It is not the presumption of either law or fact that everything known to the branches is communicated to the principal bank. The cashier of a branch is an agent of the mother bank. The directors of the same branch are other agents of the same parent institution. Suppose these several agents combine to defraud their principal; is the one excused by the fact that the other is particeps? Is the surety of one exonerated because the other has co-operated in the malfeasance? Or suppose one connive at a fraud or improper conduct of the other; is the employer responsible because one of its agents knew of the delinquency, and might have prevented its recurrence? The legal maxim, 'Qui facit per alium facit per se,' does not apply to such a case. The connivance of the branch is not that of the mother bank. The fraud of the branch is not that of the mother institution, because, if the plea be true, there was a tacit combination of the agents to injure the principal. If A. employ a principal to transact particular business, and exact from him security for his fidelity, and constitute another agent to perform other associate and supervisory functions, surely, if they both conspire to defraud their constituent, the security shall not be permitted to say that the act of the agent is that of the principal." Brandt,

in his work on Suretyship and Guaranty (section 369), recognizes and approves the doctrine laid down in the cases above referred to, and says: "If the sureties of one officer of a corporation could be relieved from liability by the neglect of duty of other officers of the corporation, the corporation would be deprived of all remedy." See additional cases cited by the author. The above authorities will suffice to show that the doctrine of constructive notice has no application to transactions such as that in the present case. Not having required the bank to insure the fidelity of all its other employes, as a condition precedent to recovery on Redwine's bond, the company cannot take advantage of the failure of duty on the part of one of the bank's employes. Undoubtedly it was the duty of McCandless, the cashier, to inform the bank as to any misdoings of Redwine of which he knew. This was, however, a duty he owed the bank, and not the company, which could only derive a benefit therefrom by express stipulation in its contract to the effect that it should be entitled to have such duty of McCandless to the bank faithfully performed. The bank suffered from such neglect to a far greater extent than did the company, whose liability under its bond was limited in amount, and surely the bank is not equitably estopped from claiming a benefit under the bond which it expressly stipulated for.

3. The insufficiency of the amended plea referred to in the third headnote is obvious. Even actual knowledge by the bank of a default on the part of Redwine would not, of itself alone, release the company from liability. It was further essential to this result that the bank should fail to notify the company of the default in question, as it had contracted to do. As this plea alleged no such failure, it stated no valid defense to the action, and was properly stricken.

4. The fourth headnote points out what we regard as a fatal variance between the allegations and the probata. An allegation that the bank had furnished the proof of loss stipulated for by the contract could not be sustained by evidence tending to show that the defendant had waived such proof of loss. For this reason it was error to deny a nonsuit. Judgment reversed.

(97 Ga. 709)

#### HENDERSON et al. v. WILLIAMS.

(Supreme Court of Georgia. Feb. 7, 1896.)

WILLS—CONSTRUCTION—DEVISES—EXECUTION OF TRUST—ACTION AGAINST TRUSTEE—CONCLUSIVENESS OF BENEFICIARIES.

1. Where, by will, property was bequeathed and devised to named trustees for the sole and separate use of a daughter of the testator for life, which property at her death was to vest absolutely in fee simple in such child or children as she might have then living, and the will conferred upon the trustees large powers as to making sales of the trust property and reinvesting the proceeds thereof, and also the power to

use the corpus of the estate for certain specified purposes, the trust created by the will was for the benefit of those entitled to take in remainder, as well as for the life tenant, although the trustee was not invested with the legal title to the estate in remainder, beyond what was involved in the execution of those powers.

2. Where a successor of the original trustees (who, by the terms of the will, was clothed with the same powers which were thereby conferred upon them) invested money arising from the trust property in land, and took the title thereto to himself as trustee for the life tenant only, "to have and to hold for her and her heirs and assigns forever," this did not, although the will was made after the passage of the married woman's law of 1866, execute the trust, or vest any title to the land absolutely in the life tenant, but the property thus acquired became immediately impressed with the trusts imposed by the will upon the property originally belonging to the trust estate for which the land purchased by the trustee was thus substituted.

3. In such case a trustee, who, in the event it should "become desirable to use any part of the corpus of said trust estate for the improvement thereof, or for the more comfortable support of said cestui que trust" (the life tenant), had "power and authority to allow the corpus thus to be used, upon the written application and consent of said cestui que trust," and who, in the proper exercise of this power, executed a promissory note, and secured the same by a deed to land, represented, in a suit brought for the collection of that note, both the life tenant and the remainder-men; and, though they were not made parties to the action, a judgment therein against him bound them all.

(Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

Action by W. L. H. Henderson and others against A. G. Williams. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

The following is the official report:

W. L. H. Henderson and Ida F. and Mary L. Henderson, minors, by their next friend, W. L. H. Henderson, on February 27, 1894, brought complaint against Williams to recover a tract of 150 acres in Newton county, the south half of 300 acres deeded by Ira E. Smith, administrator, to W. L. H. Henderson, trustee for his wife, Mary E. Henderson, of whom the plaintiffs claimed to be the heirs at law. By amendment, plaintiffs alleged: On January 4, 1884, W. L. H. Henderson, as trustee for Mary E. Henderson, and in her life, made a note for \$1,500, payable January 1, 1885, to Swann, Stewart & Co., copy of which is attached. The consideration of this note was supplies to be furnished the trustee by Swann, Stewart & Co. for 1884, to enable him to make a crop, by himself and tenants, for that year. To secure the payment of this note, Henderson, trustee, with the written consent of his wife, Mary E., on January 4, 1884, deeded to Swann, Stewart & Co. the land now sued for. Copy of the deed is attached. Bond to reconvey was given by Swann, Stewart & Co., copy of which is attached. The note, deed, and bond constitute an equitable mortgage, and the heirs at law of said Mary E. have the right to redeem the same, if the same were not already redeemed in her lifetime by

said trustee, as hereinafter set forth. The consideration of the note and deed did not pass to Henderson, trustee, on the date of the note, but was to pass to him, by Swann, Stewart & Co., in supplies to make a crop for 1884, as needed and called for by him and his tenants; and at said date it was not known by the trustee and Swann, Stewart & Co. that the trustee would need and call for the amount of the note in supplies for 1884. The trustee did not call for and receive from Swann, Stewart & Co., on the note and deed, in supplies for 1884, more than \$606.60; and hence the consideration of the note and deed has failed to the extent of \$893.40, which amount is not chargeable to plaintiffs on the note and deed. Said \$606.60 has been fully paid, in cotton delivered to Swann, Stewart & Co. at various dates stated, by reason of which the note should be canceled. On March 6, 1888, Swann, Stewart & Co. were put into possession of the land by virtue of a void decree against said trustee, and a void judicial sale thereunder, against his consent, and have since that date, by themselves and assigns, possessed and occupied the land. On February 14, 1889, they conveyed to J. W. Roberts, and on August 14, 1890, Roberts conveyed to Williams. Plaintiffs prayed that Williams be decreed to reconvey the land to them in the terms of the bond; that the note be canceled; that Williams be compelled to account for rents, etc.; and that he be compelled to deliver to them said land.

Williams answered: The consideration of the note was the delivery by Swann, Stewart & Co. to Henderson, trustee, of four promissory notes for \$100 each, dated January 30, 1882, and due, respectively, October 1, November 1, and December 1, 1882, and the delivery to Henderson, trustee, of a mortgage on a house and lot belonging to the trust estate, which notes and mortgage were signed by Henderson, trustee, and his cestui que trust; also, balances on accounts incurred by the trustee, for 1883, for his tenants or farm hands, aggregating \$322.75, besides interest; for supplies furnished by Swann, Stewart & Co. to the tenants to make crops on the land of the trust estate, to raise an income for the benefit thereof, and also for supplies, etc., to be furnished for the comfortable support of the cestui que trust for 1884, and which were furnished by Swann, Stewart & Co. for said purposes, to the amount of \$576.75; and for supplies, etc., to the tenants, for 1884, to make crops on the trust estate and raise an income therefrom, and which supplies were furnished by Swann, Stewart & Co. to the amount of \$——. It is probably true that at the date of the notes the parties did not know how much supplies, etc., the maker would call for and receive in 1884. The trustee did call for and receive from Swann, Stewart & Co., during that year, supplies, etc., in excess of \$606.60. Payments were made to Swann, Stewart & Co. by the trustee, or his tenants, as set forth, but were properly applied to open ac-

counts other than said notes, and with the direction, knowledge, and consent of the trustee. The land was purchased by Henderson, trustee for his wife, with money derived by her from the estate of her father, Needham Bullard, and under his last will, the sixth item of which is as follows: "The property given, bequeathed, and devised in this will to my daughters, Mary and Ella E., I give, bequeath, and devise unto my friends, Robert A. Murphey and Thomas Jones, in trust for the sole and separate use and benefit of my said daughters for and during the term of their natural lives, free from debts, contracts, or liabilities of any present or future husband, and at their death to vest absolutely in fee simple in such child or children as they may, respectively, have living at the time of their deaths; said trustees or their successors to have full power to sell and reinvest, or change the investment of, any or all of said trust property, without an order of the court of chancery, by and with the written consent of said cestui que trust. And upon the death or resignation of a trustee said cestui que trust shall have the power to nominate and appoint, by deed of appointment, a new trustee, without an order of court. And should it become desirable to use any part of the corpus of said trust estate for the improvement thereof, or for the more comfortable support of said cestui que trust, the said trustees, or their successors, shall have power and authority to allow the corpus thus to be used, upon the written application and consent of said cestui que trust." At the March term, 1885, of the superior court, Swann, Stewart & Co. sued Henderson, trustee, upon said note, to which suit he filed defense; and at the March term, 1886, they obtained a verdict, judgment, and decree for \$1,081.58 principal, with interest, etc. Execution issued thereon, and Swann, Stewart & Co. made and had recorded a deed to the land of Henderson, trustee, and caused the execution to be levied on the land. Under this levy the land was sold by the sheriff, in March, 1888, according to law, and Swann, Stewart & Co. bought it and took the sheriff's deed thereto; and any and all right of redemption which Henderson, trustee, or his cestui que trust may have, ceased at and after the sheriff's sale. At the time of the filing of their suit, plaintiffs were barred by the statute of limitations; more than three years having elapsed since the date of the verdict, judgment, and decree. The various matters put in issue by plaintiffs, except their claim for rents, were put in issue in said suit, and adjudged adversely to defendant therein, and plaintiffs are concluded thereby.

Upon the trial, plaintiffs introduced the deed of Smith, administrator, to Henderson, trustee, made March 25, 1882; the conveyance being simply to "W. L. H. Henderson, trustee for his wife, Mary E. Henderson, \* \* \* for her and her heirs and assigns forever." Henderson testified: Mary E. Henderson died intestate on March 30, 1893, leaving as her

only heirs at law the plaintiffs. The land in dispute is worth, on an average, from 1888 to present time, \$300 per annum for rent. Witness bought this land and other land as trustee for his wife, and paid for it mostly with money received by him, as her trustee, from her father's estate, under his will. There was other evidence as to the value of the land for rent, tending to corroborate the testimony of Henderson. Plaintiffs introduced the \$1,500 note, which had credits thereon amounting to \$501.68. Also, the deed by Henderson, trustee, to Swann, Stewart & Co., of January 4, 1884, conveying the property in dispute, and reciting "that whereas, it has become desirable and necessary to use a part of the surplus of the trust estate, of which the said W. L. H. Henderson is trustee, to wit [the property described in the deed and the plaintiffs' petition], for the purpose of cultivating the land of the said trust estate, and the comfortable support and maintenance of the said cestui que trust: Now, in consideration of \$1,500 in hand paid, and for said purposes, this deed is made." Also, with and as part of this deed, written application to Henderson, as such trustee, signed by Mrs. Henderson, to sell said land "for the purpose of continuing farming operations on the lands belonging to my trust estate, and the maintenance of my home in Oxford, and hereby give my consent to the foregoing deed to Swann, Stewart & Co. for said purpose." Also, the bond for titles made by said Swann, Stewart & Co. to Henderson, trustee. The note, deed, and bond were introduced by plaintiffs to show that the papers, taken together, constituted an equitable mortgage.

Defendant introduced the original record in the suit of Swann, Stewart & Co. against Henderson, trustee, upon said notes. The declaration described the trust estate; set out the deed to Swann, Stewart & Co., with the written consent and request of the cestui que trust; the giving of the bond for titles; the purpose of the creation of the debt; that Swann, Stewart & Co. had furnished the trustee, for said purpose, farming utensils, supplies, etc., to be used in cultivating and improving the land, and for the comfortable support of the cestui que trust; that the trustee refused to pay the note and redeem the land; and prayed that the trust estate be decreed to be liable for the debt, and that the income thereof, if necessary, be applied to the payment of the debt, or for such other judgment or decree as equity and the circumstances of the case might require. Copy of the note, of the deed, and of Mrs. Henderson's consent, was attached. This petition was filed February 23, 1885, and due and legal service thereof was acknowledged by the trustee. On March 18, 1886, Swann, Stewart & Co. amended their petition, and alleged that the consideration of the note sued upon was as is set out in the answer of Williams, above stated, and by praying that the trust estate be decreed liable for the debt sued on, etc.

This amendment was allowed, over objection. A bill of particulars was attached to this amendment. To this suit the defendant, Henderson, trustee, pleaded, denying the indebtedness, and claiming that it was not a proper charge against the trust estate. He also pleaded a set-off for cotton furnished from September 10 to November 22, 1884 (the dates of payment set out in the petition of the present plaintiffs), amounting to \$688.16. He also pleaded that the items charged for the four \$100 notes above mentioned were paid off and fully discharged; that the notes were not delivered up to be charged on said account; that the items charged up against defendant for the tenants were not correct, because he did not assume the payment thereof; and usury in the deed. There was a verdict for Swann, Stewart & Co. for \$1,081.68 principal, with interest, etc., and finding the trust property subject. On this verdict a decree was rendered against Henderson, trustee for his wife, to be levied on that portion of the trust estate now in controversy. Plaintiffs objected to the admissibility of the levy as above set forth: Because the verdict and judgment is void because not in accordance with the prayer in the petition and amended petition; the prayer of the petition being that the rents and proceeds of the land be subject to the debt, and the judgment ordering the land to be sold to satisfy the debt. Further, because Mrs. Henderson being a party to the deed, and the title to the land being in her absolutely, by virtue of the deed from Mr. Ira E. Smith to Henderson as trustee for her, she was a necessary party, and not being a party to said suit, and being dead, her heirs at law were not estopped in this suit to recover the land. The objection was overruled, to which ruling plaintiffs excepted.

Plaintiffs then reintroduced Henderson to prove the consideration of the note and deed, and to show the same were paid off, and that there was nothing due on the note, to which counsel for defendant objected on the ground that the facts sought to be proved by the witness raised a question which was res adjudicata. The objection was sustained, to which ruling, also, plaintiffs excepted.

Defendants then introduced, over the objection of plaintiffs: The execution issued upon the judgment in favor of Swann, Stewart & Co. against Henderson, trustee, and against the land described in the judgment, the levy of the *fi. fa.* thereon, and sale thereunder to Swann, Stewart & Co. for \$1,400, part of the money being received by defendant in *fi. fa.* Also, the deed of reconveyance from Swann, Stewart & Co. to Henderson, trustee, reciting the *fi. fa.* and judgment, note, deed, and bond. Also, the sheriff's deed conveying the land to Swann, Stewart & Co., and the deeds from Swann, Stewart & Co. to Roberts, and from Roberts to Williams. Also, a certified copy of the last will of Needham Bullard, the nature of which has been sufficiently above indicated. Plaintiffs

objected to the admission of the will because it does not change the fact that the title to the land in dispute "was not in the said Mary E. Henderson, at her death, by virtue of the deed from Ira E. Smith, administrator, to said W. L. H. Henderson as trustee for Mary E. Henderson," and on which plaintiffs rely for recovery. The objection was overruled, and to this ruling, also, plaintiffs excepted.

Defendant introduced, also, written deed of appointment by Mary E. Henderson of her husband to act as her trustee of her trust estate under her father's will, with all the rights and powers conferred on the trustees, or their successors, in said will. This appointment was made March 4, 1879, was accepted by Henderson on the same day, was accompanied by the written refusal of R. A. Murphey to act as her trustee, and declaring that he had never acted as such; and the appointment recited the item of the will above mentioned in full, and set forth the facts of the death of Thomas P. Jones. There was also evidence for defendant that he has been in possession of the land since the fall of 1891, and that it is worth \$150 per annum for rent.

The court directed a verdict for defendant, and a verdict was so rendered, to which direction, also, plaintiffs excepted.

J. A. Wimpy, for plaintiffs in error. J. M. Pace, for defendant in error.

**LUMPKIN, J.** The facts appear in the reporter's statement. A discussion of the law applicable is deemed unnecessary, for the reason that the opinion of Chief Justice Bleckley in *Headen v. Quillian*, 92 Ga. 222, 18 S. E. 543, in principle covers fully and aptly the controlling points involved in the present case. Judgment affirmed.

(99 Ga. 166)

#### **PATTERSON et al. v. BARROW.**

(Supreme Court of Georgia. June 12, 1896.)

**APPEALS FROM JUSTICE'S COURT — PRACTICE — ENTRY OF JUDGMENT.**

1. Where, by the judgment of a county court, two of three defendants jointly sued were discharged, and the remaining defendant held liable, an appeal to the superior court entered by him alone did not carry up the whole case, so as to enable the latter court to discharge the appellant, and render a judgment against the other two defendants to the original action. Sections 3619 and 3620 of the Code are not applicable to such a case. They would be so if the judgment below had been rendered against all of the defendants. In that event all would be bound by the final judgment rendered on the appeal. If it affirmed the judgment below, the status of all the defendants would remain unchanged. If it reversed that judgment, the two who did not appeal would be discharged, because the appeal entered by the defendant with whom they had been adjudicated jointly liable could properly be treated as having been entered for the benefit of all; but no appeal could possibly be for the benefit of one who had already been discharged.

2. The court erred in not setting aside the judgment rendered against the two defendants who had not appealed, their motion having been made in due time.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

The following is the official report:

G. W. Barrow brought suit against Parker, R. G. Patterson, and Hargis, in the county court, for damages from breach of warranty. Judgment was rendered for Barrow against Parker for \$45. Parker thereupon entered an appeal to the superior court, where the case was tried before a jury, who found a verdict in favor of Barrow against Patterson and Hargis, and found in favor of Parker; and judgment was entered that plaintiff recover of Patterson and Hargis \$45. Patterson and Hargis then moved to set aside this judgment, alleging that they were dismissed upon the rendition of the judgment in the county court, that neither of them knew the case had been appealed by Parker, and were both absent in person and by attorney at the trial in the superior court. The motion was overruled. Reversed.

E. F. Hinton, for plaintiffs in error. J. E. D. Shipp, for defendant in error.

**PER CURIAM.** Judgment reversed.

**ATKINSON, J.**, providentially absent, and not presiding.

(97 Ga. 629)

#### **GARLINGTON v. STATE.**

(Supreme Court of Georgia. Jan. 13, 1896.)

**FALSE PRETENSES — SUFFICIENCY OF EVIDENCE.**

1. An allegation, in an indictment for cheating and swindling, that the accused "did falsely and fraudulently represent \* \* \* that he owned ten acres of cotton, now up and growing, in Henry county," is not supported by evidence that the accused represented he "was going to cultivate about ten acres of cotton on land in Henry county," and promised to give a mortgage "on the cotton after it was planted."

2. The evidence, taken most strongly against the accused, showed nothing more than the breach of a contract on his part, and failed to establish the charge in the indictment that he obtained credit by making false and fraudulent representations as to his alleged existing possessions. Accordingly the court erred in not sustaining the certiorari.

(Syllabus by the Court.)

Error from superior court of Newton county; R. H. Clark, Judge.

E. A. Garlington was convicted of cheating and swindling, and brings error. Reversed.

John A. Wimpy, for plaintiff in error. John S. Candler, Sol. Gen., for the State.

**LUMPKIN, J.** Garlington was convicted in the county court, upon an indictment transferred from the superior court, of the offense of cheating and swindling. His certiorari, sued out to reverse the judgment of the county court, was overruled, and he excepted. The

charge against him was that, with intent to defraud the prosecutor, he "did falsely and fraudulently represent . . . that he owned ten acres of cotton, now up and growing, in Henry county," and that by reason of this false and fraudulent representation he obtained \$28 worth of guano. The only evidence offered in support of the indictment, in so far as it related to the representation made by the accused, merely showed that he had stated to the prosecutor he "was going to cultivate about ten acres of cotton on land in Henry county," and promised to give a mortgage "on the cotton after it was planted." In other words, the evidence showed that the accused obtained the guano on credit by promising that he would do certain things, and not on the faith of any property or means which he claimed to have at the time the credit was extended to him. At most, then, the state only succeeded in proving a breach of a contract on his part. It would never do to hold that a mere breach of contract would be sufficient to subject a citizen of this state to criminal prosecution. Such a doctrine, if vigorously enforced, would result in the conviction and punishment, by incarceration or otherwise, of a large number of persons, including many very respectable people. The law of this case was settled by the decision of this court in the case of *Ryan v. State*, 45 Ga. 128, in which it was held—quoting from 2 Russ. Crimes (5th Am. Ed.) 280—that "a pretense that a party would do an act which he did not mean to do (as a pretense that he would pay for goods on delivery) was helden not to be a false pretense." This decision was approved in the case of *Ratteree v. State*, 77 Ga. 779. The conviction of the accused was wholly unwarranted, under the evidence, and the certiorari ought to have been sustained. Judgment reversed.

(97 Ga. 789)

GRANT v. STATE.<sup>1</sup>

(Supreme Court of Georgia. Feb. 29, 1896.)

CRIMINAL LAW—RIGHT TO OPEN AND CLOSE—  
APPEAL—REVIEW—NECESSITY OF RULINGS BE-  
LOW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where, on a criminal trial, the accused introduced no evidence, and thus obtained the right to open and conclude the argument, and one of two counsel representing him thereupon addressed the jury, consuming less time than that allowed by the rules of court, and the solicitor general, without having previously given notice of any such intention, then announced that there would be no argument for the state, it was the duty of the counsel for the accused, if they desired that one of them should continue to address the jury for the remainder of the time allowed for argument under the rules, to make in open court a motion or request to this effect to the presiding judge, and obtain from him a ruling or decision thereon.

2. Where this was not done, but the counsel for the accused who had not addressed the jury merely stated to the judge, in private conversation, that he desired to argue the case, and wished the court to understand that he insisted upon so doing as a legal right of the accused, nothing stated by the judge in that private con-

versation is proper subject-matter for review by this court.

3. The newly-discovered evidence presented a theory of the case utterly at variance with the statement made by the accused upon his trial, and contained nothing which would justify either the trial court or this court in granting a new trial. The decided weight of the evidence established the conclusion that the preliminary oath was administered to all of the panel of 48 jurors before they were severally put upon their voir dire. The evidence fully warranted the verdict, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Sam Grant was convicted of a crime, and brings error. Affirmed.

E. F. Hinton, J. F. Watson, and E. A. Nisbet, for plaintiff in error. J. M. Du Pree, Sol. Gen., L. J. Blalock, and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. 1, 2. Upon the trial of the case in the court below, the accused introduced no evidence, and thus obtained the right to open and conclude the argument to the jury. At the conclusion of the evidence one of his counsel addressed the jury at some length, after which counsel for the state announced that he did not desire to argue the case. One of the counsel for the accused, who had not addressed the jury, thereupon approached the judge, and privately stated that he desired to argue the case, and wished the court to know that he insisted upon it as a legal right of the accused; but the judge informed him privately that no further speech would be allowed for the accused, that the rule was that in no case should more than one counsel be heard in conclusion, and that under the circumstances the accused had had both the opening and conclusion. This is complained of as error. The judge certifies that nothing was said about the matter, except in this private conversation between counsel for the accused and himself. We think that what was said by the judge under these circumstances is not proper subject-matter for review by this court. Where it is desired to secure a decision of the court upon any matter, there should be some appropriate motion, pleading, or request. The decision must be invoked in the proper method, and at the proper time. If counsel for the accused desired to invoke a ruling of the court as to whether he should be allowed to make an additional argument to the jury, the proper method to have pursued would have been to make a motion or request in open court, instead of approaching the judge privately, as he did. The motion should have been made in such a manner as that the judge should clearly understand that a ruling was being invoked, and that opposing counsel should also have notice of it. Whenever a motion, request, or objection is made by counsel in the trial of a case, opposing counsel are entitled to have notice of it, and they

<sup>1</sup> Rehearing denied. See 25 S. E. 939.

have a right to know of any ruling or decision made thereon by the court. The practice of counsel to approach the judge privately about matters or questions pending before him at the trial is a bad one, and cannot be too strongly condemned. See, on this subject, 2 Elliott, Gen. Prac. § 1038; Wilson v. Danforth, 47 Ga. 676; Farrow v. State, 48 Ga. 80; Barker v. Blount, 63 Ga. 423.

3. The accused, in his statement to the jury, said that he shot the deceased because the latter was advancing upon him with a pistol. The newly-discovered evidence, as set out in the affidavit of Leola McIver, is totally at variance with this statement. She deposed that she saw the killing, and that the deceased advanced upon the accused with a plank, and was striking at him with it at the time he was shot. The trial judge therefore did not err in refusing to grant a new trial on account of this evidence. Besides, he could have disregarded it altogether because there was no affidavit of any person as to the character or credibility of the witness. Polite v. State, 78 Ga. 347(3); Dominick v. State, 81 Ga. 715, 8 S. E. 432; Pease v. State, 91 Ga. 19(4), 16 S. E. 113. The affidavits introduced by the accused in support of the sixth ground of the motion for a new trial, to the effect that the preliminary oath was not administered to certain of the jurors when put upon their voir dire, were met with counter affidavits showing that the oath had been administered, and we think the decided weight of the evidence sustains the judge in finding that the oath was administered. The evidence fully warranted the verdict, and there was no abuse of discretion in refusing a new trial. Judgment affirmed.

(99 Ga. 245)

**SAVANNAH, F. & W. RY. CO. v.  
WIDEMAN.**

(Supreme Court of Georgia. July 13, 1896.)

**PAROL EVIDENCE—RAILROADS—DUTY TO AVOID  
KILLING STOCK—MEASURE OF CARE—WITNESS—  
IMPRACHMENT—WEIGHT OF EVIDENCE—APPEAL  
—WAIVER OF ERROR.**

1. Where the only objection to the admissibility in evidence of a written contract between the plaintiff and the defendant was, in effect, that, under the limitation as to time therein expressed, it had expired, and was no longer operative as to the matter in controversy between the parties, and the defendant, in whose behalf it was tendered in evidence, offered to prove "that the terms of the contract had been extended by parol" so as to cover and embrace that matter, this objection should not have been sustained without allowing the defendant an opportunity to show that the contract had in fact been so extended, no question under the statute of frauds being involved.

2. It was error, upon the trial of an action against a railroad company for the killing of live stock, to charge, "Whether the railroad company did use reasonable care, or ordinary care and diligence, and every effort, to prevent [killing the stock], is a question for the jury to determine from the evidence." Requiring the company to use "every effort" to prevent killing the stock was imposing upon it a rule

of diligence more stringent than the law exacts. *Railway Co. v. Daniel*, 18 S. E. 22, 91 Ga. 768; *Railway Co. v. Miller*, 22 S. E. 660, 95 Ga. 738.

3. A witness can neither be impeached nor sustained, as to credibility, by allowing another witness to testify as to his individual opinion upon this question.

4. In determining upon which side of a disputed issue the evidence preponderates, the credibility, and not the number, of the witnesses introduced pro and con is the proper test. *Corniff v. Cook*, 22 S. E. 47, 95 Ga. 61, and cases cited.

5. Assignments of error not argued nor insisted upon in this court will not be passed upon. *Parker v. Lanier*, 8 S. E. 57, 82 Ga. 219; *Brown v. State*, 7 S. E. 915, 82 Ga. 224.

(Syllabus by the Court.)

Error from superior court, Clinch county; J. M. Griggs, Judge.

Action by J. H. Wideman against the Savannah, Florida & Western Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

The following is the official report:

Wideman sued the railway company for damages resulting to him by the killing of five mules on November 13, 1894, by the running of a freight train. He obtained a verdict, and the company's motion for a new trial was overruled. The motion contains the following special grounds: Error in refusing to admit in evidence a contract between plaintiff and defendant for the supplying of cross-ties to defendant from April to October, 1893, in which plaintiff released defendant from all responsibility in damages to his stock during the time he was employed and working under this contract. The objection was that the contract showed on its face that it had expired before the cause of action arose; defendant proposing to show that the terms of the contract had been extended by parol, and that it was in force at the time of the accident, and related to the locality where the same occurred. Error in refusing to permit defendant's counsel to ask plaintiff, as a witness, if Rice, the engineer of the train in question, was not perfectly entitled to credit; plaintiff having previously attempted to disprove facts testified to by the engineer. In the brief of evidence it appears that the plaintiff testified on cross-examination touching the engineer: "I know Mr. Rice. I think he is an honest man. I suppose he is." Error in allowing a witness for plaintiff to testify that there was a public road crossing at or near the 118th milepost, the locality of the accident, defendant objecting that the existence of public roads could not be proved by parol, but only by a certified copy of the order from the minutes of the county commissioners or court of ordinary establishing the same. Error in the court's charge where it imposed upon the jury the duty of finding against the company unless the evidence disclosed that its employees used "every effort" to prevent the accident; the portion of the charge complained of being in these words: "I have charged you what ordinary diligence

is, under the law, and it is for you to determine whether or not, from the evidence introduced before you, this railroad company used such care and diligence to prevent the killing of the stock of this plaintiff; and whether the railroad company did use reasonable care, or ordinary care and diligence, and every effort, to prevent it, is a question for the jury to determine from the evidence." Error in charging: "By a 'preponderance of evidence' is not meant the greater number of witnesses that have been introduced, or the greater number of papers that have been introduced, upon the one side or the other; but it means that side which the jury, after a fair and impartial and honest consideration of all the evidence, believes—that side of the evidence which the jury believes is the most worthy of belief, whatever side that is. Whether it is upon the side of one witness, or upon the side of twenty, upon that side is the preponderance of evidence." The error assigned is that this charge left it entirely to the belief of the jury, without giving them the rules of law by which they were to arrive at a conclusion as to the preponderance of the testimony.

Erwin, Du Bignon & Chisholm and S. T. Kingsberry, for plaintiff in error. John O. McDonald, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 225)

ATLANTA HOME INS. CO. v. TULLIS.  
(Supreme Court of Georgia. July 18, 1896.)

INSURANCE—ACTION ON POLICY—VENUE.

1. According to the decision of this court in *Insurance Co. v. Collins*, 54 Ga. 376, an insurance company cannot be sued in a county where it had no agent or place of business at the time when the action was brought, although it may have had an agency in that county at the time the cause of action arose.

2. The decision of this court in *Merritt v. Insurance Co.*, 55 Ga. 103, when considered in connection with its actual facts as disclosed by the record on file in the clerk's office of this court, does not conflict with the ruling made in the case above stated. All of the facts of the *Merritt* case do not appear in the official report, but the record itself shows that the person served with the process against the insurance company was in fact its agent, and acting as such when the suit was begun and the service perfected upon him.

3. The court erred in overruling the motion to set aside the judgment, made in due time, and based upon the grounds that the defendant company had never been lawfully served, and that the court had no jurisdiction to render such judgment.

(Syllabus by the Court.)

Error from superior court, Thomas county; A. H. Hansell, Judge.

Action by N. G. Tullis against the Atlanta Home Insurance Company. From a judgment for plaintiff, defendant brings error. Reversed.

The following is the official report:

On September 22, 1894, Tullis sued the insurance company upon a policy of fire insurance issued to him by its agents, for the term of one year, from January 3, 1894; a loss by fire claimed to have been covered by the policy having occurred on April 27, 1894. Service of the suit was made upon the agents who had represented the company at Thomasville, where and during the time the policy was issued. No defense to the action was made until after plaintiff obtained a verdict, on April 16, 1895. Four days later, the company moved to set aside the verdict, and to open the default, and for leave to defend the action. This motion appears to be in the form of two affidavits, one by the secretary, the other by the president, of the company; the one dated April 12, the other April 19, 1895. These affidavits set up that the company is a resident of Fulton county, and has never resided outside of that county, or in the county of Thomas; that neither the company nor any of its agents, representatives, or officers had knowledge or notice of the pendency of the suit until April 18, 1895, when they received a letter from plaintiff's attorneys; that no process had ever been served on defendant, and the judgment was rendered without jurisdiction of the person or subject-matter; that on May 9, 1894, the company withdrew all its agents and agency from Thomas county, and has not since resided nor had an agent therein upon whom service of process might be had, nor for the transaction of any business; that it had a good and meritorious defense to the suit, to wit, that the policy did not refer to or cover the premises claimed to be destroyed, and the company at no time intended to issue or deliver a policy covering said property; that on July 13, 1894, the company notified plaintiff of its withdrawal from Thomasville and from said county, and that it had canceled all outstanding policies, and expressed to him \$2.13, the amount of return premium due under the policy, and notified him of its cancellation; and that the policy sued on was a subsisting contract, covering other and distinct property from that claimed to have been destroyed.

It appears from the evidence that the plaintiff was the owner of two houses upon adjoining lots in Thomasville at the time the policy in question was issued. He had applied to Evans & Son, who were then agents for the company at Thomasville, for a policy covering the house which was burned in April thereafter; but, by inadvertence, the agents erroneously inserted in the policy a description of the other of the two houses, and the mistake was not discovered until after the fire occurred. Said agents notified the company of the loss immediately upon its occurrence, and the company sent an adjuster to Thomasville, who examined into the circumstances, and, in repeated conversations, left upon plaintiff's mind the impression that

the loss would be satisfactorily settled. It was on the 9th of the following month that the company withdrew its agency from Thomas county. Much correspondence then passed between Evans & Son and the company. On June 12th, the company's secretary wrote to Evans & Son, in reply to a letter from them in reference to plaintiff's claim, stating that he had not complied with the conditions of the policy, particularly as regards the filing of proofs, and that, after this was done, the company would advise them of its position in the matter. Proofs of loss were forwarded to the company three days afterwards, and the company acknowledged receipt of them on June 18th, and propounded to Evans & Son a number of questions regarding the matter. On June 27th, Evans & Son replied to these questions in writing. The testimony for the company was to the effect that Evans & Son failed to transmit the process, or to inform the company of service of the same, and of the filing of the suit; and that on July 13, 1894, the company sent to plaintiff, by express, \$2.13, as the return premium due upon cancellation of the policy, and mailed him a letter stating that the company had withdrawn from Thomasville, and canceled all outstanding policies, and thereby gave him notice that the one in question was canceled, and of no further force. Plaintiff's testimony was that the company had never advised him that it had withdrawn from or ceased to do business in said county, nor had he at any time received any notice that any policy issued by it had been or would be canceled; and that while he was notified by the agent of the express company of the receipt of a package containing a little over \$2, which had been sent to him, he promptly refused to receive it, and ordered it to be returned to the company. The court overruled defendant's motion, and it assigns the following errors: (1) In holding that the service was valid and effectual; (2) in refusing to allow the company to file its plea to the jurisdiction; (3) in holding that the law gave jurisdiction to the superior court of Thomas county; (4) in refusing to exercise discretionary power to open the case, and allow the company to plead; (5) in failing to properly exercise said discretion; (6) in holding that the company was in laches in not informing itself of the suit.

Palmer & Read and Jackson & Leftwich, for plaintiff in error. Hammond & Hammond, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 238)

**SOLOMON et al. v. HARP.**

(Supreme Court of Georgia. July 13, 1896.)

**LEVY OF EXECUTION—SHERIFF'S ENTRY.**

It was error, upon the trial of a claim to realty, to dismiss the levy upon the ground that

the day of the month upon which it was made was not shown by the sheriff's entry, the month and the year being distinctly stated.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by Henry Solomon & Son against D. A. Bailey & Co. On levy of execution, Amanda Harp interposed a claim. Judgment for claimant, and plaintiffs bring error. Reversed.

The following is the official report:

An execution against D. A. Bailey & Co., founded on a judgment of August 6, 1889, was levied upon two acres of land in Abbeville, to which a claim was interposed by Amanda Harp. On the trial, the plaintiffs tendered the execution and entry of levy in evidence. Claimant objected to the levy as incomplete, for the reason that it bore no date, or that the day of the month was not set out in the levy. The levy was dated "this — day of December, 1889." The plaintiffs saying that they assumed the burden and relied upon the levy to show possession, and the levy being upon real estate, and plaintiffs saying that they could not amend for the reason that the sheriff had gone out of office and run away, and not offering to show the exact date of the levy by any proof, the court dismissed the same, to which ruling plaintiffs excepted.

Hal Lawson, for plaintiffs in error. E. H. Williams, for defendant in error.

**PER CURIAM.** Judgment reversed.

**ATKINSON, J.** providentially absent, and not presiding.

(99 Ga. 250)

**COLE et al. v. McNEILL.**

(Supreme Court of Georgia. July 13, 1896.)

**LABORER'S LIEN—WHO ENTITLED TO—EVIDENCE.**

1. One who was employed as a "woodsman," and whose duties as such included overlooking and superintending a large number of ordinary hands engaged in turpentine operations, who had authority to employ and discharge these hands, who also worked in a commissary in the capacity of a clerk, and who was employed for his skill in rendering services which obviously required mental and business capacity, rather than the mere power to do manual toil, these services consisting much more largely of "head work" than of "hand work," was not a laborer, entitled, under section 1974 of the Code, to foreclose a lien as such, although, in point of fact and of necessity, he did, in the performance of his duties, a considerable amount of manual labor, and often became physically fatigued.

2. Under the evidence contained in the record, the verdict was contrary to law, for the reason that the jury could not properly find that the plaintiff was a "laborer." *Oliver v. Hardware Co.* (decided at the present term) 26 S. E. 403, and cases cited.

(Syllabus by the Court.)

Error from superior court, Charlton county; J. L. Sweat, Judge.

Action by E. H. McNeill against Cole & Covington. Judgment for plaintiff. Defendants bring error. Reversed.

The following is the official report:

E. H. McNeill made affidavit to foreclose a general lien as a laborer upon the property of Cole & Covington. He alleged that he contracted with them to do manual labor for the year 1894, as general laborer and hand, commissary keeper, and woodsman on their turpentine farm, for which he was to receive \$800. By their counter affidavit, defendants admitted that they were indebted to plaintiff \$600 as woodsman, but denied that the services rendered by him constituted such manual labor as to entitle him to a lien. The jury found for the plaintiff, and defendants' motion for a new trial on the general grounds was overruled. Plaintiff testified that his contract with defendants was that he was to receive \$800 for the year 1894, during which year he was doing the work of a woodsman. In different seasons of the year there are different occupations. As a woodsman, he counted boxes during the winter months; and, while so doing, he walked 25 or 30 miles some days. It was necessary for him to do this, in order for him to discharge the duties he was sent out in the woods to do. He rode to the woods, and back, and, while in the woods, walked all the time during the boxing season. He rode defendants' horse; took care of and curried him sometimes, but did not always do it; fed him every day at noon. Upon being asked if it was a part of his duty as woodsman to look after the horse, he replied that he did it the whole time he was with them. While out in the woods, he showed the box cutters how to cut boxes; would take their tools, and work with them himself; would take the ax, and cut a few boxes. This was necessary in some instances, for the reason that he could not make the man understand otherwise. He sometimes helped to load the wagons, by rolling the barrels of crude turpentine therein, to be hauled to the still. He had something to do with scraping; placed the barrels for the men to pack the scrape in them; got into the barrels, and packed them with his feet. He did a "right smart" of that in the discharge of his duties as defendants' employé; was engaged in doing this kind of work since he commenced with them, in 1885, and they knew he was doing it in 1894. He had to issue rations from their commissary for the hands, about 75 in number. He would be at the commissary at night for several hours, after being on his feet all day. Goods for the commissary came in nearly every night, and he helped push the boxes out, and put them in the store, and open them. He felt it his duty to do so under his contract of employment. Defendants have not paid him for 1894, though payment has been demanded; and he has entirely discharged his contract for that year. He took down the count of the number of boxes cut, and showed hands how to

cut the boxes. This required skill, and he was employed for his skill. Not every man can do that kind of work. He saw that the hands did the work properly. In the work of cornering boxes, he would go before the hands, and show one who did not understand how to do it. It did not require much skill in this particular. After this, he went to where the hands had been dipping, and saw that all the trees had been dipped, and that all was well done. This required some skill. A man that does not know anything about it could not tell whether it was properly chipped or not. He did not take an ax of his own, but took the tools to show the men how to do it; and the same way with the dippers and the man who cornered the trees. He was kind of overseer in the woods; had the right to discharge a man; could not say he spent five solid days in the year in loading wagons; had to whenever it was necessary. The duties he performed in the commissary were not such as are usually done by a clerk in a store. All the labor he performed in the commissary would not amount to more than two months. He had the right to employ negroes. The woods business was supervised almost entirely by him. He was boss in the woods, but was subject to defendants. The hands were employed and discharged by him for them. He was subject to their orders, to do whatever they called upon him to do. The skill that is required to count the boxes is to know how to count. One of defendants testified: Plaintiff was to perform the duties of a woodsman, to look after the count of boxes, and attend to the cornering and chipping, and to the commissary, in which he was assistant clerk. He was not required to curry the horse. It requires skill to be a woodsman. A man without experience cannot be a woodsman. It is customary for the overseer to show the men in the woods how to cut boxes. It also requires skill to know how to chip boxes after they are cut. Common laborers box, corner, and chip them. The work is more physical than mental, and so as to the work of a clerk and woodsman in a commissary. Witness is not prepared to say that plaintiff did not render all the services that he said he rendered.

L. A. Wilson, for plaintiffs in error. W. M. Toomer and W. G. Brantley, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 249)

OLIVER v. MACON HARDWARE CO. et al.  
(Supreme Court of Georgia. March 23, 1896.)  
LABORER'S LIEN—CLERK IN MERCANTILE ESTABLISHMENT.

1. Primarily, a clerk in a mercantile establishment is not a "laborer," in the sense in

which that word is used in section 1974 of the Code, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon mere physical power to perform ordinary manual labor, he would not be a laborer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a laborer. In any given case, the question whether or not a clerk is entitled, as a laborer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances.

2. Although the intervention filed in the present case alleged in general terms that the intervenor was a clerk, that the amount he claimed was due him for services and labor performed as a clerk, and that as such clerk he performed manual labor, yet, as it failed by other appropriate allegations to show to which of the classes above indicated he belonged, it was bad for uncertainty, and properly dismissed on demurrer.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Intervention of Henry E. Oliver in the matter of a judgment against the Macon Hardware Company. Judgment against the intervenor, and he appeals. Affirmed.

Alex Proudfit, for plaintiff in error. Desau & Hodges, for defendant in error.

**LUMPKIN, J.** Some confusion has arisen in the decisions of this court with reference to the question whether or not a clerk employed in a store, office, or other place of business, is a "laborer," within the meaning of sections 1974 and 3554 of the Code; the former giving laborers a general lien for their labor upon the property of their employers, and the latter exempting the wages of laborers from the process of garnishment. In *Butler v. Clark*, 46 Ga. 466, the question arose as to whether the wages of one employed in a mill as "receiving and shipping clerk," and who "performed any other duties required of him" by his employer, were subject to garnishment. In dealing with the case, this employé was treated as "a hired workman," and accordingly adjudged to be a laborer, within the meaning of the statute. In *Claghorn v. Saussy*, 51 Ga. 576, the monthly wages of a "forwarding clerk" in the employment of a railway company were held not to be subject to the process of garnishment. It was the duty of that clerk to attend daily to the forwarding of goods, and to render other services which necessarily required the performance of a considerable amount of manual labor. The case is cited in *Oliver v. Boehm*, 63 Ga. 172, where it was decided that a person "employed as clerk, bartender, and boy of all work, to labor in and about a retail grocery and liquor store," was a laborer entitled to the lien pro-

vided for by section 1974 of the Code. The scope of this boy's employment seems to indicate that the greater part of his work consisted of manual labor, rather than of services requiring mental or intellectual skill and capacity. Indeed, in *Richardson v. Langston*, 68 Ga. 658, Justice Crawford, in referring to *Oliver's Case*, said "he specifically set out at length the actual manual labor which he performed." The learned justice doubtless referred to the record of the case, as only the headnote of the decision is reported in 63 Ga. In *Richardson's Case* the court ruled that an affidavit to foreclose a laborer's lien, in which it was alleged that the defendants, merchants selling dry goods and groceries, were indebted to the deponent "for services rendered as clerk, laborer, and general service in said store," was not demurrable as not sufficiently setting out the fact that the plaintiff was a laborer. The opinion was written by Justice Crawford, who dissented from the judgment. We make the following extract from his comments on the case: "I do not understand that clerks, or persons doing general service, although they may labor, are therefore laborers, in legal contemplation. If they are to be included in the general term 'laborers,' then I see no limit to the exercise of this extraordinary right of having execution on oath, by all agents and employes, such as cashiers, tellers, and bookkeepers of banks, secretaries, treasurers, bookkeepers, salesmen, and superintendents of manufacturing companies, as well as all the officials of railroads below the president, whether in the offices or on the roads. To enlarge upon class legislation by implication should not be the policy of courts, and especially so where ex parte summary remedies are allowed." We will next notice the case of *Hinton v. Goode*, 73 Ga. 233, in which it was decided that "one who is employed merely to labor as clerk in a store is not such a laborer as is contemplated by section 1974 of the Code, giving a lien to a laborer on the property of his employer." Justice Blandford, who delivered the opinion of the court, said: "Laborers, as used in the statute, mean what were generally and universally known as laborers at the time of the passage of the act. A laborer is one who works at a toilsome occupation,—a man who does work requiring little skill, as distinguished from an artisan,—sometimes called a laboring man. Webster. Clerks, agents, cashiers of banks, and all that class of employes, whose employment is associated with mental labor and skill, were not considered laborers, and were not intended by the statute to be embraced therein as laborers, so as to have a lien for their wages. And this is the effect of the previous rulings of this court." In *Ricks v. Redwine*, Id. 273, it was held that "a clerk employed in a store or other establishment, unless he performs manual labor, is not a laborer entitled to have a lien upon his employer's property which can be summarily en-

forced." In that case Justice Hall observed that all the former cases on the subject were reviewed in the Case of Hinton, *supra*. In *Lamar v. Russell*, 77 Ga. 306, 2 S. E. 467, it was held that the wages of a clerk and bookkeeper were not subject to garnishment; citing *Smith v. Johnston*, 71 Ga. 743, which was a case involving the right to garnish the wages of a railroad clerk. Then follows the case of *Abrahams v. Anderson*, 80 Ga. 570, 5 S. E. 778, which is substantially on the same line, and cites a number of cases, including several of those above mentioned. This brings us to the case of *Briscoe v. Montgomery*, 93 Ga. 602, 20 S. E. 41, holding that a "commercial traveler" was not a day laborer, whose wages were exempt from the process of garnishment. In the course of a very brief discussion of that case the writer remarked, "It is obvious that in the discharge of his duties a clerk and bookkeeper must necessarily perform a considerable amount of manual labor." It was not necessary, however, in that case, to go to the bottom of the subject with which we are now dealing, and this accounts for the evident looseness of the expression last above quoted. We think all the cases previously decided can be reconciled and harmonized by adopting the line indicated in the first headnote of the present case. It states the idea about as clearly as we can express it. Every human being who follows any legitimate employment, or discharges the duties of any office, is, in a very broad sense, a laborer. The president of the United States, the governor of this state, and the justices of this court are all laboring men, in the sense that they do a great deal of hard work, much of which is, indeed, attended with physical and muscular exertion; but at the same time they cannot properly be termed "manual laborers," either in the popular sense in which these words are used and understood, or in the sense in which the term "laborers" was employed in the statutes under consideration. The legislature manifestly had reference to the work in which such "laborers" were engaged, rather than to the particular designation by which they were usually distinguished one from the other. In determining whether a particular clerk, or other employé, is really a laborer, the character of the work he does must be taken into consideration. In other words, he must be classified, not according to the arbitrary designation given to his calling, but with reference to the character of the services required of him by his employer. The headnote indicates the rule to be followed in assigning him to that class to which he rightfully belongs.

2. From the foregoing it follows that an intervention filed in an equitable proceeding, containing only the allegation set forth in the second headnote, was bad for uncertainty, because it entirely failed, by other appropriate allegations, to show that the intervener belonged to that class of clerks entitled to liens as laborers. Judgment affirmed.

(99 Ga. 232)

## POST et al. v. ABBEVILLE &amp; W. R. CO.

(Supreme Court of Georgia. July 13, 1896.)

ACTION ON NOTE—FAILURE OF CONSIDERATION—  
BONA FIDE HOLDERS.

The action being upon negotiable promissory notes, and it having been shown by uncontradicted evidence that before their maturity the plaintiffs had become the bona fide holders of the same for value, it was error to direct a verdict for the defendant, although it may have been proved that the consideration of the notes had entirely failed. The mere fact that the consideration was expressed on the face of the notes was not, of itself, notice that the consideration had failed.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by Post, Martin & Co. against the Abbeville & Waycross Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed.

The following is the official report:

Post, Martin & Co. brought suit against the Abbeville & Waycross Railroad Company upon three promissory notes, dated March 9, 1891, and payable at the office of the American Car & Equipment Company, in the city of New York; each being for \$75, "for rental of rolling stock under contract of lease and conditional sale of even date herewith." They were indorsed by the payee, and the plaintiffs allege that they were bona fide holders for value before maturity of the notes. Defendant pleaded not indebted, and that the consideration of the notes had totally failed, in that they were given for certain railroad equipment described in the contract referred to therein, but that after the execution of the notes the payee became insolvent, and wholly failed to furnish any of the equipment so purchased, and defendant never received any of the equipment, nor any consideration for the notes. The court directed a verdict for defendant, and plaintiffs' motion for a new trial was overruled. At the trial there was testimony, for the plaintiffs, that they got the notes sued on, with nine others, from the payee. They were carrying a large loan, secured by various kinds of collateral, part of which the payee was in the habit of withdrawing, and substituting therefor other securities of equal value, and the notes sued on were substituted in this way. The transaction was shortly after the date of the notes, and long before they were due. Plaintiffs had no knowledge whatever of the failure of consideration, and never heard of any defense until they tried to collect the notes, but took them as ordinary business papers. The payee failed shortly afterwards, and transferred to plaintiffs the notes absolutely; that is, released its equity in them. This was in April, 1891. Plaintiffs had collected enough of the collateral to secure about 10 per cent. of the loan, the balance being still due and unpaid. There was testimony for

the defendant supporting the allegation in the plea of failure of consideration. It further introduced the agreement referred to in the notes sued on, dated 10 days after the date of the notes, and not recorded. By this agreement the payee company agrees to lease to defendant a baggage and passenger car for 88 months from April, 1891, of the value of \$1,000; the rental being payable \$250 cash, and in 12 quarterly payments of \$75 each, evidenced by 12 notes, with the right in the lessor to retake the car, at its option, in event of failure to pay any of the notes, surplus of sale by lessor to go to lessee. Lessee to keep car in repair, to pay insurance and taxes, and to replace the car if destroyed. It is further agreed that, if the lessee shall pay all sums due under the contract, the car shall become its property absolutely.

Wm. Eason, for plaintiffs in error. E. H. Cutts and D. H. Pope, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 237)

**FULGHAM v. CONNOR et al.**

(Supreme Court of Georgia. July 13, 1896.)

EXECUTION—CLAIMS BY THIRD PERSONS—SUFFICIENCY OF BOND—WAIVER—PARTIES.

1. A claim case having been tried upon its merits without objection to the sufficiency of the claim bond, and afterwards coming on for trial more than 12 years after issue had originally been joined, it was then too late to move to dismiss the claim on the ground that such bond was defectively executed.

2. Where a joint claim to land which had been levied upon was filed by several persons, and one of them subsequently died, it was error, over objection of the plaintiff in execution, to order the case to trial without having a proper party or parties made in place of the deceased claimant.

3. As this case was heard without proper parties, all the proceedings at the trial, and the result reached, were necessarily erroneous. (Syllabus by the Court.)

Error from superior court, Wilcox county; D. M. Roberts, Judge pro hac.

Execution sued out by R. G. Fulgham against Norman McDuffie and others was levied on property claimed by Elizabeth Connor and others. From a judgment for claimants, plaintiff brings error. Reversed.

The following is the official report:

On May 23, 1876, the sheriff of Wilcox county levied an execution upon land, lots 156 and 157, in the Eighth district of that county, as the property of Norman McDuffie, one of the defendants in execution. On July 18, 1881, a claim to said land was interposed by J. B. McDuffie, as agent and next friend of Mrs. Elmira Connor, Mrs. Elizabeth Connor, Amory McDuffie, Nora McDuffie, and Johnnie McDuffie. The claim affidavit is signed by J. D. McDuffie. The claim bond, which is signed

by J. B. McDuffie and J. C. McComick, recites that Elmira Connor, Elizabeth Connor, Amory McDuffie, Nora McDuffie, and Johnnie McDuffie, principals, and J. C. McComick, security, are held and firmly bound, etc. At a term previous to that of the trial the death of Mrs. Elmira Connor had been suggested of record, and the case continued for the purpose of making parties. An order was taken to make parties by next term, and no parties had been made. On this ground, counsel for plaintiff moved to dismiss the claim, which the court refused to do. Plaintiff then moved that the case be continued, and the claimant be required to make proper parties, it being admitted in open court by claimant's counsel that Elmira Connor was dead, and left, surviving, her husband, who was no party to the claim case, and her children, the other claimants, being now of full age. Plaintiff insisted that said husband should be a party, and that Mrs. Connor should be represented by an administrator, for the purpose of fixing costs and damages should her claim not be sustained. The court overruled the motion, and ordered that said children, heirs of John McDuffie and Elmira Connor, be made parties claimant. Plaintiff then moved to dismiss the claim for want of a legal bond, J. B. McDuffie not being a party, and his name not appearing in the body of the bond, and none of the claimants having signed the bond, nor any one for them, and J. C. McComick being admitted to be dead. Claimant's counsel said there was another claim and bond given. Plaintiff denied this, and showed that on this claim and bond issue was joined, and the verdict and judgment on the former trial were written on the back of this claim. The court overruled the motion to dismiss, and, upon hearing the evidence, dismissed the levy. Plaintiff excepted.

J. H. Martin, for plaintiff in error. L. O. Ryan, for defendants in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 435)

**PALMER v. McNATT.**

(Supreme Court of Georgia. Oct. 21, 1895.)

SURETY—ESTOPPEL TO DENY FALSE SIGNATURE—NOTICE—DUTY TO INVESTIGATE.

1. Merely stating to a person that another has signed his name to "a bond" is not of itself sufficient to charge him with notice as to the nature and character of such bond; nor, in the absence of any further information, or of any reason for believing that a third person may be injured by acting upon the belief that such signing was duly authorized, is the person first referred to bound to make an investigation of the facts, and repudiate the signature, or take other steps to prevent the happening of such injury.

2. Accordingly, where a bond was executed for the purpose of dissolving a garnishment,

one whose name was signed thereto as a surety without his knowledge or consent was not bound by the bond merely because, after being informed that his name had been signed to a bond of some description, but concerning which no further information as to parties or otherwise was given him, he took no steps to deny the genuineness of the signature, or have the same canceled. If, on the other hand, he really knew the nature of the bond and the purpose for which it was given, and did not, after opportunity to do so, repudiate the signature before the money held up by the garnishment was paid to the principal on the bond, he would, under these circumstances, be estopped from denying that his signature was authorized, and would be held to have ratified the signing of his name to the bond.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. O. Smith, Judge.

Execution sued out by James McNatt against J. E. Palmer, as surety on a bond given to release a garnishment. An affidavit of illegality was interposed, on which there was a judgment for plaintiff, and the surety brings error. Reversed.

I. Beasley and J. H. Martin, for plaintiff in error. D. M. Roberts, for defendant in error.

SIMMONS, O. J. In a suit by McNatt against Joseph Palmer, summons of garnishment was served upon one Peterson, who was indebted to Palmer; and, in order to dissolve the garnishment, Palmer executed a bond, to which, besides signing his own name as principal, he signed that of J. E. Palmer as security, stating to the clerk of the superior court, in whose presence the bond was signed, that he had authority to do so. The clerk approved the bond, and the amount due by the garnishee was paid over to Joseph Palmer. The case resulted in favor of the plaintiff, and judgment was entered up on the bond, and on this judgment execution was issued against Joseph Palmer, as principal, and J. E. Palmer, as security. The execution was levied upon property of J. E. Palmer, who filed an affidavit of illegality, alleging that he had never signed the bond, had never authorized any one to do so for him, had never ratified the doing of the same, had no notice that it was done until long after it was done, and the money obtained from Peterson by Joseph Palmer, had never had his day in court, and was in no way liable upon the bond. Upon the trial of the issue formed by this affidavit, he testified that he did not authorize the signing of his name to the bond, and did not know his name was signed to it until after it was done; that he had told Joseph Palmer, who was his brother, never to sign his name to any papers, and that, if he did, he (the witness) would not be bound by it; that he had no notice that his name had been signed to this particular bond until so informed by McNatt, the plaintiff, whereupon he informed McNatt that it was a forgery. He had been informed by his brother that his name had been signed to a bond, but did not know at that time what kind of bond it was, and did

not know who had it. His brother simply said, "I had to use your name on a bond," to which he replied: "What did you do that for? Have I not often told you never to use my name on a bond, that I could not make myself liable for your debts?" Joseph Palmer testified: "I did not tell him [J. E. Palmer] what the bond was about nor who had possession of it." There was a verdict for the plaintiff, and a motion for a new trial was made by J. E. Palmer, which was overruled, and he excepted. The motion contains the general grounds that the verdict is contrary to law and to the evidence, and it is further complained that the court erred in charging the jury as follows: "I charge you that if the defendant, immediately or soon after his name had been signed to the bond, received notice of it, it was his duty, if he objected to the use of his name in that connection, to inform the parties of his objection and unwillingness to have his name signed as security on the bond; and I charge you that if he received notice that his name had been signed to a bond, and had an opportunity and made no objection, his silence amounted to a ratification, and he is bound notwithstanding the bond was signed without his consent. I charge you that it was his duty to follow up the matter and investigate, and he was bound by all to which that investigation would lead. I charge you that the notice contemplated by the law in such cases is any notice that would be calculated to put a person on inquiry, that would lead him to investigate and find out if his name had been signed to the bond."

It is a fundamental principle of the law of estoppel that, in order to create an estoppel by conduct, the conduct must have operated to the injury of the person claiming the benefit of the estoppel. If it did not mislead him and cause him to change his position for the worse, or cause him to omit doing something which he might otherwise have done to protect himself from loss, no estoppel would result in his favor. One who acts upon the statement of another, who claims authority to represent a third person, must, at his peril, ascertain whether such authority exists or not; and if he makes no inquiry of the alleged principal, and his action in the matter has not been influenced by any misleading act or representation on the part of the supposed principal, or by the silence of the latter where there was an opportunity and a duty to speak, it is clear that, in the absence of an affirmative ratification, he would have no right to hold such third person bound. Accordingly, in the present case, if the signing of the defendant's name to the bond was unauthorized, and the bond was acted upon and the money paid over before he learned of the transaction, and he had done nothing before the money was paid over from which the other parties concerned would have a right to infer that the person who signed his name had authority to do so, his silence subsequently could not be held to amount to a ratification; certainly not

If there was no unreasonable delay on his part in repudiating the act after it came to his knowledge, and if the plaintiff was in no worse position when he learned of the repudiation than he was when it was first within the power of the defendant to give information. The only effect which could be given to his silence, in the absence of anything going to show that injury resulted from it, would be that, if long continued, it might, in connection with other facts, be taken into consideration by the jury as a circumstance tending to show that there was in fact a ratification; but it could not have even this effect if the unauthorized act was the signing of an instrument under seal. See *McCalla v. Mortgage Co.*, 90 Ga. 113, 15 S. E. 687, where it was held that, unless the ratification of a forged deed be made in writing and under seal, it will be ineffectual in favor of any person who has not acted upon the ratification in a way to make the doctrine of estoppel applicable for his protection; and that a ratification by mere silence, after one has parted with his money on the faith of such a deed, will not render the deed operative in favor of the person who has thus acted. A prominent case on this subject is that of *McKenzie v. Linen Co.*, L. R. 6 App. Cas. 82, where it was held that, although a person knows that a bank is relying upon his forged signature to a bill, there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel. See, also, *Zell's Appeal*, 103 Pa. St. 344, where it was held that the mere omission by one whose signature is forged to an instrument for the payment of money to seek the holder, and proclaim the forgery, immediately on his discovering it, is not such acquiescence as will estop him from subsequently setting up the forgery as a defense to an action on the instrument, where it is not shown that the holder suffered any detriment by reason of such omission. And see *Bigelow, Estop.* 638 et seq. The court below, in the instruction above quoted, left out of view the principle here stated, and charged broadly and without qualification that silence after knowledge of the unauthorized act, and after an opportunity to speak, would amount to a ratification.

Even if information as to the unauthorized act came to the defendant before the money was paid over, still, if all that was said to him and all that he knew about the matter was that his brother had signed his name to "a bond," it is clear that he was not, as a matter of law, under any obligation to go out of his way for the protection of others. As we have already said, it is incumbent upon one who deals with a person claiming authority to act for a third person to ascertain whether such authority really exists or

not; and a person who is informed that an unauthorized person has claimed authority to act for him, and who has done nothing to warrant the belief that the representation is true, has a right to assume that others will not trust to the representation, but will make due inquiry for their own protection. It is their place to come to him, not his to go to them. His omission to speak would not amount to an estoppel unless he was placed in a situation in which others might reasonably interpret his silence as an admission that the act was authorized; and even then he would not be estopped unless he knew or had good reason to believe that others were about to act upon the faith of the supposed authority. Indeed, this court has held that although a promissory note to which a person's name purports to be signed is exhibited to him, and he goes so far as to acknowledge its genuineness to the person who exhibits it to him, and who afterwards, upon the faith of this admission, purchases it from the payee, yet no estoppel will result in the absence of anything going to show that the person who made the admission knew or had good reason to believe that a purchase of the note was in contemplation. *Freemy v. Hall*, 93 Ga. 706, 21 S. E. 163. In *Bigelow, Estop.* p. 195, it is said: "It is not enough to raise an estoppel that there was an opportunity to speak, which was not embraced; there must have been an imperative duty to speak. Nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice if the true state of things is not disclosed. To use an apt illustration of one of the judges, a man may become apprised of the fact that his name has been forged to a negotiable instrument, and so become aware that some one may be led to purchase the paper by supposing the signature to be genuine, and yet he is not bound to proceed against the forger, or to take any steps to protect the interests of others whose claim he may know nothing of. So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct, as the natural and obvious result of it. If the party is present at the time of the transaction, it may be necessary for him to speak if speaking would probably prevent the action about to be taken. If absent, his silence (or other conduct) must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken. Only thus can a duty to speak arise."

According to the charge of the court in this case, as applied to the evidence, if a person signs the name of another to a bond without authority, and the latter learns of it, although he knows nothing of the nature and character of the bond, the purpose for which it was given, nor to whom it was given, nor anything further than was conveyed

by the statement that a certain person had signed his name to "a bond," and although the signer was not in any sense his agent, and had never been held out as having authority to act for him in such a transaction, he is nevertheless, as a matter of law, bound to investigate the matter, and is accordingly chargeable with knowledge of all the facts to which investigation would lead, and if he does not go to the parties concerned, and repudiate the unauthorized act, he must be held to have ratified it. This was clearly wrong. Judgment reversed.

(99 Ga. 220)

**VASON et al. v. GILBERT et al.**

(Supreme Court of Georgia. July 12, 1896.)

RES JUDICATA—PARTITION—TRUST DEED—ADDENDUM.

1. This case turned upon the question whether or not the defendants in error were common owners with the plaintiffs in error of the property partitioned, and the determination of this question depended upon the effect to be given to a decree which had been rendered in a former case. This being so, and the trial judge having rightly held that under the terms of that decree the defendants in error had an interest in the property in question, the correct result was reached.

2. The legal effect of a conveyance duly made and delivered to a trustee cannot afterwards be changed by an addendum thereto, which he voluntarily executed and had recorded, the same not having been assented to or accepted by any other party at interest.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action between A. P. Vason and others and J. I. Gilbert and others. From the judgment Vason and others bring error. Affirmed.

J. W. Walters and Harrison & Peebles, for plaintiff in error. R. Hobbs and Wooten & Wooten, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 744)

**LEWIS v. NEVILS et al.**

(Supreme Court of Georgia. Feb. 10, 1896.)

APPEALS FROM JUSTICE COURT—WAIVER OF RIGHT—ACTION ON CONTRACT—PLEADING.

The act of September 26, 1883, as amended by the act of October 16, 1891, requiring defenses to actions in justices' courts upon unconditional contracts in writing to be made at the first term, is not applicable to a suit like the present, upon a written contract which is not unconditional; and consequently, though the defendant made no appearance or defense in the justice's court, and a judgment was therein rendered against him by default, he was not cut off from entering an appeal to the superior court, nor from making his defense in the latter court, it appearing that, in compliance with the act of October 15, 1885, he offered, before the case proceeded to trial on the

appeal, to reduce his defense to writing, and it also appearing that the amount for which the suit was brought exceeded \$50.

(Syllabus by the Court.)

Error from superior court, Bullock county; R. L. Gamble, Judge.

Action by Nevils & Rushing against William Lewis in justice's court. There was a judgment for plaintiffs, and defendant appealed to the superior court, where the appeal was dismissed. Defendant brings error. Reversed.

Brannen & Moore, for plaintiff in error. H. B. Strange, for defendants in error.

LUMPKIN, J. On the 20th of May, 1893, a written contract was entered into between William Lewis and J. D. Moye. It contained the following stipulations: "First, that Wm. Lewis agrees to pay the said J. D. Moye sixty-five dollars to work till the 20th of May, 1893. First party further agrees to pay J. D. Moye eighteen dollars per month for the balance of the year 1893, or for the time said J. D. Moye works; money to be paid Nov. 15th, 1893." This contract was subsequently assigned to Nevils & Rushing, who brought an action thereon against Lewis in a justice's court; and, there being no defense or appearance by the defendant, they obtained a judgment on the same for \$65. Lewis entered an appeal to the superior court, and, at the hearing of the same, offered to file a plea of failure of consideration and of recoupment, alleging therein that the plaintiffs were not bona fide holders of the contract before its maturity. The court declined to allow the plea to be filed, and, on motion of the plaintiffs, dismissed the appeal.

We are quite certain that this contract was not an unconditional one. The meaning of the phrase agreeing to pay \$65 "to work till the 20th of May, 1893," in view of the fact that the contract is dated that very day, is certainly ambiguous; and the further agreement to pay him \$18 per month is necessarily conditioned upon his performing his part of the contract. It follows that the act of September 26, 1883 (Acts 1882-83, p. 103), as amended by the act of October 16, 1891 (Acts 1890-91, vol. 1, p. 111), requiring defenses to actions in justices' courts founded upon unconditional contracts in writing to be made at the first term, has no application to cases of this kind. The defendant was not, therefore, cut off either from entering an appeal to the superior court, or from making his defense in that court.

An appeal to the superior court was proper, because the amount for which the suit was brought exceeded \$50; and it appears that, before the case proceeded to trial on the appeal, the defendant, in compliance with the act of October, 1885 (Acts 1884-85, p. 97), offered to reduce his defense to writing. The court therefore erred in not allowing the plea to be filed, and in dismissing the appeal. Judgment reversed.

(80 Ga. 244)

**DICKEY v. GEORGIA & A. RY.**

(Supreme Court of Georgia. July 13, 1896.)

**APPEAL—BRIEF OF EVIDENCE.**

The writ of error in this case is dismissed, for the reasons stated in the syllabus in *Ingram v. Clarke*, 22 S. E. 834, 96 Ga. 777. And see *Kirby v. Lippincott* (this term) 25 S. E. 287; *Railroad Co. v. Williams* (this term) 24 S. E. 852.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action between M. J. Dickey and the Georgia & Alabama Railway. From a judgment for the latter, the former brings error. Dismissed.

Williams & Land, for plaintiff in error. E. A. Hawkins, for defendant in error.

PER CURIAM. Writ of error dismissed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 148)

**DOLLAR et al. v. RODDENBERRY.**

(Supreme Court of Georgia. Aug. 12, 1895.)

**EXECUTION SALE—GROWING CROPS OF TENANT.**

Where, after the rendition of a judgment against the owner of land, the latter rented the same to another, who planted an annual crop thereon, and, before the maturity of the crop, an execution issued from such judgment was levied upon the land so rented, the purchaser at a sale thereunder acquired the title of the owner in the land; but, as to the growing crop, he acquired only the interest of the owner as landlord, and was therefore not entitled, as against the tenant, to maintain an action of trover for the recovery after its maturity of the entire crop.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Action by S. A. Roddenberry against W. A. Dollar and others. Judgment for plaintiff. Defendants bring error. Reversed.

D. A. Russell and Glenn & Rountree, for plaintiffs in error. Donalson & Hawes, for defendant in error.

ATKINSON, J. A judgment in this state operates only as a lien upon the property of the debtor, and neither divests his title nor in any manner interferes with his right of possession or control over his property until it is enforced, and the title transferred to another, by a sale under execution. Notwithstanding the rendition of a judgment against him, the owner of land may lawfully let the same to a tenant for years or at will. The tenant, however, takes the leased premises subject to the right of the judgment creditor to terminate its existence by the enforcement of the judgment and a sale of the land. In such a case, while the tenancy may, by contract as between the original landlord and tenant, be for a definite term,

it is nevertheless, by operation of law, at the will of the judgment creditor, and subject to be determined by him at any time by an enforcement of the judgment. At common law it was the element of uncertainty in the duration of his term which entitled a tenant at will to his emblements. See 1 Co. Litt. p. 55a. And this element of uncertainty is introduced into the tenancy now in question, not by the act of the tenant, but by the voluntary act of the judgment creditor, who is now seeking to deprive him of his emblements. If uncertainty in the duration of his term is the circumstance which entitled the tenant to his emblements, surely under a tenancy at one time certain, but afterwards rendered uncertain because, by operation of law, it came to be at the will of the judgment creditor, the tenant ought not to be deprived of his emblements. Under an execution against the landlord, the sheriff is entitled to seize, and the purchaser acquires at the sale, no greater interest in the premises than the landlord himself had. If this be true,—and that it is cannot be seriously questioned,—then, under the state of facts existing here, this defendant is entitled to recover. Such recovery is allowable on the most obvious principles of justice and reason, because the time for the termination of his estate is rendered uncertain, not in consequence of any wrongful act of the tenant himself, but because of the necessary uncertainty as to the time at which the judgment creditor may choose, by a sale of the rented premises, to extinguish the title of the tenant's lessor. At a sale of the property of the landlord, the purchaser acquires his interest in the leased premises, and as well his interest in the way-growing crops, but no more. If, prior to the sale, the tenant had given his note, payable to the landlord, covering the rent for the full term, the consideration of this note would have failed when the title of his landlord was extinguished, and he was acquired to attorn to another. *Ferguson v. Hardy*, 59 Ga. 758. If he had paid the rent in advance, he must, nevertheless, account to the purchaser for the rent for the remainder of his term after the sale of the leased premises, looking to the warranty of his landlord for reimbursement, because he held his lease subject to the judgment lien. The only effect of the judicial sale upon the tenant was to change the personnel of his landlord. By virtue of his purchase at the sheriff's sale, the purchaser acquired whatever interest the landlord had by way of rent in the unmaturing crops at the time of the sale; and therefore, upon the maturity of the crop, he was entitled to the entire rent of the premises to be paid by the tenant, but not to the entire crop of the tenant. The former he took by virtue of his purchase at the sheriff's sale. The latter remained in the tenant by virtue of his right to emblements.

No case has heretofore arisen in this state

in which this precise question has been presented for the consideration of this court. Cases have arisen in which the relative rights of the landlord and the judgment creditor touching the rent reserved have been considered. But the same question has arisen in other states, and in one of them we find the question here made directly decided, and supported by such satisfactory reasoning that we are disposed to accept the conclusion reached in that case as satisfactory to us in this. See *Bittinger v. Baker*, 29 Pa. St. 68. We are aware of the line of decisions in other states in which it is held that the claim of a mortgagee to the growing crop is superior to that of a tenant to his emblements; but in all of those cases it will be observed that the mortgage itself, under the statute of the state in which the question arose, passed the legal title to the mortgagee, and divested the title of the mortgagor. We encounter no such difficulty here, however, for, as above stated, a judgment operates simply as a lien upon the property of the debtor.

We are the more readily persuaded to the correctness of this conclusion because it coincides with our view of abstract justice and of right. It is an ancient maxim of the law that he who rightfully sows ought to reap the profits of his labor; and if he rightfully enter in subordination to the title of another, but his tenancy be terminated without fault on his part, and in consequence of some uncertain event, he shall be allowed to take away his way-growing crops; for emblements, in strict law, are confined to the products of the earth arising from the annual labor of the tenant. The tenant, under the protection of this rule, is invited to agricultural industry without the apprehension of loss by reason of some unforeseen contingency which might arise and terminate his estate. It would seem to us a most unreasonable rule, and one which would tend greatly to embarrass the business of agriculture, if every tenant who rightfully entered under the owner of land, after the cultivation of his crop, could be deprived of it at the will of a judgment creditor. Under such a rule, no man would be safe in the enjoyment of the product of his labor, and the judgment creditor would be thus enabled to reap where he had not sowed, and gather where he had not sowed; and this is not allowable. Let the judgment of the court below be reversed.

(37 Ga. 56)

**COLUMBUS & R. RY. CO. v. CHRISTIAN.**  
(Supreme Court of Georgia. Aug. 16, 1895.)

**LIABILITY OF MASTER FOR TORTS OF SERVANT—INSTRUCTIONS—EVIDENCE OF CHARACTER.**

1. For the wrongful act of an employé of a railroad company resulting in injury to another, committed while engaged in the performance of the company's business in the line of

his duty, the company is liable. But if, while so engaged, upon account of some private feud previously existing or suddenly arising, wholly disconnected with his duties as such employé, and not pertaining to the business then in process of transaction (the company then not owing to the other person the duty of personal protection), he commit injury upon the person of another, the company would not be liable. The turning point in the present case being whether the agent of the company wrongfully slew the husband of the plaintiff, and, if so, whether it was done while he was engaged in the transaction of the company's business, in the line of his duty, because of differences arising in the settlement thereof, or whether he committed the homicide because of a personal grievance wholly disconnected with the business then in hand, it was error for the court to charge generally, and without qualification, as follows: "If you believe from the testimony that Dixon was not justifiable in taking the life of Christian, then I charge you that the plaintiff would be entitled to recover for whatever damages the evidence shows she has sustained by reason of the death of her husband."

2. If the homicide be wrongful, whether the offense be properly classed as manslaughter or murder would not be material; but, if the agent was justified in its commission, no liability would arise against the company, whether the act was committed by him while engaged in the business of the company, in the line of his duty, or otherwise.

3. When, in the course of a judicial proceeding, it becomes material to inquire whether one is, generally speaking, a "dangerous man," evidence of general reputation with respect to those particular characteristics which tend to establish the fact is admissible; but it is not competent for the party offering the witness for that purpose in such a proceeding to show affirmatively by him particular acts of violence or manifestations of petulance in a particular instance upon the part of the person whose character is under investigation.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Action by Ella E. Christian against the Columbus & Rome Railway Company to recover damages for the death of her husband. From a judgment for plaintiff, defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Little & Little, C. J. Thornton, H. O. Cameron, and Peabody, Brannon, Hatcher & Martin, for plaintiff in error. John W. Park, Blandford & Grimes, L. F. Garrard, and Tol. Y. Crawford, for defendant in error.

ATKINSON, J. 1, 2. Twice before this case has been before this court for review. The decision made upon its first appearance is reported in 79 Ga. 460, and 7 S. E. 216, and that made when it was last here appears in 80 Ga. 124, and 15 S. E. 701. The law of the case seems to have been practically settled by the decision first above indicated. In that case, upon authority of our Code provision, it was ruled that liability of railroad companies for injuries committed upon others by persons in their employment was not confined to injuries inflicted by their servants while engaged in running and operating their cars, but extended to injuries inflicted by their employes in the conduct of their business other

than those resulting from negligence in running their trains, etc. The effect of this construction placed upon this section of the Code is to eliminate entirely from the region of doubt the proposition as to whether railroad companies are answerable generally for torts committed by their employes while engaged in the transaction of the business of their employers. Whatever room there may be for the consideration of that question by courts in other states, we are concluded, not only by the Code provision above referred to, but likewise by the adjudications of this court upon that section of the Code. But while the section of the Code in question lays down the proposition broadly that, for damage done by any person in the employment and service of such company, the latter shall be liable, such language must be understood to mean such torts only as are committed by an employé while engaged about the business of his employer; for it cannot be presumed that the legislature intended that the mere circumstance of a person being in the employment of a railroad company should render it liable for all torts committed by such employé, whether in any manner connected with the performance of his duties to his employer or otherwise. Such a construction would impose upon the employer a responsibility for the probity of an employé's conduct in all the relations of life, and under those circumstances under which the employer could not by any possibility exercise the slightest, much less a controlling, influence over the conduct of the person employed by it. Therefore, to make it answerable, the tort must have been committed by the employé, not necessarily by the authority of the master, either express or implied, but by him while he was engaged about the business of his master. But if, while the employé is engaged about the business of his master, upon some matter or some provocation wholly disconnected with the performance of his duties as a servant, upon some private feud, in an altercation with a third person, he should commit an injury upon such third person, such injury would not fall within the class for which the master is liable, unless it be a case in which, by reason of the relation existing between the person thus injured and the railroad company, the latter owed to the former the special duty of personal protection, as in the case of a passenger before the completion of his journey. Of course, in such a case, if an employé, charged with the duty of executing upon the part of the master the contract of passenger carriage, should wrongfully inflict injuries upon the person of the passenger, the carrier would be liable.

In the present case, the husband of the plaintiff was a patron of the defendant, having frequent occasion to deal with it and its agents touching the transportation of freight; and in the course of one of his visits to the freight office of the defendant, and while engaged in discussing his business relations

with the agent of the company, he was slain by the agent. The turning point in the case was whether the agent of the company wrongfully slew the husband of the plaintiff, and, if so, whether it was done while he was engaged in the transaction of the company's business, in the line of his duty, because of differences arising in the settlement thereof, or whether it was wholly disconnected with the business in hand. Upon this question the court charged the jury: "If you believe from the evidence that Dixon (meaning the agent of the defendant) was not justifiable in taking the life of Christian (plaintiff's husband), then I charge you that the plaintiff would be entitled to recover whatever damages the evidence shows she has sustained by reason of the death of her husband." The husband of the plaintiff, as we have seen, was a patron of the defendant. He was at the place where he was killed rightfully, and upon the implied invitation of the company, to transact his business with its agent; and, in the transaction of such business, he was, at least, entitled to protection against the violence and insults of such agent. If in the course of the transaction of such business, upon provocation growing out of the negotiations between the parties, he was wrongfully slain by the agent of the company, the latter would be liable. But even though the homicide might have occurred during the time the negotiations were pending between the agent of the company and the deceased, if the deceased was slain by the agent upon some private feud, growing out of other matters, wholly disconnected with the transaction of the business then in hand, and upon some provocation given by the deceased, the company would not be liable. If, however, the agent of the company took advantage of the opportunity afforded by the presence of the deceased at his place of business to bring about a difficulty with the deceased upon the occasion of some previous private quarrel, the company would be liable, because of the obligation imposed upon it by law to at least afford to its patrons protection against the violence of its agents, when the patron is himself without fault, and is engaged about his business with the company. If, however, the patron himself provoke a difficulty which terminates in his homicide, thus withdrawing the agent from the business of the company to engage in a settlement of an outside controversy with himself, the company would not be answerable for the consequences resulting to such patron from the violence of the agent thus provoked; or, if the patron were himself guilty of such disorderly conduct as would authorize his expulsion from the premises, the agent of the company might be authorized to expel him, using only such force as would be necessary to accomplish that purpose; but such conduct or provocation would not justify the homicide of the patron upon the part of the agent, and the company could not exonerate itself from liability for the com-

sequences of the act of the agent done on its behalf, without showing that the agent was justified in the premises. Of course, if the homicide committed by the agent was justifiable, the justifiable act of the agent could not be made by relation the wrongful act of the company. We think, therefore, that when the court made, by its charge, the question as to whether or not the act of the agent was justifiable the sole test of the liability of the company for the damages resulting from the homicide of the plaintiff's husband, it left entirely out of consideration the question as to whether or not the homicide was committed under such circumstances as would excuse the company from liability, upon the theory that it was a mere personal conflict, wholly disconnected from the business of the company. Whether or not the wrongful act alleged to have been committed was committed by the servant, and, if so, whether it was done in the course of the transaction of the business of his employer, or upon independent provocation, for the consequences of which the company would not be liable, are questions for the jury, and should have been submitted for their consideration. If the homicide be wrongful, and committed in the course of the transaction of the business of the company, it can make no difference whether the offense committed by the agent be classed as manslaughter or murder; the company would, nevertheless, be liable. But, if the agent was justified in its commission, no liability could arise against the company, whether the act was committed by him while engaged in the business of the company, in the line of his duty, or otherwise.

3. In the course of the trial, a number of witnesses were introduced for the plaintiff, tending to show that Dixon, the agent of the company, was a dangerous man, and it was sought to establish this fact, not by general reputation, but by proving that he had had a number of disputes and altercations with different persons; and a motion was made to rule out all of this class of evidence, upon the ground that it was irrelevant, and upon the further ground that it was not admissible for the purpose of showing the dangerous character of the defendant's agent. Proof that one is a dangerous man in a general sense involves an inquiry into the character of the person alleged to be dangerous, and any evidence of the existence of a general reputation which tends to establish such a character would be admissible; but it is not competent for a party who offers a witness for the purpose of proving general reputation either to show particular acts of violence or manifestations of petulance in particular instances upon the part of the person whose character is under investigation. Where it is sought to establish as against a party or witness a special general character, such general character must rest largely upon the opinions of witnesses, based upon their observation of the conduct of the individual, and upon the im-

pressions formed upon their minds by reports from other persons touching such character; and while, upon cross-examination, it may be competent to test the value of the opinion of the witness by an inquiry into the knowledge of those particular facts upon which his opinion rests, the reputation of the person whose character is under review must, at least, be established by general reputation, and not by special acts. As has been well said by the supreme court of Pennsylvania in the case of *Frazier v. Railroad Co.*, 38 Pa. St. 110: "Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established; and sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character." We think, therefore, that, if evidence of the reputation of the agent of the defendant company as a dangerous man was material, such reputation could not be proven by particular acts, nor by manifestations of petulance upon particular occasions. See 1 Greenl. Ev. (15th Ed.) p. 94. Judgment reversed.

(98 Ga. 176)

## EMPIRE HOTEL CO. et al. v. MAIN.

(Supreme Court of Georgia. March 16, 1896.)  
INSOLVENT CORPORATION — APPOINTMENT OF RECEIVER.

1. Even if the directors of an insolvent corporation, after advancing money to it, and accepting for the same preferred stock of the company, subsequently unlawfully canceled this stock, and issued to themselves promissory notes of the company for the amounts severally advanced by each, and sought to collect the same by suit, these facts are insufficient to authorize a court of equity, upon the petition of a stockholder, to appoint a receiver to take charge of the assets and franchises of the corporation. In such case the plaintiff can be fully protected as to all of his rights in the premises by a proper injunction, such as was granted in the present case, and to which there was no exception.

2. Where a receiver of the property of a corporation was improperly appointed, an order directing him to sell such property was necessarily erroneous.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by H. K. Main against Empire Hotel Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

R. J. & J. McCamy and Jones & Martin, for plaintiffs in error. C. B. Reynolds, Maddox & Starr, and King & Spalding, for defendant in error.

LUMPKIN, J. The facts of this case are numerous and somewhat complicated, and, in the argument before this court, quite a number of legal questions were presented. However, as the case, in our judgment,

should have been made to turn upon the controlling propositions announced in the first headnote, we shall limit our remarks accordingly.

It was charged that the directors, after advancing money to the hotel company, and accepting for the same preferred stock of the corporation, subsequently unlawfully canceled this stock, issued to themselves promissory notes of the company in lieu thereof, and were seeking to collect the same by suit. It is fair to say in this connection that these directors introduced evidence strongly tending to show that their conduct in the premises was neither unlawful nor fraudulent, but was fully warranted by the existing facts. Upon the assumption, nevertheless, that it was not, we do not think, in view of the prayers of the petition, that a receiver should have been appointed. In our opinion, the injunction granted by the judge, and to which there was no exception, gave to the plaintiff all the relief to which he was entitled under the prayers of his petition. Whatever may be the rights of stockholders in an insolvent business corporation whose affairs manifestly cannot be profitably conducted, with reference to the institution of equitable proceedings for the appointment of a receiver to be charged with the duty of winding up the business of the corporation, and administering its assets, such a case is not presented by the petition filed in the proceeding with which we are now dealing. While the plaintiff's petition contains a recital of facts which might have authorized relief upon the line just indicated, and while much evidence was introduced in support thereof, he prays in his petition for no relief other than the appointment of a receiver to take charge of the affairs and property of the company, for an injunction restraining the directors and common stockholders from interfering with its affairs or prosecuting suits against it, and for "general relief." There is no prayer whatever for administration, for a sale of the property, or for a distribution of its assets; much less a prayer looking to the dissolution of the corporation on the ground that its business cannot longer be profitably conducted, nor the purposes for which it was chartered successfully carried into effect. A prayer for general relief covers much, but it can hardly be extended so as to authorize relief of an entirely independent nature from that specifically prayed for, and forming the basis upon which the plaintiff's petition was framed. Reduced to its last analysis, the petition is simply an attempt to place the affairs and property of the hotel company in the hands of a receiver, for no other reason than that its directors have been guilty of misfeasance or malfeasance in the performance of their corporate duties. The appointment of a receiver for this purpose and on this ground is not allowable. "The law is well settled that the courts have no power to

remove corporate officers. \* \* \* It is also well established that a court of equity cannot practically remove corporate officers by enjoining them from performing any of their customary duties, and by appointing a receiver to manage the corporate affairs." 2 Cook, Stock, Stockh. & Corp. Law, § 746. "A receiver will not be appointed in a suit by a stockholder to remedy the frauds or ultra vires acts of the directors or of the corporation itself. \* \* \* Other remedies will be applied." Id. § 863. And, to the same effect, see High, Rec. §§ 287, 288.

It is obvious that the remedy of injunction will generally, if not in every instance, afford ample protection to a stockholder as against mismanagement of the corporation's affairs by its directors or other officers. Such relief was granted in the present case, and, as above intimated, would seem to be entirely adequate in preserving the plaintiff's rights in the premises. The appointment of a receiver being erroneous, it follows that the order directing him to sell the property of the hotel company cannot be sustained. Judgment reversed.

(38 Ga. 178)

#### WORTHAM v. SINCLAIR.

(Supreme Court of Georgia. March 18, 1896.)

PLEADING PAYMENT—ORIGINAL PROMISE—QUESTION FOR JURY.

1. A plea of payment which fails to allege with reasonable certainty when, how, and to whom the payment was made is insufficient; and, if advantage is taken of its defects by proper demurrer, it should be stricken, unless amended.

2. The evidence in the present case tended to establish an original undertaking on the part of the defendant, and not a mere verbal promise by him to pay the debt of another; and as the jury might have found that the defendant was liable to the plaintiff upon the account sued on, as upon an implied assumpsit for money laid out and expended for the use of the defendant, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, McIntosh county; R. Falligant, Judge.

Action by T. O. Wortham against D. S. Sinclair. Plaintiff was nonsuited in the superior court, and brings error. Reversed.

The following is the official report:

Wortham sued Sinclair upon an account dated at Darien, Ga., December 1, 1892, for "eight months' board for G. W. Brandon, as per agreement, at \$8.00 per month, \$64.00; one month's board for Ohese Pearce, as per agreement, at \$8.00." A judgment was rendered for plaintiff for the \$72 sued for, and defendant appealed to the superior court. In that court, defendant pleaded not indebted, and also the following: "The debt claimed by plaintiff has been fully paid off and discharged before the entering of his suit." The plaintiff moved to strike the last-named plea, upon the ground that it was uncertain, indefinite, and not sufficiently specific. This

motion was overruled, and to this ruling plaintiff excepted. At the conclusion of the evidence for plaintiff, defendant moved for a nonsuit, on the ground that the evidence showed no contract between plaintiff and defendant, and that there was no assumption of the debt in writing by defendant. This motion was sustained, and to this ruling, also, plaintiff excepted. The only evidence for plaintiff was that of plaintiff himself. He testified: "I had charge of Mr. Sinclair's turpentine business in this county. I had entire management of the business. I hired the hands. We did not have hands enough to run the business, and Mr. Sinclair gave me the money to go to North Carolina to hire hands on the best terms I could. I went to North Carolina, and hired Mr. Brandon and Mr. Pearce, [at] ten dollars per month and their board. I was to give the negroes twenty dollars per month and rations out of the commissary. When I got back from North Carolina to Darien, I told Mr. Sinclair what I had done, and what I had agreed to give them, and he said to me, 'All right.' It had been the custom for several years for me to hire the hands, and they were boarded at different places, and the board was paid to whoever they were boarded with. I, myself, was boarded at first, and Mr. Sinclair always paid the board to the person with whom I boarded. I took the two white men, Brandon and Pearce, to my house. I charge for their board eight dollars per month, each, and Mr. Sinclair knew they were staying there. The usual price for board out there was ten dollars per month. G. W. Brandon was boarded at my house eight months, and Chese Pearce one month. These men owe me nothing, but Mr. Sinclair owes me for their board and the the sum of \$72.00, as set out in the bill of particulars sued upon, and the amount is just, true, due, and unpaid. I made no contract with Mr. Sinclair to pay me the board of Brandon and Pearce, only that I was to go to North Carolina, and hire men on the best terms for the business I could; and I agreed that they should be paid ten dollars a month and board, and, when I came back and told him what I had done, he said it was 'all right.'"

Lester & Ravenel, for plaintiff in error. W. A. Way, for defendant in error.

LUMPKIN, J. This was an action upon an account, tried in a justice's court, wherein the plaintiff recovered. The defendant entered an appeal to the superior court, and, on the trial there, the plaintiff was nonsuited. The case depends almost entirely upon the view to be taken of the evidence, a statement of which appears in the official report.

1. In the superior court, the defendant filed a plea alleging: "The debt claimed by the plaintiff has been fully paid off and discharged before the entering of this suit."

The plaintiff's motion to strike this plea, upon the ground that it was uncertain, indefinite, and not sufficiently specific, was overruled. It is obvious that the plea was lacking in several respects. However, the motion to strike, which was in the nature of a general demurrer, was itself deficient, in that it entirely failed to point out these defects.

2. Without undertaking to say what verdict ought to have been rendered under the evidence introduced by the plaintiff, we are satisfied the case ought to have been submitted to the jury for the purpose of allowing them to pass upon the question whether or not there was an original undertaking on the part of the defendant to pay to the plaintiff the board bills constituting the subject-matter of the plaintiff's account. Judgment reversed.

(98 Ga. 171)

SAVANNAH & O. CANAL CO. v.  
SHUMAN.

(Supreme Court of Georgia. March 16, 1896.)

LIMITATION OF ACTIONS—BREACH OF CORPORATE DUTY.

Although a particular individual may have an interest in the performance by a corporation of the duties devolving upon it by its charter in which the general public does not share, yet, if no special right accrues to him as an individual under the charter, his right of action for damages resulting from a breach of duty on the part of the corporation does not fall within any of the classes of rights mentioned in section 2916 of the Code, but under the general law, and consequently his action for such damages must be brought within four years.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by H. A. Shuman against the Savannah & Ogeechee Canal Company. Judgment for plaintiff. Defendant brings error. Reversed.

Denmark & Adams, for plaintiff in error. W. C. Hartridge, for defendant in error.

SIMMONS, C. J. The sole question to be determined in this case is whether the action was barred by the statute of limitations. The defendant is a canal company, incorporated under an act of the legislature (Dawson's Compilation, p. 97); and the gravamen of the action is that the company did not keep its canal in such condition as to enable the plaintiff to transport his lumber and wood over it in boats. It does not appear from the petition that the injuries complained of were sustained within four years before the filing of the suit, and for this reason the defendant contended that the action was barred. The trial judge held that, under section 2916 of the Code, the action was not barred. That section is as follows: "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within

twenty years after the right of action accrues." We think the court erred in holding this section applicable. There is nothing in the defendant's charter which creates, in favor of any individual, such a statutory right as would authorize him to bring suit against the corporation at any time within 20 years. It is true, the charter requires the company to keep its canal "in good and sufficient order, condition, and repair, and at all times free and open to the navigation of boats, rafts, and other water crafts, and for the transportation of goods, merchandise, and produce," etc.; but no liability is expressly created in favor of any individual or individuals. There is a duty imposed for the benefit of the public, and any member of the public who has sustained injury by reason of a breach of this duty has a right of action against the company (see *Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937); but the fact that such a duty is imposed does not of itself create such a liability in favor of any individual as would bring the case within the section of the Code above quoted. In order to bring the case within this section, the liability would have to be one expressly created in favor of an individual or a class to which he belongs, as distinguished from one arising under the general law in favor of all persons who might be injured by a breach of the corporate duty. If the charter had declared that in case the company should fail to keep its canal in good condition and repair, and any person should be injured thereby, the company should be liable to such person for the injury, this would have created such a statutory right in favor of a person thus injured as would render this section of the Code applicable. Under the charter as it stands, however, the plaintiff's right of action for damages resulting from a breach of the duty imposed by the charter does not fall within any of the classes of rights mentioned in this section, but under the general law. And this is so although the plaintiff may have had an interest in the performance of the corporate duties in which the general public did not share. The four-years period of limitation was therefore applicable, and the demurrer ought to have been sustained. Judgment reversed.

(98 Ga. 170)

**BALDY v. HUNTER.**

(Supreme Court of Georgia. March 16, 1896.)

STATE COURTS—FOLLOWING FEDERAL DECISIONS—GUARDIANS—INVESTMENT IN CONFEDERATE BONDS.

1. The decisions of this court in the cases of *McWhorter v. Tarpley*, 54 Ga. 291, *Nelms v. Summers*, Id. 606, and in other cases, the doctrine of which is recognized in the case of *McCook v. Harp*, 7 S. E. 174, 81 Ga. 236, are binding upon this court, and it is not constrained to follow the decisions of the supreme court of the United States in cases involving the same or similar questions.

2. According to the above-cited Georgia deci-

sions, a guardian who, during the war between the states, in good faith invested the funds of his ward in bonds of the Confederate States, under an order of the judge of the superior court properly obtained under then existing statutes of this state, was protected thereby, and is not liable to the ward for the value of the money so invested.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Marianne J. Baldy, by her next friend, against J. H. Hunter, executor. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Barrow & Osborne, for plaintiff in error. Garrard, Meldrim & Newman, for defendant in error.

**LUMPKIN, J.** This case, in view of the former decisions of this court, by which the present bench is bound, and which have never been reviewed in the manner pointed out by law, presents a very narrow field for discussion. It involves two questions only: First, whether a guardian who, during the war between the states, in good faith invested the funds of his ward in Confederate bonds, under an order of the judge of the superior court properly obtained in conformity with the then existing statutes of this state, is liable to be called to account by his ward for loss thus occasioned; and, secondly, whether this court is constrained to follow the decisions of the supreme court of the United States rendered in similar cases.

On both questions the law has been definitely settled by previous adjudications of this court. The case of *Nelms v. Summers*, 54 Ga. 606, is exactly in point upon the first question; and that of *McWhorter v. Tarpley*, Id. 291, is conclusive of the second. We shall content ourselves with merely referring to the reasoning employed by Judges Jackson and McCay in the opinions delivered by them, respectively, in these cases, and will only further remark that the doctrine laid down by them is distinctly recognized by this court in the case of *McCook v. Harp*, 81 Ga. 236, 7 S. E. 174, which cites still other cases in point which came before this court for review. Judgment affirmed.

(98 Ga. 236)

**FORD et al. v. WILLIAMS.**

(Supreme Court of Georgia. March 23, 1896.)

AMENDMENT OF PLEA—WHEN ALLOWED—AFFIDAVIT.

Where the defendant in an action brought under the pleading act of 1893 filed a plea at the first term, in which he severally and distinctly answered each paragraph of the plaintiff's petition, as required by that act, it was, before the passage of the act of December 18, 1896, the right of the defendant at the trial term to amend his original plea by setting up a new and independent legal defense, without making an affidavit that, at the time of filing the original plea, or answer, he did not have

notice or knowledge of the new facts or defense set out in the amended plea or answer; and it was error to reject an amendment offered for this purpose solely on the ground that it was not filed at the first term.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Action by Minnie Williams, by her next friend, against J. W. Ford and others. From a judgment for plaintiff, defendants bring error. Reversed.

Grace & Jones, for plaintiffs in error. L. D. Moore, for defendant in error.

**LUMPKIN, J.** The only question presented for our determination in the present case is that which is indicated in the headnote. While it is true that the pleading act of 1893 (Acts 1893, p. 56) does distinctly declare that the defendant in a civil action "shall not, as heretofore practiced in this state, file a mere general denial, commonly known as the plea of the general issue," and thereby, in effect, abolished this plea, the act does not declare that the defendant, in case he severally and distinctly answers each paragraph of the plaintiff's petition, shall be cut off from all right of amending his defense after the appearance term. Whether or not such a result was in legislative contemplation when this act was passed, we cannot undertake to say. It is sufficient for us to know that the right to amend by setting up a new and independent legal defense was not expressly taken away. Before the enactment of the law in question, this right unquestionably existed; and as this act was radical in its nature, and made great innovations upon the practice prevailing before it took effect, it ought not to be too strictly construed. In other words, it would be going too far to hold that the pre-existing law, which undoubtedly allowed such right of amendment, was repealed by implication. As an evidence of legislative construction with reference to the meaning and effect of the pleading act of 1893, we refer to the subsequent act of December 16, 1895 (Acts 1895, p. 44), in which it is provided that: "The defendant, after the time allowed for answer has expired, shall not in any case by amendment set up any new facts or defense of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer, containing the new answer, he shall attach an affidavit that at the time of filing the original plea or answer he did not have notice or knowledge of the new facts or defense set out in the amended plea or answer." The language just quoted contains a clear intimation that the right to set up new defenses after the appearance term did exist; and the purpose of the last act was to cut off this right, except upon the conditions therein specified.

The exact question now ruled upon has never before been distinctly decided by this court, though we have had before us some cases in which the consideration of it has been more

or less directly involved. We think we have reached the right conclusion; but if, unfortunately, we have not done so, it is a matter of no great moment, since the act last above cited deals with the question in such manner as to relieve the courts in the future of any embarrassment in the matter of allowing or disallowing amendments to pleas. Judgment reversed.

(97 Ga. 44)

## CLAY v. PHOENIX INS. CO.

(Supreme Court of Georgia. Aug. 16, 1895.)

**INSURANCE—CONSTRUCTION OF POLICY—NOTICE TO COMPANY—WHAT CONSTITUTES—CONDITION AGAINST INCUMBRANCES—WAIVER OF BREACH.**

1. Without sacrificing the substantial limitations imposed upon the liability of an insurer by the contract between the parties, stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures, and to advance the beneficial purposes intended to be accomplished.

2. Where a real-estate renting agent is likewise an insurance agent, and, at the request of the owner of premises, procures a policy of insurance to be issued by a company represented by him upon tenements placed under his control as a renting agent, if the policy contains a condition that it shall be void if the premises should become vacant or unoccupied without notice to the company, and before a loss the premises do in fact become vacant and unoccupied, but with full knowledge on the part of the agent of the company of the fact, such knowledge would amount to notice to the insurance company, even though the information from which it was derived was really imparted to the person who was thus both real-estate renting and insurance agent in business relating to the former, rather than to the latter, capacity. In such a case notice is the potential fact necessary to the protection of the insurer; and if the agent, having full power to cancel the policy, nevertheless permits it to remain of full force after notice of the breach of condition, the company is bound.

3. In such a case, if the policy of insurance contain a stipulation "that if the property insured, or any part of it, is mortgaged, or otherwise incumbered, either prior or subsequent to the date thereof without consent of this company written thereon," the same should be void, but at the time it was issued the agent of the company through whom the policy was issued knew of the existence of a mortgage upon the premises insured, and the company nevertheless issued the policy, but failed to enter thereon its consent to such incumbrance, but in the meantime accepted the premiums required, it will, in case of loss, be held to have waived such stipulation, and will be estopped to insist upon a forfeiture thereunder. In such case, refusal to insure, or cancellation of the policy, is the right of the insurer, and not forfeiture of insurance after loss.

4. Under the principles here announced, there was sufficient evidence to justify the submission of the questions of fact involved to a jury, and the court accordingly erred in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. J. Hunt, Judge.

Action by C. C. Clay against the Phoenix Insurance Company. From a judgment of nonsuit, plaintiff brings error. Reversed.

The following is the official report:

C. C. Clay sued the insurance company upon a policy of insurance, and for damages and attorney's fees, alleged to be due him on account of the bad faith of the company in refusing to pay loss he alleged he sustained by the burning of a house and certain furniture covered by its policy of insurance. At the close of the testimony for plaintiff defendant's counsel moved for a nonsuit on the following grounds: (1) Because plaintiff, by his proof, failed to make out any cause of action; (2) because plaintiff, by his proof, showed that when the policy was issued, and since, there was a mortgage upon the property, not disclosed to defendant; (3) that during the continuance of the policy the premises insured became vacant in violation of the policy; (4) that no notice, either of the mortgage or the vacancy, was given to defendant, nor was any consent made by it thereon or therein, in accordance with the terms of the policy. The motion was sustained, and to this ruling plaintiff excepted. Plaintiff introduced the policy. By it defendant, subject to the conditions therein mentioned, insured plaintiff against loss or damage by fire to the amount of \$900,—\$500 on a building "occupied by assured as a family residence," \$200 on household furniture, including pictures, paintings, etc., and a piano while contained therein, and \$200 on piano. The term of insurance was from November 22, 1890, to November 22, 1891. The policy contained the stipulations that if the property insured, or any part of it, was mortgaged or otherwise incumbered, either prior or subsequent to the date of the policy, without the consent of the insurance company written on the policy, or if the premises should be occupied or used so as to increase the risk, or become vacant or unoccupied without notice to or consent of the company in writing upon the policy, then the policy was void. Further, that the insurance might be terminated at any time at the request of the assured, and might also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy. Further, that it was a part of this contract that any person other than the assured who may have procured the insurance to be taken by the insurance company should be deemed the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to the insurance. The policy was signed by defendant's president and secretary, and countersigned at Macon, November 22, 1890, by W. W. & R. S. Collins, agents. Plaintiff also introduced the record of proof of loss. Among other things, this contained the statement that the total insurance on the property was \$1,600 (in the policy notice was acknowledged of \$500 concurrent insurance); that the property belonged at the time of the fire to C. C. Clay; that J. H.

Tallman had a mortgage on the house and lot for \$2,500; that the building described or containing the property was, at the time of the fire, in charge of a negro in the yard, and Mr. George Brooks, living near; that the fire occurred about 11 o'clock p. m., September 6, 1891; and that the house and furniture were a total loss, and were of the value of \$2,750. Plaintiff also introduced the demand made by him upon the insurance company.

Two witnesses were introduced by plaintiff, —J. J. Clay and George Brooks. Clay testified: "The house was destroyed by fire on the night of September 6, 1891. It was worth \$1,500, and contained furniture and fixtures worth at a low estimate \$1,000. The list presented shows \$1,502 worth of property contained in the house, but I cannot say that it was all in there at the time of the fire. On Friday before the fire occurred on Saturday or Sunday night, I went through the house with Brooks. We were going to move the furniture the following Monday to Brooks' house, and thought there were five or six loads; all of \$1,000 or \$1,200. I missed two pictures which cost me \$50 apiece. Won't say there were \$1,500 worth in there at that time. I had it in there. They stole it out. There was a piano which was worth \$300. I suppose it was all burned. I got there on Sunday night or Monday after the fire, and saw remnants on the ground,—the iron parts of them, parts of lounge and mattress springs, which had not burned up. The house was totally destroyed, and I judge from the fire they all burned up. Can't swear positively that all the things on the list were there on Friday before the fire. I didn't take a list of them then, but noticed one or two things gone. I think everything was there; at least \$1,000. All the kitchen utensils were there. I procured this insurance from Hill, who clerked for Collins & Bro., the agents of defendant. Hill and Collins were then doing business together. Think I told Hill, when I applied for insurance, I wanted the policy written in the name of C. C. Clay, the property belonging to him. Friday morning before the fire I went to Jim Keel to get a permit for the property to remain vacant, and I saw him and Bob Collins. The house was then unoccupied, and had been two days. Collins & Bro. had charge of the property when I got back to Macon three weeks before the fire. I never took it out of their hands. It never was out of their hands. I told them Friday morning to rent it out if I did not succeed in making arrangements with Brooks. I rented it the last time myself on Monday evening, and the woman stayed until Wednesday, and I turned her out for nonpayment of rent. The property then belonged to C. C. Clay, and I was acting for him, and am now. If the case goes against me now, it will be my loss. At that time it would have been his. At that time he was the owner of the property. I sold it to him March 20, 1890, and was agent for Mrs. B. E.

Clay in making the sale. The property did not originally belong to me, but to her. When I took out the insurance I told Mr. Hill there was a mortgage on the property, and he would find the facts at the office of Turpin & Brother. I know he went to Turpin & Company to get it. I saw him going there. He says, 'I will go around and get it;' and he found there was other insurance on it. He couldn't get it anywhere else. I don't know whether I said the mortgage was to Tallman or not. I notified him I had borrowed money, and had to keep it insured to pay this mortgage, to secure the payment of loss. How I know he went to Turpin Brothers? I didn't know how much insurance I had there. I had insurance with some other gentlemen,—I cannot remember who,—and the policy expired, and I then wished to do business with Collins Brothers, and that is how come them to get it. Question. When you told Hill there was a mortgage on this property, he wrote the policy anyway, did he? Answer. I have got it there. Q. He did not require any statement made by you other than that? A. I do not remember what he said. It has been a long time ago. I paid the money. I know he got my money. I reckon it was for that. When I paid him the money, I never got the policy. I don't think I saw it in two or three months. I don't believe I had it when the fire occurred. I am under the impression that I did not have it at all. I think he had it. I just left it [policy] there. I am under that impression. I may be wrong. I never knew what company it was in. I telegraphed to Bob Collins to meet me at the depot, and he done it. I am under the impression that I found the policy at his house after the fire. I just told him to go to Turpin Brothers, and find out about that thing, and write so much on that house. I had a talk with Robert and W. W. Collins. Q. Did you explain to Robert there was a mortgage on it? A. I don't think I talked to him. I think all the transaction was done with Jud Hill. I do not remember that I talked with Bob or W. W. The whole transaction was with Hill. He was the clerk in the office. I do not know who instructed the \$500 [concurrent] insurance put there. I cannot swear I told Mr. Hill to put it there. I told him there was other insurance on it, and he asked me who had it, and I told him Turpin had it. I did take out a policy of insurance with Turpin & Company. I don't remember the amount. The date of that policy is November 22, 1890. I told him to go to Turpin, and he would find the additional insurance which I had taken out on the policy. I was under the impression he went there, but afterwards I saw he had \$500 on it, and I thought he must have gotten it from them, for they were the only ones that knew it. I never told him where was \$500 other insurance. Told him to go and find out from Turpin Brothers, for I had for-

gotten what I had. Q. Did you see Mr. Hill at any time after you made this application for insurance about it? A. I saw him, or some of them, that got some money from me. I paid the premium for this policy, and must have paid it to their agents, Collins & Brother. I negotiated with Hill for the insurance. I told him about the mortgage on the property. I told him there was other insurance on it. I think the house was unoccupied at the time of the fire. There were negroes living, you may say, in the same yard. There was no partition. It was like living in and occupying the house. On Wednesday before the fire I turned the negro out, because she would not pay. I did not take hold of her and turn her out, but gave her notice to get out. On Friday before the fire I was at the office of Collins & Brother, and stayed there some time. They knew the house was unoccupied. I told Bob Collins and Hill to try and get somebody in it. That I thought I would have somebody in it Monday, and gave them my reasons. That Brooks would move the furniture out when I came back Monday, and he had a party he thought would take it, and furnish the furniture. Q. Was there anything more said about its being vacant, as to what you ought to do, or them? A. No, sir. Mr. Keel told me— I don't remember what they told me. I says, 'Get somebody in it,' and they had had charge of it for a long time. They said, 'All right.' I don't remember what they told me. I said, 'Get somebody in it.' They had charge of it for a long time. Q. Who did? A. Jud. I think he got \$10 a week from it, renting it out and keeping it up like an agent will for a man. Q. Now, you say you gave them notice it was vacant? A. They knew it was vacant. I talked with them about its being vacant before I left. I told them that I thought I would have a tenant Monday, but, if I did not, to help me get one. I do not recollect what they said. I think they told me they would do their best. They gave me no notice that the policy would be canceled, nor did they pay me any money for the unexpired term. When I went off, I did leave this property to rent, and told Jim and Bob and Jud Hill to rent it out for me. They were all engaged in the real-estate business. Q. Didn't you say, upon your first cross-examination, that you returned to Macon somewhere between three and four weeks before this loss occurred, and took charge of the property yourself, and took it out of Collins & Brother's hands? A. No, sir; I don't know that I took it out of their hands; but I tried to rent it out. I am under the impression there was no one in it when I got here. That Collins did not have any one in it, and I put some one in it, and they were to pay their rent in advance, and did not, and I told them to get out, Wednesday, I think, before the fire. The written portion of the policy is in Hill's handwriting. The mort-

gage to Tallman was given by Mrs. B. E. Clay. I have been in Collins Brother's office, and saw Hill there at work, and Collins had told me that Hill had charge of this business, had charge of their insurance business; that he had more to do with the insurance than he [Collins] did. I think I heard both Bob and W. W. Collins say this. Know I have heard Bob say so time and again before and after the loss occurred. Hill has done business in the presence of Collins about the property with me, and paid the insurance before him and W. W. Collins, both; and I have talked to Hill about it in their presence. His business was with Collins & Brother, and he generally managed their business. I think both the Collinses were present when we were talking about it, when W. W. & R. S. Collins were managing and renting out for me the property under discussion. I think they had charge of this property at the time. When I went to get this insurance, I went to Hill, and told him to get it for me. Don't remember that I told him what company. Am under the impression that he advised me, or it was through his influence that I took it out in the company that I insured with, though I generally left it with them. The mortgage on the property has been paid off. The property covered by the mortgage is worth fully \$15,000. I think the original amount of the mortgage was four or five thousand dollars, and was the only mortgage on the property that I remember." Brooks testified, in brief: "The house was burned about half past twelve o'clock on the night of September 6, 1891. The top of the house was just falling in when I got to the fire, and we could see through the windows that the house contained furniture. The house and its contents were all destroyed. At the instance of Mr. Clay, I procured a negro man to stay at this house at night. I cannot say that he stayed there at night. I told him to go and stay there, because Mr. Clay asked me to do it the Friday before. I saw the man every morning, coming from the direction of the house. I cannot swear that he went there. He was in my employment. I know everything was in the house Friday before the fire, because I saw it. Whether it was moved out between then and the time of the fire I do not know. I lived about two blocks from the house. I have seen the boy coming from there every morning, but didn't see him go there at night, for I was busy. I never saw him the night of the fire. When I saw him coming every morning from that direction, he was coming to my house, where he lived. He was almost to my fence. I think this was on Thursday or Friday morning, when I saw him coming. It was the only morning that I noticed him. I did not give him a key with which to get in the house, and do not know how he got in. Suppose the house was closed, but cannot say. Did not see the man

the night of the fire, and not until the next morning at breakfast. There was no tenant in the house. Had moved out two or three days before. I was there with Mr. Clay on Friday, and saw a negro woman there. Mr. Clay instructed me to get some one to take care of the house a week or ten days before the fire, but not the Friday I was there with him. It was between this week or ten days and the time of the fire that I saw the woman occupying the house."

Hardeman, Davis & Turner, for plaintiff in error. Dessau & Hodges and C. L. Bartlett, for defendant in error.

ATKINSON, J. The official report states the facts.

1. Courts are not at liberty to arbitrarily disregard reasonable limitations imposed upon the liability of insurance companies under policies of insurance by stipulations and conditions therein expressed; but in the construction of such policies and such conditions and stipulations the courts will look through the whole contract to the real intention of the parties at the time of the execution of the instrument, and give to it such construction as will impute to them a reasonable intendment, and such construction as will relieve against forfeitures, if that construction be consistent with the general intent expressed in the policy. Courts will presume, when policies of insurance are issued by insurance companies, and they accept premiums paid therefor, that such policies are issued in good faith, and with the design, upon the consideration received, to afford to the assured reasonable immunity in case of loss. If the condition be so repugnant to the stating clause of insurance as that both cannot stand together, courts should disregard the condition, upon the idea that it will not be presumed that the insurance company issues a policy of insurance with an intention never to become liable thereon. If the condition impose upon the assured a duty with respect to the thing insured, that duty must be performed, however slightly material to the interest of the insurer its performance may appear to be. If the condition or stipulation impose duties which are wholly immaterial, or with respect to matters which are wholly irrelevant, the right of the assured would not be affected by a nonperformance. There is no greater sanctity and no more mystery about a contract of insurance than any other. The same rules of construction apply to it as to other contracts, and the true rule for their interpretation may be stated to be that stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures, and to advance the beneficial purposes intended to be accomplished.

2. In the present case it appears from an

inspection of the record that the agent of the insurance company was likewise a real-estate agent; that in his capacity as real-estate agent he had charge of the property of the assured. At the request of the assured, he caused a policy of insurance to be issued by the defendant company, of which he was then the agent, and which policy of insurance required that it be countersigned by the local agent before it should become valid. The policy was in fact countersigned by the local agent, who was likewise the real-estate agent having in charge the property of this plaintiff. The policy contained a condition that if the property insured should become vacant and remain vacant and unoccupied for any length of time without notice to or the consent of the company indorsed in writing on the policy, the policy should become void. No written consent that the property may remain vacant and unoccupied appears on the policy. The question, then, is, did the company have notice that the property was vacant? It will be seen that it is not required that the notice of the vacancy should appear in writing indorsed on the policy, but only where the consent of the company is relied upon as excusing the vacancy of the premises is this required. The evidence demonstrates that the local agent of the company who issued this policy of insurance and who joined in the execution of the contract of insurance was fully advised that the property was vacant. No notice by implication is necessary to bring home to him the substantive fact that the house was vacant. He had express knowledge of that fact. He was the agent of the company—its alter ego—with respect to this insurance, and notice to him must be held to be notice to the company. See *Insurance Co. v. Wilkinson*, 13 Wall. 234, 235. The policy of insurance remained in his custody, the assured being temporarily absent from the city, until after the loss. The premiums were duly paid by the assured and accepted by the company. With full knowledge that this property was vacant, they permitted the insurance to remain uncanceled, retained the premiums, and, after loss, seek to be absolved from liability to the assured. The allowance of such a defense would be a gross fraud upon the assured. In such a case the right of the insurance company is, upon notice of a breach of the condition, immediately to cancel the policy and terminate the contract of insurance. If, notwithstanding the breach of condition, it permits the policy of insurance to stand, and thereafter receive or retain premiums already received, it will be held to have waived the breach of condition. Such an interpretation is consistent with the principles of law consonant with the doctrines of sound morality, and gives to each of the parties the full benefit of the condition expressed in the policy.

3. There was likewise in the policy of insurance a condition to the effect "that, if the property insured is mortgaged or otherwise incumbered, either prior or subsequent to the date thereof, without the consent of this company written thereon," the same should be void. It appears that at the time the application for insurance was made information was given to the clerk in the office of the local agent by and through whom the insurance was effected that a mortgage actually existed upon the property. According to the testimony of the plaintiff (and this is not disputed), he was informed by the local agent that the particular clerk in question was the one who had charge of the insurance business. It was his duty to obtain the very information imparted to him by the assured, and with this information the company, through its agent, issued the policy upon which this action was brought. To allow the company to defeat a recovery by simply showing that a mortgage existed upon the property at the time the insurance was effected would be to impute to it a deliberate purpose to defraud the assured. It would be to permit the company to say to the assured: "We had no intention of insuring your property in the first instance. The policy of insurance is a false token, by means of which we have obtained your money in payment of premiums. We received and retain the money with no intention of affording to you the immunity from loss which you had a right to expect the policy would afford." Courts will not, in such a case, impute a fraudulent purpose to the insurance company in the execution of its contract, but will rather presume that the policy was issued in good faith, and with an honest purpose to afford to the assured immunity against loss as stipulated therein. It will be presumed conclusively when, with knowledge that there was a mortgage upon the property, it nevertheless issued the insurance, and accepted the premiums, that it intended to waive the condition in question, and which would have the effect otherwise to render the policy void. In such a case, if the company intend afterwards to insist that the condition is a valid one, it should refuse, in the first instance, to issue the policy, or, having issued it, it should exercise its right of cancellation before a loss; and, failing this, it is estopped to rely upon the breach of condition. It would have no right so to deal with the assured as to lead him to believe that his property was in fact insured, when the policy, according to its contention, was really void.

4. According to the view we take of the evidence submitted in this case, there was sufficient evidence to require its submission to a jury, and the court erred in granting a nonsuit. Let the judgment of the court below be reversed.

(98 Ga. 216)

**NEWTON et al. v. FERRILL, Ordinary.**  
(Supreme Court of Georgia. March 23, 1896.)

**FENCES—ELECTIONS—ADOPTION OF STOCK LAW.**

There is no law authorizing an election upon the question of "fence or no fence" to be held in any county of this state, or in any militia district thereof, after an election upon that question, already held in and for such county, has resulted in favor of "no fence." After the establishment of the "stock law" in a given county or militia district, the law does not contemplate a restoration of the pre-existing status as to fences by the holding of further elections. (Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Application for mandamus by D. C. Newton and others against Hampton L. Ferrill, ordinary. Application denied, and plaintiffs bring error. Affirmed.

G. H. Miller, Seabrook & Morgan, and D. H. Clark, for plaintiffs in error. Saussy & Saussy and Garrard, Meldrim & Newman, for defendant in error.

**LUMPKIN, J.** An election upon the question of "fence or no fence" was held in Chatham county, resulting in favor of "no fence," and therefore establishing in that county what is familiarly known as the "stock law." Afterwards a petition was presented to the ordinary by certain freeholders of the Eighth district of that county for an election on the same question in that district. The ordinary declined to entertain or to act upon the petition; and, on mandamus proceedings to compel him to do so, his decision was sustained. The ordinary was right, and the judge of the superior court correctly so held. We have examined all the statutes of this state relating to elections upon the fence question, and it is evident upon their face that the "stock law" is regarded as a beneficial measure; and it is accordingly provided that, where once an election has resulted adversely to the establishment of the "stock law," there may, under specified restrictions and conditions, be other and subsequent elections to enable the people to obtain the benefit of that law; but, whenever an election has been declared in favor of "no fence," there is no provision in any of the statutes for an election to be thereafter held upon the fence question. In other words, the plain meaning of all the legislative declarations upon the subject is that "no fence" or the "stock law," when once established, shall be permanent, and not thereafter subject to change. It is true that the law does provide that there may be, in any militia district, an election upon this question in order to obtain the benefit of the "stock law"; but, manifestly, this provision cannot be available when there has already been a county election upon the question resulting in favor of "no fence," thus settling the matter finally and definitely as to the

whole county, and, of course, as to each and every militia district thereof. Under the old system existing in this state before any of the statutes above referred to were enacted, every landowner was required to inclose with fences, possessing given requisites, all portions of his lands from which he desired to exclude the stock of his neighbors. In view of the fact that keeping up fences involved great expense, the legislature, by passing the acts in question, opened up the way for a gradual introduction of the "stock law," by providing for legally conducted elections upon the question. It is evident that, when fences are once abolished, it would be exceedingly burdensome, if not entirely impracticable, to restore them; and hence the legislature, in effect, said that the people of a given county, or even of a militia district, might have an opportunity of obtaining the "stock law." Failing in the first instance, they might have another, and still another, and so on; but, when once this new law went into effect, there should be no further change in the status. So, after the adoption in Chatham of the "stock law" for the whole county, there could be no subsequent election in any one or more militia districts of that county for the purpose of restoring fences. This is true, not only because there is no provision of law authorizing such an election, but for the reason that a reopening of the fence question after it had once been definitely and finally determined by popular vote in favor of "no fence" would be contrary to public policy, as above shown. Judgment affirmed.

(98 Ga. 219)

**BATEMAN v. SMITH GIN CO.**

(Supreme Court of Georgia. March 23, 1896.)

**PRACTICE BEFORE JUSTICE—WANT OF PROSECUTION—DISMISSAL.**

Where a case, on the appeal in a justice's court, was called for trial, and the plaintiff did not appear, it was the right of the defendant to move to dismiss the case for want of prosecution, but not to proceed to trial, and obtain a verdict in his own favor, there being no plea of set-off or other defense in the nature of a cross action against the plaintiff.

(Syllabus by the Court.)

Error from superior court, Houston county; John L. Hardeman, Judge.

Action by the Smith Gin Company against O. C. Bateman. From a judgment of the superior court, reversing a judgment in favor of defendant in justice's court, defendant brings error. Affirmed.

M. G. Bayne, for plaintiff in error. H. A. Mathews, for defendant in error.

**LUMPKIN, J.** The plaintiff below recovered a judgment against Bateman in a justice's court, from which he entered an appeal to a jury in the same court. When the case was called for trial on the appeal, the plaintiff (for reasons not necessary to be stated) failed

to appear, and thereupon the justice allowed counsel for Bateman to submit the case to a jury, and take a verdict in his favor. The plaintiff then sued out a certiorari to the superior court, alleging that the justice erred in allowing the case to take this direction, and in not dismissing it for want of prosecution. Upon hearing the certiorari, the superior court ordered that the case be remanded to the justice's court, that the verdict be set aside, and the case reinstated for trial before a jury in that court. We think the judgment of the superior court was exactly proper and correct. There is no law or rule of practice, of which we have any knowledge, under which the course pursued in this case in the justice's court can be upheld. Where a plaintiff fails to appear and prosecute his case, it is, of course, the right of the defendant to move to have the same dismissed for want of prosecution; and this is the only proper course to be pursued, unless there has been filed a plea of set-off, or some other defense in the nature of a cross action against the plaintiff. In that event it might be the right of the defendant to proceed to prove his counterclaim, and take judgment thereon; but even then the merits of the plaintiff's cause of action would not be affected by the rendition of a judgment in the defendant's favor upon his counterclaim. It does not appear from the record now before us, however, that there was any such plea or defense in the present case; and, consequently, allowing the defendant to enter upon a trial in the absence of the plaintiff appears to have been naked and palpable error. In principle, the question with which we are now dealing is settled and controlled by the decisions of this court in *Wade v. Wisenart*, 86 Ga. 482, 12 S. E. 645, and *Morris v. Murphey*, 95 Ga. 307, 22 S. E. 635. And see, also, *Burdell v. Blain*, 66 Ga. 169. Judgment affirmed.

(98 Ga. 240)

**SMITH v. EQUITABLE MORTG. CO.**

(Supreme Court of Georgia. March 23, 1896.)

**PRACTICE IN SUPERIOR COURT — MOTIONS — SALE UNDER EXECUTION — SUMMARY EVICTION.**

1. The superior court is a court of record, and all motions or petitions therein for any affirmative relief extending beyond that covered by a judgment or decree rendered in a cause pending in such court, certainly where the relief sought is against a person not a party to the record, must be reduced to writing, and entered upon the motion docket, and that person is entitled to notice before any judgment upon such motion can be rendered against him.

2. Under section 3651 of the Code, no person other than the defendant, his heirs, or their tenants or assignees since the judgment can be summarily evicted from land by virtue of a sale under execution.

(Syllabus by the Court.)

Error from superior court, Crawford county; John L. Hardeman, Judge.

Action by the Equitable Mortgage Company against Nancy M. Smith. Judgment for plaintiff. Defendant brings error. Reversed.

The following is the official report:

An oral motion was made in the superior court for the following order: "It appearing to the court that on the first Tuesday in June, 1894, the sheriff of said county of Crawford exposed for sale, after duly advertising the same, and did on said day sell, the following property, to wit, all that tract or parcel of land lying and being in the First district of said county, and being whole lots numbers 181 and 182, and 20 acres in the northwest corner of lot number 183, consisting of 425 acres, more or less, being a portion of T. F. Gibson's plantation in said district; and at the time of said sale Nancy M. Smith was in possession of said land, by virtue of some contract of sale with the said defendant, and refuses to give possession of the same to the Equitable Mortgage Co., who were the purchasers at the said sale; and that the said purchasers have failed to make application for possession until the term of the court following said sale, and until the sheriff, K. P. Lowe, had gone out of office: Wherefore, it is ordered that the sheriff of said county of Crawford proceed to put the said Equitable Mortgage Co., their agents or attorneys, in possession of said land, and by dispossessing said Nancy M. Smith, her agents, tenants, or assigns, or the said M. M. Evans, her agents, tenants, or assigns, after twenty days' notice." The attorney of Nancy M. Smith, being present, objected to the passing of said order, because Nancy M. Smith did not hold under M. M. Evans by any contract or deed since the judgment, but held adversely to said M. M. Evans. There was no petition in writing for said order. It was not docketed, and no notice given to said Nancy M. Smith or her tenants of intention to apply for the order. The court overruled the objection, and passed the order. Nancy M. Smith excepted.

R. D. Smith and J. H. Hall, for plaintiff in error. M. G. Bayne, for defendant in error.

ATKINSON, J. The official report in this case states the facts. A motion made during the progress of a case for the allowance of any privilege or the adjudication of any right which may fall within the pleadings of a cause pending in the superior court may be made orally, as well as in writing; and, if the judgment of the court pronounced upon such motion be registered upon the minutes of the court, this will suffice to sustain the judgment. But where it is sought to invoke the powers of the court touching matters which lie outside the pleadings, though in some sense pertinent to the cause, the court can acquire jurisdiction for that purpose only through the means of a written application or motion for the relief desired; and this is true whether such collateral matter be between the same parties who are at issue upon the main case, or be between one of the parties to the main case, and a stranger to the record. It is essential to the validity of a judgment rendered upon such a motion that the person to be af-

fectured thereby should have notice of the application, and an opportunity to be heard upon it. The necessity for a strict observance of these rules is well illustrated in the facts of the present case. In this case a piece of property was exposed for sale under an execution, and sold. At the term of the superior court next ensuing the sale, oral application was made during the term to the presiding judge for an order directing the eviction of one who was a stranger to the record in the case, and who does not appear, from the language of the order itself, to be liable to eviction under this summary proceeding; for, under section 3651 of the Code, no person other than the defendant, his heirs or their tenants or assignees since the judgment, can be summarily evicted from the land by virtue of an execution sale thereof. No motion was made of which the party to be affected by it had notice; and yet the court, without getting jurisdiction of this person, was asked to proceed against her, in the face of the plain and manifest provision of the Code which protected her possession against summary judicial invasion. We doubt not, had the court, under rule 46 of the superior court, required this motion to be reduced to writing, required it to be served upon the party to be affected by it, required it to be placed upon the docket in accordance with paragraph 5 of section 267 of the Code, this plaintiff in error could have shown satisfactory reason against her dispossession. At least, she would have had the opportunity to make the showing, and the court would have had such jurisdiction of her person as would have enabled him to render a valid decree in the premises. Judgment reversed.

(98 Ga. 202)

## STEWART v. STATE.

(Supreme Court of Georgia. March 23, 1896.)

## CERTIORARI—NEW TRIALS—POWER TO GRANT—CITY COURTS.

1. The writ of certiorari lies from all inferior jurisdictions, but the power to grant new trials is confined to the superior courts and the city courts specified in and described by paragraph 5, § 4, art. 6, of the constitution of this state.

2. Courts established upon the recommendation of grand juries under the provisions of the act of October 19, 1891, as amended by the act of December 23, 1892, are not "city courts," within the description of such courts as expressed in the language, "and such other like courts as may be hereafter established in other cities," employed in the section of the constitution above cited.

3. The refusal by the judge of the superior court to entertain an application for a writ of certiorari upon the sole ground that in a court of the character indicated at the beginning of the preceding note a motion for a new trial had not been first made was error.

(Syllabus by the Court.)

Error from superior court, Jackson county; N. L. Hutchins, Judge.

W. M. Stewart was convicted of a criminal offense in a city court, and filed a petition

for certiorari to the superior court, which was refused, and he brings error. Reversed.

The following is the official report:

Stewart was tried by jury in the city court of Jackson county, for abandoning his child, and was found guilty. He presented his petition for certiorari to the judge of the superior court, alleging that the verdict was contrary to law, evidence, etc., and assigning error upon the charge of the trial judge. The judge of the superior court refused to grant the certiorari, on the ground that a motion for a new trial should have been made and determined by the judge of the city court before the petition for certiorari was sued out. To this ruling defendant excepted.

E. C. Armistead, for plaintiff in error. R. B. Russell, Sol. Gen., for the State.

ATKINSON, J. 1. The city court for Jackson county is neither established *eo nomine* by the constitution of this state, nor has there been a special act of the legislature establishing that court. We must therefore refer the fact of its existence to the act of the general assembly approved October 19, 1891 (Acts 1890-91, vol. 1, p. 96), it being entitled "An act to establish city courts in counties having a population of fifteen thousand or more where the same do not now exist, upon the recommendation of the grand juries of said counties; to define the powers, mode of selecting officers and jurisdiction of the same, and for other purposes," as amended by the act approved December 23, 1892 (Acts 1892, p. 107), by which it is provided that the power to establish such courts should be extended to the grand juries of counties having a population of 10,000. The plaintiff in error, having been indicted and convicted in the city court of Jackson county, filed a petition for certiorari to the superior court of that county, which was refused upon the special ground that he had not first moved for a new trial in the city court of Jackson county; the circuit judge holding that until this was done, and the motion for a new trial disposed of, the plaintiff in error was not entitled to a writ of certiorari. The question is whether, in this class of courts, the plaintiff in error had the right to take his case by writ of certiorari to the superior court for review, without first having moved for a new trial in the city court. We think he was entitled to have his petition for certiorari considered. A city court of the character described by and established under the acts above referred to is essentially an inferior judiciary, and the express power is conferred by the constitution of this state upon the superior court to correct errors of inferior jurisdictions by writ of certiorari. See paragraph 5, § 4, art. 6 (Code, § 5143). When this power was conferred, the law impliedly imposed a duty upon the superior courts to

exercise it, and therefore the writ of certiorari was a remedy to which the plaintiff in error was entitled. We do not think the superior court, or the legislature, for that matter, by express enactment, could lawfully impose upon the exercise of this right of review from such courts the condition that parties dissatisfied with judgments therein should first move for a new trial, for the reason that, city courts of that character having no power to grant new trials, the constitutional right to the writ of certiorari could not lawfully be burdened with the obligation upon the part of suitors to seek in a city court a relief which that court had no constitutional power to grant. Its judgment in the first instance is a final judgment of an inferior judiciary, and it is from such judgments alone that the writ of certiorari lies.

2. The power to grant new trials is conferred by the constitution of this state (see paragraph 6, § 4, art. 6) to the superior courts and such city courts as are recognized as city courts by the terms of the constitution itself. We do not think that courts such as are authorized to be established by the legislative enactments above referred to are city courts within the meaning of that term as employed in the constitutional provision above mentioned, which reads as follows: "The general assembly may provide for an appeal from one jury in the superior and city courts to another, and the said courts may grant new trials on legal grounds." It will be observed that it speaks of those courts as the superior and city courts, and when we come to inquire what city courts are embraced in the provisions of that clause of the constitution, we look elsewhere in the same instrument for a definition of the term "the city courts." We find only one reference to city courts in the constitution, and the city courts there mentioned are those of the city of Atlanta and Savannah, "and such other like courts as may be hereafter established in other cities." Hence, when we find the power to grant new trials limited to the city courts and the superior courts, and we find an express recognition of a certain class of city courts in the constitution, we are forced to the conclusion that the exercise of this power was limited by the constitution to the city courts thus expressly recognized. The power to grant new trials is not one of those powers incident to courts generally, but it is such a power as can be exercised only by those courts upon which the power is expressly conferred by the constitution. Had the constitution been silent upon the subject of new trials, the general assembly would have had power to authorize the granting of new trials in any courts within this state; but where it undertakes to enumerate and describe the courts which shall exercise the special power of granting new trials, that enumeration and description is exhaustive,

and the legislature cannot thereafter enlarge the list; and this upon the familiar principle, "*Expressio unius est exclusio alterius.*" Upon the application of this general rule of constitutional construction, see *White v. Clements*, 39 Ga. 232; especially that portion of opinion appearing on pages 265 and 266. In addition to the city courts of Atlanta and Savannah, which are recognized by name, the constitution, by description, extends this power to certain other city courts; and the courts to which such power is thus extended are expressly "such other like courts as may be hereafter established in other cities." Two things are essential to the establishment of a court which will meet the requirement of the constitution in this respect. It must be a court modeled substantially upon the plan of the city courts of Atlanta and Savannah as they existed in those cities at the time of the adoption of the constitution. Identity in the minor details of practice, procedure, or jurisdiction is not required if in those respects they be substantially similar to the courts above referred to; but to the creation of such a court it is absolutely indispensable that it be given a situs within the limits of an incorporated city. If it be located by the legislative act creating the court within an incorporated city, the legislature may confer upon it such jurisdiction beyond the limits of the city within the county as it may deem proper, but by the express language of the constitution it must be located within the corporate limits of a city. The mere fact that there may be an incorporated city within the limits of a county for which one of the courts of the character now under review is created does not make it a city court within the meaning of this constitutional provision. There may be a half dozen different incorporated cities in one county. The legislature would have the power to create within the limits of each of such incorporated cities, if it saw proper to do so, a city court which would meet all of the requirements of the provision of the constitution now under consideration; but, in order to the creation of such courts, the act creating them must locate them within the corporate limits of a city. The act under which the city court for Jackson county was created is a general law authorizing the creation of city courts in counties having a population of 10,000 or upward, upon the recommendation of the grand juries, and this without reference to the existence or nonexistence of even an incorporated town or village within the limits of such counties. The constitutional convention, in dealing with this subject, we doubt not, acted advisedly. There was wisdom in the limitation imposed upon the power of the general assembly to create indiscriminately courts of the character now under review. In cities where there is a considerable population, and a considerable volume of business resulting from mercantile and other transactions, and

which would largely contribute to the maintenance of such an institution, the expense of the court, as compared with its public utility, would not be so severely felt by those who were called upon to support it as if it existed in more sparsely settled communities, where there was less litigation. The legislature, in the exercise of the broad power conferred upon it by paragraph 1, § 1, art. 6, of the constitution (Code, § 5123), may create such courts in all the counties in the state, and as many of them as it sees proper, but it cannot confer upon such courts the power to grant new trials, unless it complies with the constitutional requirement that such courts should be located in cities. It may confer upon such courts any jurisdiction not limited by the constitution to other courts. As to such matters of jurisdiction, the constitutional convention having itself made an explicit declaration, will be presumed, by having conferred the right upon certain courts to grant new trials, to have denied to the legislature the power to confer a similar jurisdiction upon any other class of courts.

3. The circuit judge having declined to consider the application for certiorari, as we think, improperly, placing his refusal upon a ground not involving the merits of the plaintiff's case, we will not scrutinize closely or critically the petition for certiorari with a view of determining whether or not the conclusion reached by him was right, although assigning a wrong reason therefor. On the contrary, we think it safer and better that he should first be called upon to exercise the original jurisdiction conferred upon him by law in the premises. Let the judgment of the court below be reversed.

(98 Ga. 236)

**HERRINGTON, Deputy Sheriff, v. BLOCK et al.**

(Supreme Court of Georgia. March 23, 1896.)

EXECUTION—STAY PENDING CERTIORARI.

Where there is pending in the superior court a certiorari from a city court directly involving the validity of a judgment for money, rendered by the latter court, and the sheriff is seeking to enforce, by levy and sale, an execution issued thereon, the judge of the superior court may, upon a proper application, pass an order directing the officer to suspend all further proceedings upon such execution until after the trial of the certiorari, and the determination therein of the questions made with reference to the validity of such judgment.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Application by A. & N. M. Block for an order to L. B. Herrington, deputy sheriff, to stay the enforcement of an execution. From an order granting the petition, defendant brings error. Affirmed.

Harris & Harris, for plaintiff in error. Matt R. Freeman, for defendants in error.

SIMMONS, C. J. Tinsley obtained a judgment in the city court of Macon against A. & N. M. Block, and an execution was issued thereon, and levied by the sheriff. Subsequently, the defendants filed a motion to vacate the judgment, which motion was dismissed on demurrer; and, upon this ruling, they assigned error by petition for certiorari. The petition was sanctioned by the judge of the superior court, and the writ of certiorari issued. The writ was exhibited to the sheriff, and he was requested to stop the sale of the property levied upon, but refused to do so. The plaintiffs in certiorari then filed a petition to the judge of the superior court praying for a rule against the sheriff to show cause why he should not be required to desist and forbear to sell the property levied on until the final hearing of the certiorari, and that an attachment for contempt issue against him. To this petition the sheriff demurred, on several grounds. The demurrer was overruled, and the rule nisi made absolute, and the sheriff was ordered to desist and forbear to sell the property until final hearing of the certiorari. To this judgment the sheriff excepted.

Under this state of facts, the judge of the superior court did not err in passing the order excepted to. When the case was removed from the city court to the superior court by the writ of certiorari, the latter court had exclusive jurisdiction over the case. The petition for certiorari must, in the opinion of the judge of the superior court, have made a prima facie case, showing error in the judgment of the city court, or he would not have sanctioned the writ. This could not be determined until the final hearing of the certiorari. If the judge, at that hearing, had determined that the judgment of the city court was erroneous, he would, doubtless, have directed the judge of the city court to reinstate the motion to vacate, and to set aside the judgment sought to be vacated; but this would have been useless if the officer had sold the property in the meantime. The petitioners would have been greatly damaged by the seizure and sale of their property under an erroneous judgment. It is true, they could have recovered the property from the purchaser if the judgment upon which the execution issued was void; but that would have given rise to other and further litigation. So, we think, the judge of the superior court did not err, but exercised a wise discretion, in restraining the officer from selling. Judgment affirmed.

(98 Ga. 284)

**SPARKS v. LOWNDES COUNTY.**

(Supreme Court of Georgia. March 30, 1896.)

EXECUTION FOR TAXES—INTEREST—PROPERTY IN HANDS OF RECEIVER.

In view of the act of November 11, 1889 (Acts 1889, p. 31), prescribing that all executions for taxes due the state or any county

thereof shall bear interest at the rate of 7 per cent. per annum from the time fixed by law for issuing the same, tax executions against railroad companies bear that rate of interest, and the law is applicable even as to taxes accruing and becoming due while the property of such companies is in the hands of a receiver. Such interest is not in the nature of a penalty.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

Action by the comptroller general, for the use of Lowndes county, against W. B. Sparks, receiver for the Georgia Southern & Florida Railroad. From an order overruling the demurrer, defendant brings error. Affirmed.

Gustin, Guerry & Hall, for plaintiff in error. Park & Gerdine, A. W. Lane, John L. Harde-man, and S. A. Reid, for defendant in error.

SIMMONS, C. J. The Georgia Southern & Florida Railroad was placed in the hands of a receiver by the superior court of Bibb county, and during the years 1891, 1892, and 1893, while in the hands of the receiver, taxes accrued upon the property of the railroad company in Lowndes county, and executions, dated December 21, 1891, and December 20, 1893, were issued for taxes due the county for each of these years respectively, with interest from date at 7 per cent. per annum. After the property in the receiver's hands was sold, and the proceeds brought into court, a petition by the comptroller general, for the use of Lowndes county, was filed, in which he alleged that the principal sum of these executions had been paid by the receiver under an order of the court, but that the interest was still unpaid; that there was still in the hands of the receiver a large sum to be used in discharge of liens against the property; and that the claim for interest due on these tax executions constituted a first lien upon this fund; and the petitioner prayed for an order directing the receiver to pay the same. The receiver demurred to the petition, and moved to dismiss it, upon the ground that the fund in his hands as receiver was not liable for interest upon taxes. The demurrer was overruled, and to this ruling he excepted.

The act approved November 11, 1889 (Acts 1889, p. 31), declares that "all executions issued for taxes due the state or any county thereof, or any municipal corporation therein, \* \* \* shall bear interest at the rate of seven per cent. per annum from the time fixed by law for issuing the same." It was contended by counsel for the plaintiff in error that when the railroad was taken possession of by the court, through its receiver, interest on claims against the railroad company ceased to run; and, in support of this contention, counsel relies on the case of *Thomas v. Car Co.*, 149 U. S. 116, 13 Sup. Ct. 824, where it is said that, "as a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law. It

is a necessary incident to the settlement of the estate." Even if this is true, we do not think the rule is applicable in this case. This is not a claim arising *ex contractu* or *ex delicto*, but a tax levied by the sovereign power of the state for the benefit of one of the counties thereof, which, in matters of taxation, should be treated as a division of the state government. *Hawkins v. Sumter Co.*, 57 Ga. 166; *Lingo v. Harris*, 73 Ga. 28. The lien of the county for taxes is paramount to all other liens except that of the state itself; and, when the state declares that the execution for these taxes shall bear interest from the time the execution is issued, the interest has the same priority of lien that the tax itself has; and the court which seizes the property, and puts it in the hands of a receiver, for the purpose of administering it, has no power to displace this lien; but it is the duty of the court to recognize it, and have it paid in preference to all other claims against the fund in the receiver's hands. Ordinarily, it would be the duty of the court to provide for the payment of taxes upon the property in the receiver's hands as the taxes fall due; but, if the court should fail to do so, it would not, in our opinion, prevent the interest from running on the executions issued therefor. The state having declared, in its sovereign capacity, that all executions for taxes shall bear interest, no court has a right to establish an exception which will prevent the running of such interest. Besides, the railroad, while in the hands of the receiver, and during the period in which these taxes became due, was being operated continuously, and produced income over and above its running expenses, amply sufficient to pay the taxes and the interest thereon (see *Johnson v. Moon*, 82 Ga. 251, 10 S. E. 193); and there was no obstacle to their payment, so far as any action of the court itself was concerned, for the order appointing the receiver, and directing him to operate the road, directed also that he pay all taxes against the defendant as soon as sufficient funds were in his hands.

It was contended by counsel for the plaintiff in error that this interest was in the nature of a penalty, and inasmuch as the default of payment of the taxes was not attributable to the railroad company, but to the court or its receiver, a court of equity should not enforce the penalty. We do not think the interest provided for by the act of 1889, *supra*, is to be regarded as a penalty. A penalty is a punishment, and interest is merely a compensation for the use or forbearance of money. 11 Am. & Eng. Enc. Law, "Interest," p. 379. In the case of *Railroad Co. v. Wright*, 87 Ga. 487, 13 S. E. 578, relied on by counsel for the plaintiff in error, there was a penalty of \$500. That was a penalty pure and simple. In the other case cited by counsel for the plaintiff in error on this subject (*Litchfield v. Webster Co.*, 101 U. S. 773), the statute prescribed that delinquent taxpayers should be charged 1 per cent. per month for each month during which

the tax remained unpaid. This was more than the legal rate of interest, and in the statute itself it was expressly stated to be a "penalty for nonpayment." In the statute now under consideration, the 7 per cent. required to be paid upon the execution is described as interest, and not as a penalty, and is simply the legal rate of interest which governs in all cases in which another rate is not expressly agreed upon. It follows from what has been said that the court below did not err in overruling the demurrer. Judgment affirmed.

(98 Ga. 167)

**REGENSTEIN et al. v. CITY OF ATLANTA.**

(Supreme Court of Georgia. March 16, 1896.)

**MUNICIPAL CORPORATIONS—POWER OVER STREETS  
—REVIEW BY COURTS—SPECIAL ASSESSMENTS  
—ILLEGALITY—GROUNDS FOR INJUNCTION.**

1. The broad power conferred upon the municipal authorities of cities having a population over 20,000 by the act of October 10, 1891 (Acts 1890-91, vol. 1, p. 229), "to renew by the use of any material that may be decided on, or repair, any pavement now laid or hereafter laid in said city," whenever, "in the judgment of the city council of said city, the pavement has become worn out and no longer serviceable as a good pavement," or "useless," includes the power to repave with new material a street upon which the pavement already laid has become in the condition above indicated. Whether or not a necessity exists in a given case for the exercise of this power is a question primarily within the discretion of the municipal authorities, and the courts will not by injunction control such discretion unless it has been manifestly abused to the prejudice of a complaining citizen.

2. Even if the proportionate shares of the cost of such an improvement assessed against abutting lot owners are, because of a failure to properly assess other persons or corporations likewise liable to assessment on account of the cost of such improvement, or for any other reason, excessive, this affords no ground for a court of equity, at the suit of such lot owners, to enjoin the collection of the entire assessments made against them. If in any case an execution for an excessive assessment is levied, the citizen may meet the same by affidavit of illegality, which is his appropriate remedy.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Matilda Regenstein and others against the city of Atlanta to enjoin the collection of special assessments. From a judgment for defendant, plaintiffs bring error. Affirmed.

Simmons & Corrigan, for plaintiffs in error.  
J. A. Anderson and Geo. Westmoreland, for defendant in error.

**SIMMONS, C. J.** In 1888 a pavement of rubble stone was laid by the municipal authorities of the city of Atlanta upon Pryor street in that city, and the owners of abutting property were assessed for a certain proportion of the cost thereof, as provided by the act of September 3, 1881, amendatory of the city charter. Subsequently a general law was

passed, authorizing the mayor and general council or other governing authority of any city of this state having a population of more than 20,000 "to renew by the use of any material that may be decided on, or repair, any pavement now laid or hereafter laid in said city, upon the same terms and conditions as to assessments of property and street car companies, as were in force when the said pavements were originally laid, provided, in the judgment of the city council of said city the pavement was worn out and no longer serviceable as a good pavement; it being the intention and purpose of this act that the city council or other governing authority of said cities shall have the power to pave again any street on which the pavements are worn out and useless." Acts 1890-91, vol. 1, p. 229. In February, 1894, a majority of the owners of property abutting on Pryor street petitioned the mayor and council to repave the street with vitrified brick, the pavement to be laid in accordance with the act of 1881, above referred to, "and the acts amendatory thereof." In April, 1894, the commissioner of public works and the city engineer reported favorably on the petition, and pursuant to the petition counsel passed an ordinance authorizing the repaving of the street with vitrified brick. The ordinance recited that this was done "under and in accordance with an act of the legislature of Georgia amending the charter of the city of Atlanta, approved September 3, 1881, and acts amendatory thereof"; also that it appeared that "the old pavement on said street is so worn out as to make such repaving thereof necessary." After the pavement had been laid, certain persons owning property abutting on Pryor street prayed for an injunction against the enforcement of executions against their property for assessments for their proportionate share of the cost of paving; the main ground of objection being that there was a durable pavement on Pryor street at the time the repaving was done, and that council had no authority to repave "with a costly and expensive ornamental pavement." The court refused to grant an injunction, and the petitioners excepted.

1. It is clear that under the acts above referred to the municipal authorities, upon complying with the conditions therein mentioned, had the power to repave when, in the judgment of the city council, the pavement was worn to such an extent as to be no longer serviceable as a good pavement. To construe the act of 1891 as meaning that the power thereby granted is to be exercised only where the entire pavement is, in a literal sense, "worn out," would be to render it practically inoperative. What was meant by "worn out" is explained by the language which follows these words. If the legislature had meant that the power to repave should exist only where the pavement was, in a literal sense, "worn out," there would have been no occasion to add, "and no longer serviceable as a good pavement," nor, where the phrase "worn

out" is again used, the words "and useless." The act in terms leaves it to the judgment of the city council whether this condition exists or not. It also leaves to their determination the material to be used in repaving. A court of equity therefore should not undertake to control their discretion in these matters, unless it is plainly and manifestly abused to the prejudice of a complaining citizen. Under the evidence in the present case, the court below was fully warranted in holding that no such abuse of discretion had been shown.

2. It was complained that the street-railroad company was not charged its full proportion of the cost of the pavement, and that for this reason, as well as for other reasons stated, the assessments against the plaintiffs in error were excessive. Even if this were true, it would afford no ground for resort to a court of equity to enjoin the collection of the entire assessments made against them. An ample remedy at law is provided by the act of 1861, *supra*, the sixth section of which provides that "the defendant shall have the right to file an affidavit denying the whole or any part of the amount for which the execution issued is due, \* \* \* and all such affidavits so received shall be returned to the superior court of Fulton county, and there tried and the issue determined as in cases of illegality," etc. The allegations as to the defective execution of the work in certain parts of the street were met by affidavits showing that these defects had been remedied before the time of the hearing. Judgment affirmed.

(98 Ga. 243)

TINSLEY v. BLOCK et al.

BLOCK et al. v. TINSLEY.

(Supreme Court of Georgia. March 23, 1896.)

BAIL TROVER—NONSUIT—RES JUDICATA—APPEALS FROM CITY COURT—DECISION.

1. The granting of a nonsuit in an action of bail trover, where the plaintiff has obtained possession of the property sued for by giving bond, under section 3420 of the Code, does not conclude him upon the merits of his action; and, even though the defendant had obtained a money judgment upon that bond in lieu of a judgment of restitution, the plaintiff may, nevertheless, renew his action, save as to the element of bail, and no conversion subsequent to the granting of the nonsuit need be proved in order to maintain the same.

2. Inasmuch as the plaintiffs, in their second action, improperly required bail, their remedy, so far as relates to this element, was not maintainable, and the bail, had the same been given, could, in the light of the evidence, have been discharged on motion; but, under the evidence as a whole, the question of the plaintiffs' right to recover ought to have been passed upon by the jury, and therefore the superior court properly sustained the certiorari, the petition therefor assigning as error the granting generally of a nonsuit against the plaintiffs.

3. There was no error in refusing to render a final judgment in favor of the plaintiffs, or in remanding the case to the city court for a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Ball trover by A. and N. M. Block against Minnie Tinsley in the city court, in which there was a nonsuit. On certiorari to the superior court the judgment was reversed, and the case remanded, and defendant and plaintiffs bring error and cross error, respectively. Affirmed.

Freeman & Griswold, for plaintiffs. Harris & Harris, for defendant.

LUMPKIN, J. Many of the material facts of the present case are stated in the opinion filed in the case of Block v. Tinsley, reported in 95 Ga. 436, 22 S. E. 672. The second ball trover action instituted by the Blocks, on June 21, 1894, in renewal of their former action against the defendant, Tinsley, resulted in the city court in a judgment of nonsuit, which, on certiorari, was set aside. It seems that the judge of the city court granted this last nonsuit, on the ground that the plaintiffs had shown no possession by the defendant, nor a conversion by her, of the property in dispute subsequent to the granting of the first nonsuit. The certiorari being sustained, the case was remanded to the city court, and of this Mrs. Tinsley complains in her bill of exceptions. The Blocks, by cross bill of exceptions, allege that the judge of the superior court erred in refusing to render a final judgment in their favor, and in ordering a new trial in the city court.

It cannot be denied that, as a general rule, a judgment of nonsuit does not conclude the plaintiff upon the merits of his cause of action. The Code expressly provides that if a plaintiff shall be nonsuited, and shall recommence his action within a given time, "such renewed case shall stand upon the same footing, as to limitation, with the original case." Section 2982. This necessarily implies that a judgment of nonsuit is not a final adjudication of the case against the plaintiff; for, if it were, there could be no renewal of the action at any time, and the question of limitation would have nothing to do with the matter. Is there any sound or valid reason why the right to renew an action of bail trover, in which a nonsuit had been granted, should not rest upon the same footing as the right of renewal in other cases? We cannot see why there should, in principle, be any difference; and in a case where no complication arose because of a replevy of the property in dispute by the plaintiffs, followed by a money judgment in lieu of a judgment of restitution in favor of the defendant, there would be absolutely no difficulty in holding that the plaintiffs could recommence their action with all their original rights preserved. That there was such a replevy by the plaintiffs, and such a judgment in favor of the defendant, cannot, we are convinced, change the rule of law which would otherwise be applicable. If, instead of the money judgment, Mrs. Tinsley had obtained a judgment of restitution, and the property had been actually returned to her possession, there would be

perfectly plain sailing. The original status of the parties as they stood before the first action was brought would have been restored, and it could not have been seriously denied that the Blocks had a perfect right to renew their suit. The fact that Mrs. Tinsley elected to take, and actually obtained, a money judgment, does not alter the principle involved. That judgment, unless reversed or set aside, conclusively binds the Blocks, in so far as it adjudicated their liability to pay Mrs. Tinsley the amount for which it was rendered; but it adjudicated nothing as to the merits of their original cause of action, founded upon the alleged conversion by her of their property. In fact, that judgment was predicated upon a breach of the contract embraced in the replevy bond, by which the Blocks undertook to restore the property in the event they failed to recover in the identical pending action in connection with which this bond was given. By taking the money judgment, Mrs. Tinsley relinquished all right to subsequent possession of the property, and the question as to the right of present possession is no longer open. But the question of title, put in issue by the plaintiffs' original action, has never been finally passed upon or adjudicated; nor has it yet been judicially ascertained whether or not Mrs. Tinsley, in the first instance, wrongfully converted to her own use property which really belonged to the Blocks.

In the opinion prepared by the writer in the former case, it was said that the Blocks "certainly must have known that, after nonsuit in their action of trover, they no longer had any right to the possession of the property; and, if they made no effort to voluntarily restore its possession to the defendant, they surely had reason to anticipate that the defendant would ask for a judgment against them upon their bond." The following expression was also used: "Pending the action of the court upon the defendant's motion, the plaintiffs acted at their peril in surrendering the property to any one whomsoever, as so doing could in no way protect them as against any judgment the court might afterwards render in the defendant's favor." It was argued by counsel for the defendants in error that these statements were not harmonious. In this view, however, we do not concur. Taking the two statements together, they simply mean that the nonsuit terminated all right of immediate possession which the Blocks had acquired by giving the bond; and, if they thereupon failed to restore the possession to the defendant, they subjected themselves to suit upon their bond, and acted at their peril in surrendering the property to any one else. That opinion also contained the following expression: "When the judgment of nonsuit was rendered, and the defendant elected to take a money judgment for the value of the property, that property, so far as she was concerned, became the property of the Blocks; and when that money judgment was legally entered, as was done, and was

acquiesced in by the Blocks by failing to except to it, 'the question of title to the property originally in dispute was forever settled between these parties.'" Counsel for the defendant also called into question the accuracy of the last clause of what is above quoted. We admit in perfect candor that this criticism is well founded. We really did not mean, nor wish to be understood as holding, that "the question of title to the property originally in dispute was forever settled between these parties." On the contrary, we intended merely to say that there was no longer any occasion for controversy between the parties as to possession of the property, and that the payment by the Blocks of the money judgment would practically result in their thereafter becoming the owners of the property, under a sort of enforced purchase, independently of whether, in point of fact, they had any previous title thereto or not. We certainly did not intend to convey the idea that, because of the facts recited, the question of title in dispute before the first action was brought was settled as against the Blocks. We did mean to say that Mrs. Tinsley voluntarily relinquished both ownership and possession by taking a money judgment in lieu of the property itself; and, consequently, the title (if any) which she thus surrendered went into the Blocks, and she could not thereafter assert any claim thereto. It was quite beyond the intention of the writer to convey the impression that, in our opinion, their right to show that the original title had been previously vested in them was cut off or affected by the judgment in Mrs. Tinsley's favor. When the case is tried again, the plaintiffs must, in order to recover, show that there was in the first instance an unlawful and wrongful conversion of their property. If they succeed in doing this, the measure of damages will be the value of the property and its hire, or whatever damages may have been actually sustained in consequence of such conversion. The defendant cannot insist upon the position that the value of the property is not an element of damages, on the ground that the Blocks already have the property. Their present possession of the property is explained by the fact that, as Mrs. Tinsley elected to take a money judgment in her suit upon their replevy bond, they were practically compelled to buy the property from her. In other words, the Blocks have fully paid, or are liable to pay, for the possession they now hold.

It must result as a necessary conclusion from the foregoing that the plaintiffs will not be under the necessity of proving any conversion subsequent to the granting of the first nonsuit. Their present right of action being predicated upon the original conversion, it will be sufficient, so far as this element of the case is concerned, if they prove a conversion prior to the bringing of their first action.

2. There was no occasion, in the second action, to require bail. In fact, so doing was

Illogical and inappropriate. Had a bail bond been given, the sureties might have been discharged upon motion. In view of the law as announced in the first division of this opinion, and of the evidence submitted at the last trial, the judge of the city court erred in granting a nonsuit, and this error was properly corrected by the order passed in the superior court sustaining the certiorari.

3. With reference to the cross bill of exceptions, it need only be said that the superior court could not properly render a final judgment in a case involving disputed issues of fact; and the judgment remanding the case to the city court for another trial was unquestionably correct and proper. Judgment on both bills of exceptions affirmed.

(98 Ga. 224)

FULTON et al. v. GIBIAN et al.

(Supreme Court of Georgia. March 23, 1896.):

ASSIGNMENT FOR CREDITORS—WHAT CONSTITUTES  
—CONSTRUCTION—SALE—RESCISSON FOR  
FRAUD—EVIDENCE.

1. Where an insolvent partnership executed and delivered to several of its creditors mortgages upon its assets, and also executed and delivered to these and other creditors, as collateral security for their claims, an assignment of the choses in action belonging to the partnership, these mortgages and the latter instrument, whether taken singly or collectively, did not constitute such an assignment as rendered the assignment acts of 1881 and 1885 applicable, there being nothing in any of these instruments creating a trust in favor of the debtors or anyone else, and the only persons deriving any benefit therefrom being those to whom the instruments were given.

2. It makes no difference that the assignment of the choses in action provided that certain of the creditors therein named should be first paid out of the proceeds realized from the collection of the papers assigned, and that the balance of such proceeds should then be applied pro rata to the claims of the other creditors mentioned in the instrument, the assignment being directly to all these creditors of both classes, and not charging any of them with any duty of collecting for the others, or imposing upon any of the assignees a trust of any kind.

3. The evidence relied upon by one of the intervening partnerships to establish its contention that it was entitled to rescind the sale of its goods to the failing partnership on the ground of fraud in the purchase, and consequently had a right to claim the proceeds of those goods in the receiver's hands, was not sufficient for the purpose indicated.

4. On the whole, there was no error in granting a nonsuit as to all the interveners.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

A creditors' bill was filed against Albert Gibian and L. J. Lillienthal, partners as A. Gibian & Co., in which a receiver was appointed. Fulton & Bro. and others became parties plaintiff by intervention, and raised issues with certain mortgage creditors of defendants, on the trial of which there was a nonsuit, and interveners bring error. Affirmed.

The following is the official report:

Under a petition in the nature of a general creditors' bill against Albert Gibian and L. J. Lillienthal, doing business under the firm name of A. Gibian & Co., a receiver was appointed, who took charge of the assets of said firm, and proceeded to wind up its affairs, under the direction of the court. Among the parties plaintiff by intervention were Fulton & Bro., the Chicago Distilling Company, and the Greenbrier Distillery, Charles Nelson proprietor. Said interveners raised issues with certain mortgage creditors of Gibian & Co., wherein the validity of the mortgages and a certain transfer of accounts, notes, and choses in action was questioned. The cause came on to be tried upon the issues so raised, and upon the conclusion of the evidence for the interveners the mortgagees moved for a nonsuit upon the issues touching them, which motion was granted, and interveners assigned the following as errors: (1) The jury should have been allowed to pass upon the issue raised by Fulton & Bro., in which they claimed that \$833.06, realized by the receiver from the sale of tobacco in the stock of Gibian & Co. at the time the receiver took charge of it, belonged to them, because purchased from them fraudulently, so as to entitle them to rescind, and to prevent the lien of the mortgages from attaching, they having been given to secure antecedent debts. (2) The mortgages given by Gibian & Co. to a number of their creditors, being dated the same day, made, delivered, and filed for record at the same hour (9:15 p. m.), and covering all the assets of Gibian & Co., including choses in action and equities, constituted an attempt to make an assignment for the benefit of creditors, and were therefore invalid, in that they did not conform to the law governing such assignments. (3) Said mortgages, taken in connection with the transfer and assignment of certain notes, accounts, and choses in action to the parties to whom the mortgages were given, constituted an attempt to make an assignment for the benefit of creditors, but failed to comply with the statute covering such assignments. (4) The transfer of notes, accounts, and choses in action by Gibian & Co. to said mortgagees was an attempt to make an assignment for the benefit of creditors, and was void for failure to comply with the statute governing such assignments. (5) The mortgagees attempted to create a lien upon notes, accounts, and choses in action; it being contended that these could not be mortgaged, and that the description given of them was insufficient. (6) During the trial, plaintiffs introduced pages 146, 147, 148, and 149 of the stock book of Gibian & Co., which purported to contain a complete statement of the liabilities of the firm on August 20, 1891. In argument of the motion for nonsuit, defendants' counsel claimed the right to comment on other pages in said book, begin-

ning on page 150, and showing the assets of said firm. Plaintiffs contended that only the pages actually tendered, showing a complete statement and summary of liabilities, were in evidence, and, if opposite counsel wished other pages of the books, showing assets, to go in, they must put them in. The court held that certain pages of the book could not be tendered in evidence without considering the whole book in, with the right to either side to use what they pleased of it; whereupon plaintiffs withdrew said pages from evidence. The ruling made by the court is assigned as erroneous.

Among other evidence introduced by plaintiffs was the testimony of J. H. Fulton, who in 1891 sold Gibian & Co. some manufactured tobacco, for Fulton & Bro. To his interrogatories were attached an itemized statement of goods shipped to Gibian & Co., showing bills of August 13 and September 5, 1891, for \$528.72 and \$528.92, closed by acceptances which have not been paid; also showing bills of May 28, June 6, and July 13, 1891, for \$431.04, \$95.28, and \$523.92, closed by acceptances, and paid; also bill of October 3, 1891, for \$528.80, being goods stopped in transit. Fulton testified: "I dealt with Lillienthal, a member of the firm of Gibian & Co. On May 29, 1891, I called at their store to sell them tobacco. Lillienthal said there was one piece of goods he wanted made under his own brand, and asked me to call again that afternoon, which I did. Noticing that their stock was very much reduced, I asked him the reason, and he told me they were going out of the grocery business; that it kept from \$60,000 to \$100,000 of their money locked up; that the profits were too small on groceries, and they were going into the tobacco, cigar, and whisky business exclusively; that there was more money in it; and that they would soon become the largest jobbers of these goods in the South. I then showed him my samples, priced my goods, and he selected the piece he wanted made up under his brand 'Bon Ton.' I offered to sell on terms of sixty days' acceptance, or two per cent. off for cash. He accepted the proposition, and began to write the contract. I called his attention to the fact that if he did not pay the cash, deducting the two per cent., he must close each bill by the firm's acceptance. He said, 'I will insert it that way, but you will not need any acceptance, as we discount all of our bills, and pay cash for all we buy.' After the contract was signed and delivered, I left, fully believing from his statement that the firm was perfectly solvent. In extending credit and shipping the goods, I acted upon his statements to the effect that they intended doing a large business, and paid cash for all they bought. I had no means of knowing anything regarding their financial standing and responsibility outside of their statements and representations to me. If I had not thought them per-

fectly solvent, I would not have shipped the goods. Neither member of our firm ever sold any goods to Gibian previously, but our salesmen sold them some goods during 1885 and 1886."

The mortgages in question were fifteen in number, twelve of them being first mortgages, and three second mortgages. All of them were dated October 15, 1891, and filed for record on the same day, at 9:15 o'clock p. m. One of the first mortgages was foreclosed and levied on the stock of goods described therein on October 16, 1891. The first mortgages purported to have been made to secure indebtedness by notes amounting to over \$65,000; the second mortgages were to secure notes aggregating \$5,689.53. At the time of their execution the total indebtedness of the firm was about \$151,000. Of this the part secured by mortgages amounted to \$114,000, and said mortgages were given to secure debts existing prior to their execution. The property conveyed by them is described by general summary of the stock of goods consisting of whiskies in barrels and bottles and other vessels, liquors of various kinds, wines, beers, ales, porter, flasks, tobacco, and cigars, with numerous other articles enumerated, and all other articles, merchandise, or goods usually kept in a wholesale grocery and liquor store, all now in the two-story brick storehouse (describing it); also office and store furniture in said store (enumerated); also three bay mules (described), with three drays and a buggy; "also all books of account, notes, choses in action, accounts, and other evidence of indebtedness belonging to said parties of the first part, including amounts due said firm by A. Backer of New York, said accounts and claims amounting nominally to the sum of \$76,411.81, and, with the exception of the account of A. Backer, aforesaid, all fully shown and described on the books of said parties of the first part, and all now in said store." It is further stated that "this mortgage is intended to bear date and take rank with other first mortgages executed this day upon said property, and to be concurrent with the same, without any priority whatever over said other mortgages." The written transfer of choses in action, accounts, and notes, to which was attached a long schedule, referred to therein, is in the following words: "For value received, we hereby transfer and assign for collateral security to [the mortgagees] the accounts, claims, choses in action, and equities due and owing to us, a schedule of which is annexed to this transfer, and made a part hereof; the said accounts to be collected or used and applied to the debts which the parties named hold against us; all amounts collected to be distributed pro rata upon the mortgages executed by us in favor of said parties on October 15, 1891. Any overplus that may be collected over and above the claims aforesaid shall be paid

upon the mortgages of [the second mortgagees], to whom such claims are also transferred and assigned; such overplus to be distributed pro rata on the amounts due such parties, as shown upon certain second mortgages which were also executed by us on October 15, 1891, in their favor. We hereby waive all notice required by statute in case any of these claims should be made by the parties to whom they are hereby transferred." It was admitted that the list of transferred accounts was the same as the list attached to the inventory made by the receiver; also that the Bon Ton tobacco shown in the receiver's report and inventory was tobacco shipped by Fulton & Bro.; also that the accounts and claims of the three contesting creditors were correct, that of Fulton & Bro. amounting to \$1,058.64. The receiver's inventory and report, filed November 5, 1891, showed 93 boxes of Bon Ton tobacco shipped by Fulton & Bro. to Gibian & Co., of the invoice value of \$1,023.25. This report showed the inventoried value of merchandise, fixtures, etc., to be \$55,290.74, and the amount of open accounts to be \$74,278.49. He reported that he found upon the books of Gibian & Co. a profit and loss account, generally considered as of little value, amounting to about \$28,000, being the accumulation of worthless debts from January 1, 1893, to November 5, 1891. The receiver's final report also was in evidence, from which it appears that after the payment of expenses, receiver's and attorney's fees, and other disbursements, the amount remaining is considerably less than the aggregate of the first mortgages. The receiver testified that the report made November 5, 1891, showed all the assets that came into his hands, which, so far as he knew, were all the property of Gibian & Co. He did not know whether the accounts transferred by them were covered by the mortgages or not; did not think those transferred accounts came into his hands. In the final report appear entries of accounts amounting to \$30,518.03, notes amounting to \$2,064, and merchandise and office furniture amounting to \$350, turned over to A. Gibian by order of the court. The receiver presumed those accounts were accounts he had not been able to collect. They were not part of the transferred accounts, that he knew of. He knew nothing about those transferred accounts, as that was done before he had anything to do with it. The transferred accounts never came into his possession at all. From the general character of the description of the property in the mortgages, it might cover the property that came into his hands as receiver. Said description tallies with the property that came into his hands only in the respect that some of the articles described in the mortgages were in the stock when he took charge. A stock of merchandise, office furniture, two or three mules, one or two drays, a horse, and a top buggy came

into his hands. He thought there was no other property of Gibian that came into his hands outside of the description contained in the mortgage. Nothing in his inventory appeared except what was in the storehouse besides the mules, etc. He had not compared the list of accounts made by himself with the list of those transferred to the preferred creditors, to see whether or not they were the same. Could not tell whether he had any of the transferred accounts or not. He followed the order of the court, which directed him to take charge of the accounts set out in the intervention, and in so doing took charge of the accounts transferred to the mortgagees. It is a fact that the amount in his hands, after deducting taxes and other expenses of the receivership, is not sufficient to pay the preferred debts. He made all reasonable efforts to collect the accounts. Would say those not collected are uncollectible. Those transferred to Gibian & Co. he considered practically uncollectible, else he would have collected them. They were placed in the hands of attorneys. He never had anything to do with the transferred accounts. In one instance part of an account was sent him that did not appear on his list, and he simply turned over the money. He thought it was \$75, and that it went to the Exchange Bank. He thought he collected something like \$40,000 on the accounts. He settled several of those accounts by order of the court. He balanced several of them without a cent; for instance, one of Gibian's travelers collected about \$3,000. From the tax digest of 1890 the aggregate returns of Gibian & Co. appeared to be \$17,400, while Gibian's individual return amounted to \$2,275, and Lillenthal returned one poll. For 1891 the returns of the firm aggregated \$19,950, Gibian's individual return amounted to \$8,200, and Lillenthal's one poll.

Steed & Wimberly, for plaintiffs in error. Hardeman, Davis & Turner, Bacon & Miller, and Hill, Harris & Birch, for defendants in error.

LUMPKIN, J. The facts of this case appear in the reporter's statement.

1. The execution and delivery by an insolvent partnership of several mortgages, all bearing the same date, does not make an attempted assignment for the benefit of creditors. *Hollingsworth v. Johns*, 92 Ga. 428, 17 S. E. 621. Nor does the transaction, considered as a whole, take the character of such an assignment, because, in addition to the mortgages, the partnership also executed and delivered to the mortgagees and other creditors an instrument transferring as collateral security for the claims of all these creditors the choses in action belonging to the partnership, it not appearing that a trust in favor of the debtors or of any one else was thereby created. An insolvent debtor

may assign to a creditor, for that creditor's exclusive benefit, choses in action as collateral security for his debt. *Boykin v. Epstein*, 94 Ga. 750, 22 S. E. 218. It being clearly the right of a debtor to secure his creditors in either of the above-mentioned ways, we cannot see how securing them simultaneously in both ways would render the transaction an assignment to which the assignment acts of 1881 and 1885 would be applicable. The decision of this court in *Powell v. Kelly*, 82 Ga. 1, 9 S. E. 278, supports the ruling made in the present case. The case of *Kiser v. Dannenberg*, 88 Ga. 541, 15 S. E. 17, is altogether dissimilar. Indeed, the dissimilarity is so obvious, we need not undertake to specify the points of difference. In *Johnson v. Adams*, 92 Ga. 551, 17 S. E. 898, there was an element of trust. In the head-note of the decision therein the distinction between that case and one like the present is clearly pointed out. There are other somewhat similar cases in which a trust of the same character was created, which renders them inapplicable to the present discussion.

2. The instrument by which Giblan & Co., the insolvent partnership, sought to effect a transfer of their choses in action to certain of their creditors, was as follows: "For value received, we hereby transfer and assign, for collateral security, to the Exchange Bank of Macon [and other named creditors], the accounts, claims, choses in action, and equities due and owing to us, a schedule of which is annexed to this transfer, and made a part hereof; the said accounts to be collected or used and applied to the debts which the parties named hold against us; all amounts collected to be distributed pro rata upon the mortgages executed by us in favor of said parties on October 15th, 1891. Any overplus that may be collected over and above the claims aforesaid shall be paid upon the mortgages of Max Cohen [and two other named creditors], to whom such claims are also transferred and assigned; such overplus to be distributed pro rata on the amounts due such parties, as shown upon certain mortgages which were also executed by us on October 15th, 1891, in their favor. We hereby waive all notice required by statute in case any of these claims should be made by the parties to whom they are hereby transferred. This, October 16th, 1891." It will be observed that the above instrument specifically stipulates that the transfer thereby made is to the second class as well as to the first class of the creditors therein named. Unquestionably, therefore, the legal title to the property thus assigned was effectually transferred to both classes of creditors jointly, each class having an equal right with the other to immediate possession, and each taking a present interest therein. It is true that the instrument effecting this transfer plainly contemplates that, in order to secure the fruits thereof, the property must necessarily be converted into cash; but it does not

undertake to impose any duty in this regard upon the one class rather than upon the other. It simply vests in both classes jointly the legal title, leaving them free to adopt such means as they may command to effect a division of the property. Clearly, the creditors of neither class are constituted trustees for the other, given any power to exercise independent and exclusive control over the property, or charged with any duty of converting the same into cash and accounting to the members of the other class for their respective interests. It would require a considerable strain to hold that any trust was created by this assignment. Surely, if none of the creditors made any attempt to collect the choses in action so assigned for the protection of all, and allowed the same to become utterly worthless in their hands, we would not feel authorized to hold that either class would thereby become liable for the loss thus occasioned to the members of the other class. The case of *Boykin v. Epstein*, supra, distinctly settled the proposition that a debtor, in the exercise of his right to prefer creditors, could assign choses in action as collateral security, either to a single creditor or to a number of creditors jointly, provided no trust was created by such transfer. Of course, it is not a necessary prerequisite that each and every assignee should be given an equal interest in the property assigned; that is to say, the debtor would be entirely at liberty to provide that the interest of one creditor should be, say one-half, that of another one-twelfth, and so on. In other words, it is not incumbent upon the debtor to himself divide the property up, giving to each creditor only so much thereof as it is desired shall constitute his part; but an assignment of the whole may by one instrument be made to all the creditors, the particular interest of each in the undivided whole being sufficiently specified to enable a subsequent division of the property to be made by the creditors among themselves.

The real objection urged against the assignment made in the present case is that Giblan & Co. had no power to arbitrarily divide the assignees into two separate and distinct classes, giving to one a preference and priority of payment over the other. As no trust was imposed upon the first class by this arrangement, we fail to see how the assignment would be thereby invalidated. The sole purpose of this provision was to definitely fix the beneficial interest each class should receive under the joint assignment to both. Had property worth a definite amount been assigned, there surely could be no objection to the debtors' providing that the interest of certain creditors should, in any event, be equal to the full amount of the claims held by each, respectively; and, after this interest was deducted and paid out of the property as a whole, the balance remaining should be divided pro rata among other named creditors, according to the amounts of

their respective claims. What was done in the present instance amounts practically and substantially to the same thing. The exact value of the choses in action assigned could not, because of the uncertainty as to their collection, be definitely ascertained. Therefore it was that Giblan & Co., wishing to save some of their creditors entirely from loss, provided that the interest of this class should equal the full amount of their claims, regardless of the actual value of the property assigned; and to successfully carry this scheme into effect, further stipulated that sufficient of the proceeds realized from the property should be first set apart and paid over to this class, in order that the remaining interest conferred upon the creditors of the second class might be determined and divided ratably among the latter. Really, the important thing to be considered is whether or not the instrument by which the transfer was effected passed the title to the property actually assigned into both classes of creditors jointly, and not into one class alone for the benefit of both. We have no hesitation in saying both classes took under the assignment a joint, present, and immediate interest in the property. This being so, it is of very little practical importance to inquire as to the precise beneficial interest which, as between themselves, either class could assert against the other. Had the property been actually assigned and transferred to one only of these classes, giving that class exclusive possession of and control over the property in order that its claim should first be satisfied, and imposing upon it the duty of then administering the property for the benefit of the other class, an express trust would have been created, and the case would have worn an entirely different aspect.

3, 4. We do not think that Fulton & Bro., intervening creditors, established by a sufficiency of proof their contention that they were entitled to rescind the sale of their goods to Giblan & Co. on the ground of fraud in the purchase. And on the whole we find no error in the granting of a general nonsuit as to all the interveners. Judgment affirmed.

(98 Ga. 213)

#### WYLLY v. SCREVEN.

(Supreme Court of Georgia. March 23, 1896.)  
DOCUMENTARY EVIDENCE—PROOF OF EXECUTION  
—PLEADING—MORTGAGE—APPLICATION  
TO SUBSEQUENT DEBTS.

1. Where an action was properly brought, not only for the purpose of obtaining a money judgment for the amount of the plaintiff's demand, but also for the purpose of establishing a lien upon specified property, any written instrument by which the debt was secured and the lien created, if set forth and declared upon in the declaration, is, in the absence of a plea of non est factum, admissible in evidence in the plaintiff's favor, without proof of its execution.

2. Where a deed was executed to secure a specified debt, the security thus created could,

by a written contract between the parties, be so extended as to secure, as between them, another debt subsequently contracted by the grantor in favor of the grantee; and in such case it was not essential that this latter contract should in terms specifically describe the property covered by the original deed, this being sufficiently accomplished by references in the contract to the deed itself, and the description in the latter being full and accurate.

3. The evidence warranted the verdict; there was no error at the trial; and the court did not err in refusing to set the verdict aside.

(Syllabus by the Court.)

Error from superior court, McIntosh county; R. Falligant, Judge.

Action by John Screven, Jr., against W. C. Wyly. From a judgment for plaintiff, defendant brings error. Affirmed.

Clifton & Fraser and Garrard, Meldrim & Newman, for plaintiff in error. Geo. W. Owens, for defendant in error.

SIMMONS, C. J. Wyly, a rice planter, desired to obtain from Screven, a rice factor, advances to the extent of \$6,000 for the purpose of cultivating his crops for the year 1892; and it was agreed between them that Wyly should give to Screven a note for \$8,000, which Screven should use as collateral in obtaining from a bank the \$6,000, it being a rule of the bank that it would not advance more than 75 per cent. on such paper; and, to secure the payment of this indebtedness, it was agreed that Wyly should execute to Screven a conveyance of certain property, real and personal. It was also agreed that Wyly should pay interest on all advances at the rate of 8 per cent. per annum, and, in case of nonpayment, attorney's fees for collecting the same. In accordance with this agreement, Wyly, on February 1, 1892, delivered to Screven his note for \$8,000, due October 1, 1892, payable to the order of Screven, and made and delivered to him a deed to the property referred to; and during that year Screven made advances to Wyly to the extent of \$6,000. On February 13, 1893, at which time there was a balance due by Wyly upon this indebtedness, the parties entered into an agreement in writing whereby Screven agreed to advance to Wyly, for the purpose of cultivating his crops for that year, a sum not exceeding \$3,200, and Wyly agreed as follows: "The party of the second part, in consideration of the advances thus to be made, agrees to make and deliver unto the said party of the first part his promissory note of even date with these presents, for \$3,200, due and payable on January 10, 1894, said note being secured by a deed being made by the said party of the second part to the said party of the first part, of date February 1st, 1892, and the note therein described, for the sum of \$8,000." It was further agreed that eight per cent. interest should be paid on all advances, and that, in case the note or claim for advances should be placed in the hands of an attorney for

collection, ten per cent. should be paid as attorney's fees. The note for \$3,200 was delivered, and the money advanced, in accordance with this agreement. In February, 1894, Screven brought suit against Wyll for an alleged balance of \$4,525.02 due on these advances, and prayed that the realty and personalty described in the deed be sold to satisfy the same. The defendant answered that he did not owe the plaintiff the sum claimed, and could not specify the amount due; and that the deed did not operate as a lien to advances made under the agreement of February 13, 1893. The jury found for the plaintiff \$4,284.76, with interest from January 16, 1894, and 10 per cent. attorney's fees, and that the property be subject to the lien claimed. The defendant made a motion for a new trial, which was overruled, and he excepted.

1. It was complained in the motion for a new trial that the court erred in admitting in evidence the agreement of February 13, 1893, over the objection of the defendant that there was no proper proof of its execution. There was no error in overruling this objection. A copy of the agreement was attached to the declaration, and it was declared on as a part of the plaintiff's case, the action being not only for the recovery of the amount alleged to be due, but to establish a lien, which lien the declaration alleged was created by the defendant's deed and this agreement together. This being so, the defendant could not require proof of the execution of the agreement without first putting its execution in issue by a sworn plea of non est factum. See Code, §§ 2851, 3454, 3472, 4149, and cases cited in the notes to these sections. The defendant did not do this. In his answer, he admitted the execution of the agreement, and denied merely that it had the legal effect claimed for it by the plaintiff.

2. It was insisted that this agreement was ineffectual to establish a lien, for the reason that it did not describe the property; and, upon this ground, it was objected to as inadmissible for the purpose for which it was offered. It was also contended that, in so far as the original indebtedness was paid, the deed which had been given to secure the same ceased to be a lien, and that the lien could not be extended by such an agreement as the one in question, so as to operate as security for further indebtedness; and it is complained that the court erred in refusing to charge the jury to this effect. There is no merit in these contentions. When the new agreement was entered into, the title to the property was still in the creditor, and there was no reason why the parties could not enter into an agreement, which should be binding as between themselves, that the title, though conveyed as security for one debt, should stand as security for another. No particular form is required for an agreement to constitute a lien.

It is sufficient if it clearly indicates the intention to create a lien, the debt to secure which it is given, and the property upon which it is to take effect. We think the agreement in question does this. It clearly describes the debt, and states that it is secured by the deed of the party of the second part to the party of the first part, "of date February 1st, 1892, and the note therein described, for the sum of \$8,000." By means of this description the deed referred to could be identified, and by reference to the deed the property which it was intended should stand as security for the debt could be easily ascertained, the property being fully and specifically described therein.

3. The evidence warranted the verdict, and there was no error in refusing a new trial. Judgment affirmed.

(38 Ga. 268)

#### SOUTHERN EXP. CO. v. WOOD.

(Supreme Court of Georgia. March 30, 1896.)

##### CARRIERS—LOSS OF GOODS—CONCERNMENT OF VALUE.

1. The silence of a shipper touching the character and value of goods contained in a package, which does not indicate that its contents are of great or unusual value, or such an imperfect description of such contents as misleads the carrier with respect to their nature and value, may, when the circumstances require a full disclosure from the shipper, even in the absence of an inquiry by the carrier, or of an actual intent to defraud by the shipper, amount to such a fraud as will discharge the carrier from liability on account of loss or destruction of the goods.

2. Applying the law as above announced to the facts of the present case, a finding for the defendant was demanded, and therefore the verdict in the plaintiff's favor was contrary to law, and ought to have been set aside, irrespective of any ruling made at the trial.

(Syllabus by the Court.)

Error from city court of Macon; John P. Ross, Judge.

Action by A. L. Wood against Southern Express Company. Judgment for plaintiff. Defendant brings error. Reversed.

Erwin, Du Bignon & Chisholm and Dessau & Hodges, for plaintiff in error. Estes & Jones, for defendant in error.

SIMMONS, C. J. The law of this case, as announced in the first headnote, was laid down by this court in the case of Express Co. v. Everett, 37 Ga. 688, and is so fully discussed in the opinion of Chief Justice Warner in that case that we deem it unnecessary to enter into any further discussion of it here. See, also, the opinion of McCay, J., when that case was again before this court. 46 Ga. 306. In the present case the trial judge, in his charge to the jury, seems to have followed those decisions; but we think he erred in not setting aside the verdict as not sustained by the evidence. The facts, in brief, are that a package wrapped in common manilla paper, and tied with a twine string, but not sealed,

and which, it is alleged, contained the music and the libretto of an opera, the former worth \$1,000 and the latter worth \$50, was delivered to the agent of the defendant at Selma, Ala., for transmission to Macon, Ga. There was nothing on the package to indicate its value. According to the testimony of the person who delivered it to the agent, he told the agent that it was a package of music, but said nothing as to what kind of music it was, nor was anything said as to its value. No value was asked to be placed upon it, and none was given. He testified that the agent asked him 35 cents charges, and he replied that the package came to him for 25 cents, and after some discussion induced the agent to make a reduction in the charges. The agent testified that he first asked 40 cents charges, to which the sender replied that was too much; that the package came for 25 cents, and they ought to carry it back for the same price; and he remarked that it was nothing but printed matter or music, and the agent thereupon gave him a lower rate. There was further testimony for the defendant to the effect that, if its agent had been informed that the package was worth \$1,050, the rate would have been 10 cents per \$100 extra valuation, and that it would not have gone through the same channel as regular freight, but would have been put in the money department, where all valuable, sealed, and money packages were, and would have been carried in a safe in the express car instead of with the general freight therein. It appeared that the car in which the package was carried was destroyed by fire, but the packages in the iron safe in that car were not destroyed. There was considerable testimony as to the value of the opera, it appearing to have been the only copy in existence, and not capable of replacement. The jury found for the plaintiff \$475. The evidence shows that the conduct of Erhart, the person who delivered the package to the agent of the express company, was calculated to deceive the agent as to the value of the package, and it doubtless did deceive him. His higgling over the small sum charged for the freight was sufficient of itself to induce the agent to believe that the package was not valuable; and when he told the agent that it was music, without explaining anything further, the agent would naturally conclude that it was printed music, which is not very expensive. At any rate, no one would have supposed from the appearance of the package, or from what was said, that the package contained something worth a thousand dollars. If Erhart had informed the agent as to its value, it would have been placed in an iron safe, with other valuable packages; and, according to the evidence, would not have been destroyed by fire. By his higgling with the agent he got the benefit of a reduced rate, when, if the true value of the package had been known, a higher rate would have been charged for it. Such conduct on the part of the shipper, we think, amounted to

a concealment of the true character of the contents of the package, and constituted such a legal fraud upon the carrier as would in law discharge it from all liability as a carrier. The facts of the case are in this respect stronger in behalf of the carrier than were the facts in the *Everett Case*, supra, for in that case nothing was said to the agent of the carrier by the person who delivered the package for shipment which could have tended to mislead the agent; while in the present case the sayings, as well as the conduct, of the shipper, were calculated to deceive the agent. In that case there were two verdicts in favor of the shipper, but both verdicts were set aside; the second upon the ground that it was contrary to law, because the evidence did not sustain it. See Code, § 2080; *Wood v. Southern Exp. Co.*, 95 Ga. 452, 22 S. E. 535. Judgment reversed.

(98 Ga. 278)

## SANDERLIN v. WILLIS.

(Supreme Court of Georgia. March 30, 1896.)

SALE OF LAND—RESCISSON—ACTION FOR PRICE—EVIDENCE.

1. No legal right of rescission can arise in favor of the holder of land under a bond for title until after a breach of the bond by the obligor.

2. The defendant having pleaded that he had tendered the balance of the purchase money, and made a demand for the title called for by the bond, and that the plaintiff failed and refused to comply with such demand, and having entirely failed to sustain these allegations by evidence, the verdict against the defendant was absolutely demanded, and ought not to be set aside, though errors were committed at the trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by W. J. Willis against John F. Sanderlin. Judgment for plaintiff. Defendant brings error. Affirmed.

Steed & Wimberly, for plaintiff in error. Nottingham & Brunson, for defendant in error.

LUMPKIN, J. This case was before this court at the March term, 1894, when a new trial was granted, because, in our opinion, the presiding judge erred in striking a plea of the defendant alleging that there had been a breach of the bond for titles delivered to him by the plaintiff. 94 Ga. 171, 21 S. E. 291. Another trial was had, which resulted in a second verdict for the plaintiff, and the defendant now assigns error upon the overruling of his motion for a new trial.

The announcement contained in the first headnote is too manifestly correct to require argument in its support. The real question, therefore, upon which the case turned, was whether or not the defendant sustained his plea by evidence. He alleged, in substance, that he had tendered to the plaintiff, Willis, the balance of the purchase money

for the land bargained for, had demanded of Willis the title called for by his bond, and that Willis had utterly failed and refused to comply with this demand. After giving the entire brief of evidence a thorough and careful examination, we are satisfied these allegations were not sufficiently proved. There was evidence tending to show an inability on the part of Willis to make a good title to the land at the time of the alleged tender and demand, but no such defense was set up in the plea. Considered as to its bearing upon the real defense relied upon by the defendant, and put in issue by his plea, this evidence is entitled to no weight, being entirely foreign to the defendant's contention that Willis had made a breach of his bond by failing and refusing to comply therewith when proper tender and demand were made. Judgment affirmed.

(98 Ga. 260)

**CAPERS v. KIRKPATRICK et al.**

(Supreme Court of Georgia. March 30, 1896.)

**TRUSTEES—APPLICATION FOR REMOVAL—APPEAL—PARTIES.**

Where a trustee filed an equitable petition against several designated persons as cestuis que trustent under a will, some of them being contingent remainder-men, with interests more or less remote, praying that he be allowed to resign the trust, that a suitable person be appointed his successor, and that, after an accounting and settlement with such successor, the petitioner be relieved of and fully discharged from the trust; and where, after the case had been referred to a master under an order consented to by all parties, in which it was recited that, upon the filing of the master's report, the judge should appoint a successor to the petitioner, to whom the latter, upon receiving notice of the appointment, should without delay turn over the trust estate, there was a verdict finding that the petitioner was liable in an amount stated, and recommending his discharge as trustee upon his paying the same to the person who had been appointed such successor, or, in the event of nonpayment, that its collection be enforced by execution,—the petitioner could not properly bring the case to this court for review by a bill of exceptions without serving all the cestuis que trustent who were parties to the original petition. These persons, though they may not have been necessary parties in the court below, were proper parties defendant; and the petitioner, having elected to litigate with them as such in that court, cannot dispense with their presence in this court, notwithstanding their interests in the subject-matter may be only contingent.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Petition by F. W. Capers, trustee, against Mary A. Kirkpatrick and others, for leave to resign his trust. From the decree rendered, petitioner brings error. On motion to dismiss. Granted.

T. Oakman and S. Dutcher, for plaintiff in error. F. H. Miller, M. P. Foster, and W. H. Fleming, for defendants in error.

**SIMMONS, C. J.** When this case was reached in its order in this court, the defendants in error moved to dismiss it, on the ground that some of the parties in whose favor the judgment complained of was rendered were not made parties to the bill of exceptions. It appears from the record that the plaintiff in error, who was trustee under the will of A. P. Robertson, filed a petition, in which he prayed that he be allowed to resign the trust, that a suitable person be appointed his successor, and that, after an accounting and settlement with such successor, the petitioner be relieved of and fully discharged from the trust. The cestuis que trustent who were made parties defendant to the petition were Mary A. Kirkpatrick, the life tenant, Mary A. McBee, née Kirkpatrick, the first remainder-man, and the children of William H. Robertson, who were contingent remainder-men. They were all served, either personally or by publication. The case was referred to a master, under an order consented to by all parties, in which it was recited that, upon the filing of the master's report, the judge should appoint a successor to the plaintiff, to whom the latter, upon receiving notice of the appointment, should without delay turn over the trust estate. The master reported, and various exceptions were filed to his report. The court, after hearing the exceptions, approved the report, except as to certain parts stricken therefrom; and a verdict was accordingly taken, by which the jury found that the plaintiff was liable in an amount stated, and recommended his discharge upon his paying the same to the person who had been appointed his successor, or, in the event of nonpayment, that its collection be enforced by execution. The court rendered a decree in accordance with the verdict, and appointed a successor to the plaintiff, as trustee. The plaintiff excepted thereto; but no service of the bill of exceptions was made upon any of the parties defendant except Mrs. Kirkpatrick and Mrs. McBee. In resisting the motion to dismiss, the able counsel for the plaintiff in error contended that the real parties in interest were before the court, and that the interests of the contingent remainder-men who were not served were so remote that they were not necessary parties here. It may be true that these remainder-men were not necessary parties in the court below. Still, they were proper parties, and the plaintiff having neglected to make them parties, and litigate with them as such, and a verdict and decree having been rendered in their favor, they are necessary parties in this court, notwithstanding their interests in the subject-matter may be only contingent. The rule is that all parties to the judgment sought to be set aside must be made parties in this court. This is necessary in order that any judgment that this court may pronounce may be binding upon all parties to the litigation. See, on this sub

ject, *Baker v. Thompson*, 78 Ga. 742, 743, 4 S. E. 107; *Allen v. Cravens*, 68 Ga. 554; *Davis v. Peel* (Ga.) 22 S. E. 525. Writ of error dismissed.

(98 Ga. 257)

McELROY v. GEORGIA, C. & N. RY. CO.  
(Supreme Court of Georgia. March 30, 1896.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—  
SIGNALS.

The only negligence alleged against the defendant railway company being the failure of its servants to observe the requirements of section 708 of the Code, as to blowing the whistle of the engine and checking the speed of the train in approaching a public road crossing, and it appearing that the crossing in question was one where the track of the railway company crossed the public highway upon a bridge or trestle above the latter, there was no error in granting a nonsuit, the section in question being applicable to grade crossings only. *Atkinson, J.*, dissenting.

(Syllabus by the Court.)

Error from city court of Dekalb; *H. C. Jones*, Judge.

Action by Robert W. McElroy against Georgia, Carolina & Northern Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

Albert & Hughes, for plaintiff in error. Erwin, Cobb & Woolley, for defendant in error.

SIMMONS, C. J. McElroy sued the railway company for personal injuries, predicated his suit upon section 708 of the Code, the only negligence alleged against the defendant being the failure of its servants to comply with the requirements of that section in not blowing the whistle and checking the speed of the train in approaching a public crossing. It appeared from the evidence at the trial that the crossing was one where the railroad crossed the public highway upon a bridge or trestle 10 or 15 feet above the highway. At the conclusion of the plaintiff's evidence the court, on motion of the defendant's counsel, granted a nonsuit, holding that the section referred to did not apply to a crossing of this character, but applied to crossings at grade only. Section 708 provides that there must be fixed on the line of the railroad, and at a distance of 400 yards from the center of each public road crossing, and on each side thereof, a post, "and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." After a careful consideration of the phraseology of this section, a majority of the court are of the opinion that the trial judge was right in his construction of it. The object of the statute was manifestly the protection of persons and property where the track of the

railroad crosses the public road upon the bed of the highway; and there is no indication that it was intended to apply also where the railroad passes above or underneath the highway. Where the crossing is at grade, the railroad company and the public have a common right to the use of the highway; and it was doubtless on account of the great danger attending the exercise of this right by both, and the consequent need of some provision for the protection of persons or property upon or about to go upon the track at such points, that the legislature enacted the statute from which this section was taken. It is quite clear that the requirement that the speed shall be checked applies only where the crossing is at grade, for the statute says this shall be done "so as to stop in time should any person or thing be crossing said track on said road"; and, of course, there could be no occasion for stopping the train for the protection of persons not on or about to go upon the track itself. We think it is also clear that the provision as to the blowing of the whistle is applicable only where the checking of the speed is required, for both things are required to be done at the same time. Whenever the train is approaching a crossing to which the statute is applicable, and has arrived at one of the posts required to be placed 400 yards from the crossing, the engineer is required to blow the whistle of the locomotive until it arrives "at" the public road, "and to simultaneously check and keep checking," etc. These requirements are also stated conjunctively in section 710, which provides that, if any engineer neglects to blow the whistle "and to check the speed, as required in section 708," he is guilty of a misdemeanor, etc. If an engineer were indicted under this section, it would not be a sufficient defense that he did one of these things. In order to comply with the law, he would have to do both. If the legislature had intended that these requirements should be separable, or that both of them should be applicable where the crossing is at grade, and only one of them should apply where the railroad is above or below the public road, we think they would have used language expressive of that intention. To place this construction upon the statute would be to ingraft upon it a meaning not warranted by anything in the language of the statute itself; and this court has already held that the statute, being penal in its nature, and subjecting employes failing to observe its requirements to indictment and punishment, is to be construed strictly, and its requirements should not be extended by construction. *Morgan v. Railroad Co.*, 77 Ga. 791. The decision of this court in the case of *Bowen v. Railroad Co.*, 95 Ga. 638, 22 S. E. 695, and the reasoning of Justice Lumpkin therein, must be understood and construed with reference to its own facts. There the crossing was at grade, and hence the train was approaching a cross-

ing to which the statute was undoubtedly applicable. If we are right in our conclusion in the present case, that the statute was inapplicable except as to grade crossings, the doctrine of the Bowen Case is not involved. Whether, independently of the statutory requirements, a recovery could be had upon the state of facts alleged, is a question we are not required in this case to decide; the action, as already stated, being based wholly upon the statute. Judgment affirmed.

ATKINSON, J. (dissenting). The provisions of section 703 of the Code, in so far as the same require the engineer of a locomotive to blow the whistle, are applicable not only to crossings at grade, but also to crossings where the public road passes above or underneath the track of the railroad.

(98 Ga. 306)

ROBINSON v. HUIDEKOPER et al.  
(Supreme Court of Georgia. April 6, 1896.)  
RAILROAD RECEIVERS—ACTION FOR NEGLIGENCE—  
BURDEN OF PROOF.

1. According to the principle laid down by this court in *Henderson v. Walker*, 55 Ga. 481, which was reviewed and affirmed in the case of *Youngblood v. Comer* (decided at the last term) 23 S. E. 509, special statutes enacted for the purpose of fixing and arriving at the liability of railroad companies, and relating expressly and exclusively to such companies, cannot, by implication or interpretation, be held applicable to receivers of a railroad operating it under the orders of a court.

2. This being true, there is, so far as such receivers and their servants are concerned, no law in this state changing the common-law rules of evidence applicable to actions by servants against masters for personal injuries; and therefore, upon the trial of an action against such receivers by one of their employes for injuries of this kind, alleged to have been caused by the defendants' negligence, there is no presumption of law that they were negligent, but it is incumbent upon the plaintiff to prove affirmatively that such was the fact.

3. There being, in the present case, no evidence showing that the defendants were negligent, the verdict in their favor was the only legal one which could have been rendered; and therefore, whether the rulings of the trial judge complained of in the motion for a new trial were or were not erroneous, that motion was properly overruled.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by W. F. Robinson against F. W. Huidekoper and others, receivers. From a judgment for defendants, plaintiff brings error. Affirmed.

Hall & Hammond, for plaintiff in error.  
Glenn, Slaton & Phillips, for defendants in error.

LUMPKIN, J. The decision of this court in *Henderson v. Walker*, 55 Ga. 481, which has recently been reviewed and affirmed, is based upon the principle that special stat-

utes which relate expressly and exclusively to railroad companies cannot be held applicable to receivers of a railroad operating it under the orders of a court, for the reason that such receivers are not themselves railroad companies. The statutes referred to include not only those passed for the purpose of creating, as against a railroad company, a liability to which it would not be subject under the rules of the common law, but also those designed to vary pre-existing rules of evidence, so as to enable plaintiffs, in certain classes of cases, the more readily to establish a prima facie case of liability against such companies. At common law a master was not liable to one agent because of injuries arising from the negligence or misconduct of other agents in and about the same business. This general rule is still of force in this state. Code, § 2202. But an exception has been made by statute in the case of employes of railroad companies. Code, §§ 2083, 3033, 3038. The *Henderson* Case decides that these sections cannot be invoked in favor of the employe of a receiver in charge of the property of a railroad company. Again, at common law, there was not, in the trial of an action by a servant against his master for personal injuries, any presumption of negligence against the master; and hence, on the trial of such a case, it was incumbent on the plaintiff to prove affirmatively the negligence alleged. Our law so far varies this rule of evidence in favor of an employe of a railroad company who has received personal injuries through the running of the locomotives, cars, or other machinery of the company, that a presumption of negligence is raised against the company when he shows affirmatively that he himself was without fault. In other words, he makes out a prima facie case merely by showing that he was injured in the manner stated, and without negligence on his part. The question in the present case is, does this modification of the general rule of evidence prevail in favor of an employe of railroad receivers? We think not, and the application of the doctrine of the *Henderson* Case seems to render this conclusion unanswerable. There was no evidence in the present case which, in our judgment, showed affirmatively that the defendants were negligent; and, as a finding in their favor was the only one which could have been legally rendered, we need not pass upon the various assignments of error contained in the motion for a new trial. Judgment affirmed.

ATKINSON, J. (concurring). Without assenting to the correctness of the doctrine laid down in the cases cited in the first headnote, supra, I am, upon the authority of the rulings made in those cases, constrained to the conclusion reached in this, and for that reason only concur in the judgment.

(98 Ga. 238)

## VAUGHAN et al. v. GEORGIA CO-OPERATIVE LOAN CO.

(Supreme Court of Georgia. April 6, 1896.)

## FRAUDULENT CONSPIRACY—CONCEALMENT OF ASSETS—RELIEF IN EQUITY.

Where a debtor and other persons enter into a fraudulent scheme or conspiracy for the purpose of defeating the collection of a debt due by the former, and, in pursuance of the conspiracy, do a number of fraudulent and unconscionable acts, the effect of which, if permitted to stand, would be to destroy the creditor's lien upon property subject to the payment of this debt, the latter may, by equitable petition against all the conspirators, setting forth the facts, and containing appropriate prayers, not only obtain a money judgment or decree against the debtor, but also have such other relief against his co-defendants as the particular facts and circumstances of the case will justify. A petition of this kind is not multifarious nor demurrable for misjoinder of parties, or for misjoinder of causes of action.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Action by the Georgia Co-operative Loan Company against Stephen B. Vaughan and others. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

The demurrer filed by the defendants to the petition in the court below was overruled, and defendants excepted. The petition alleged: Plaintiff, the Georgia Co-operative Loan Company, is a duly-chartered corporation. Defendants are Stephen B. Vaughan, his sister, Annie J. Dill, and Patrick Armstrong. On December 12, 1891, said Vaughan was the owner in fee of a lot in the city of Augusta, described. He purchased it from John B. Vaughan, trustee, Sarah E. Vaughan, life tenant, Annie J. Dill and M. L. McCord, remainder-men (said S. B. Vaughan being the third remainder-man), for \$2,500, as appears by deed dated June 5, 1891. Previously, and while the title was in John B. Vaughan, trustee, the land had been pledged by security deed dated April 21, 1887, to E. C. Palmer, for a loan of \$3,500. In order to make the purchase and pay off the prior lien for balance due under the security deed to Palmer, and to pay accumulated taxes, and for other purposes, S. B. Vaughan secured a loan of \$5,500 on the land from plaintiff, giving therefor a security deed dated December 12, 1891, and recorded the same day. At the time of his application to plaintiff for this loan, and at the date of said deed, S. B. Vaughan occupied the official fiduciary relation for plaintiff of being its local secretary and agent at Augusta, Ga., and was a lawyer practicing there. Because of the trust and confidence arising from the relations above mentioned between said Vaughan and plaintiff, plaintiff sent its check for \$5,500 to him, and intrusted him with the duty of paying off the prior lien, and especially that of Palmer, instead of having those liens properly canceled before paying over the money or simultaneously therewith,

as is the usual practice of plaintiff in making loans; and said Vaughan agreed to make a proper distribution of the funds so intrusted to him. He did not pay off the full demands arising from the loan made by Palmer, but paid only a part of it; and, Palmer having died, his administratrix, O. F. Cumming, filed suit against Sarah E. Vaughan (who signed the note with said John B. Vaughan, trustee), to the May term, 1893, of the city court of Richmond county, for \$662, and on November 24, 1893, obtained a verdict therein for \$423. The first information plaintiff had of S. B. Vaughan's not having performed his trust to pay off the prior liens of the debt due Palmer was in November or December, 1893, when S. B. Vaughan told J. D. Proctor, plaintiff's secretary, who was then visiting Augusta, that the administratrix of Palmer had sued for a balance of \$662, but that he would easily win the case; that, if any judgment should be obtained, he would pay it; and that Proctor need not concern himself at all about the matter. Execution issued on the judgment in the city court in favor of said administratrix, and was levied upon the property. Under this levy, the property was sold on March 6, 1894, for \$1,225, and the sheriff made a deed to the same to Patrick Armstrong. Plaintiff had no notice that the suit of the administratrix had been tried, or verdict rendered, or execution issued, or levy made, or that the sale was being advertised or expected to take place, relying upon the good faith of S. B. Vaughan, who told its secretary in November, 1894, that he need not concern himself about the matter, and the persons in possession of the property at the time of the levy being tenants of S. B. Vaughan, and not of plaintiff. Plaintiff had no knowledge on the subject until after the sale, at which the property on which it had loaned \$5,500, on a valuation of \$11,000, was sacrificed for \$1,225, and its lien entirely divested, if said sale should be held legal, which \$5,500 would be a total loss to plaintiff, as S. B. Vaughan is insolvent. Said Vaughan purposely and deliberately conceived the plan, and successfully carried it out, to keep plaintiff in ignorance of the levy and sale, in order that he might buy in the property for himself, or for some one who would secretly hold it for his benefit, and thus free the property from the lien of plaintiff's claim, and cause plaintiff to lose its debt; and said Annie J. Dill conspired with him in carrying out said plan, and they secured the assistance of Armstrong, though plaintiff does not charge Armstrong with a full knowledge of the facts. S. B. Vaughan made an agreement with Messrs. Lockhart & Baxter, attorneys for the administratrix, who had moved for a new trial in said case, that, if they would dismiss that motion, he would settle with them for \$500, instead of the amount of the verdict; and he gave his note for the difference, it being a part of said agreement, either by direct expression or necessary implication, that the

levy and sale should proceed at once, Vaughan even going so far as to let them know of his purpose to keep plaintiff in ignorance of the sale, so that Vaughan might have the property bid in for his benefit. Said Lockhart & Baxter, who are gentlemen of high character, became concerned about the peculiar attitude in which Vaughan had placed them, and, desiring to free themselves from any connection with what began to appear to be a fraudulent scheme, on February 21, 1894, wrote Vaughan: "Upon further consideration of the statements made us by you in regard to sale under fl. fa. of Carolyn P. Cumming, Admx., we are satisfied that the notice either by you or by us must be given to the Atlanta Loan Co., which holds second deed to our security. We believe the fact that you are or have been the agent of this company, coupled with our knowledge that no notice is intended to be given them, would render the sale void for conspiracy, in the first place, and, in the second place, that it might entail unpleasant consequences upon [us] in case of an investigation of the matter by the company. We must therefore ask, with a view to protecting ourselves and our client, that you notify the company in Atlanta, or that you permit us to do so." In reply to this letter, said Vaughan, on February 22, 1894, wrote to them: "You are laboring under a mistake in regard to my agency of the company in Atlanta. I was the local secretary of the company when they first organized a branch here, but resigned that position about two years ago, and have no connection with the company now whatever. It is not my intention to enter into any conspiracy with any one, but my only aim is to stop this company from pushing me to the wall, and unjustly so, too. I desire and expect to pay them every cent of my indebtedness to them, but they must take it as I agree with them; that is, \$55.00 per month until paid. As it is, they are trying to make me pay it all up in full, and more besides. Furthermore, when the general manager was down here during the exposition, I told him that you had entered suit against my mother on the same property for \$662, but that I expected to gain the case, and that, even if I lost it, we had enough property to cover the amount outside of this property. I hope this will explain the matter in a different light, and that you will agree with me that nothing has been kept concealed under the law from anybody. My idea is to get my sister or Mr. Cumming to buy the property in and hold it, allowing me the equity of redemption; so that, as soon as the company agrees to let my contract with them continue, I will then redeem the property. I do not desire to have a heavy judgment standing over me anyway, and they could, at least, get it and hold it. So, you see I am only acting in good faith, to keep the property from being sacrificed." Accepting the statements of said Vaughan as true, and not wishing to appear officious, Lockhart & Baxter did not notify

plaintiff, as they at first intended. The property, when put up at sale by the sheriff, was really bid in by Vaughan; but, to carry out his plan to defeat plaintiff's claim, he had the bid entered by the sheriff in the name of said Annie J. Vaughan, his sister; and then, for the purpose of still further covering up the real facts, they entered into an agreement with Armstrong that he should pay the \$1,225, and take the sheriff's deed, but should not be the absolute owner of the property, but hold the same for the benefit of said Vaughan, through his sister, Annie J. Dill. In pursuance of this agreement, Armstrong advanced the money, held by him as administrator of J. F. Armstrong, and took the deed in his name as such administrator. But for the action of said Vaughan in inducing Lockhart & Baxter not to notify plaintiff of the sale, it would not have lost its lien upon the property, because it would have willingly advanced the money to pay the \$423 execution, or any other lien prior to its own. After plaintiff learned of the sale, its secretary came at once to Augusta, and offered to pay over the \$1,225 and any other actual cost to which Armstrong had been put, if said Vaughan and Annie J. Dill and Armstrong would give such papers as would restore the property to its former condition, of being subject to the lien of plaintiff's claim; but all of them failed and refused to accept its offer. The levy of the \$423 execution on the property, worth, according to valuation at the time of the loan, over \$10,000, and having a market value of \$5,000 or \$6,000, was grossly excessive, especially as either the eastern or the western portion of the lot could easily have been levied upon and sold separate from the other portion, and would have brought far more than the amount of the execution, and the sale is void by reason of such excessive levy. Armstrong had no right or lawful authority to take the money belonging to the estate of John F. Armstrong, and buy real estate therewith, nor to lend or advance the money to any one, and take a deed to the same in his name as administrator, and the sale should be set aside upon payment to him by plaintiff of said purchase price of \$1,225. No judgment has been entered upon the verdict of the jury in the suit of said administratrix against Sarah E. Vaughan, and consequently no execution could legally issue, and no legal sale be had; and hence the deed from the sheriff to Armstrong, administrator, is void. S. B. Vaughan is now indebted to plaintiff upon said \$5,500 loan \$5,027, which sum is due and unpaid. A copy of the contract is attached. Plaintiff stands ready to pay off any lien on the property that may have priority over the security deed held by it. It prayed for process; that the sheriff's deed be declared void and canceled, as against its right; that it have judgment against S. B. Vaughan for the sum due it, and the equity of redemption in said mortgaged property be foreclosed; that the property be declared sub-

ject to its said judgment after the payment of any prior lien thereon; and for general relief.

J. R. Lamar, for plaintiffs in error. Fleming & Alexander, for defendant in error.

SIMMONS, C. J. The allegations of the plaintiff's petition are set out by the reporter. The defendants demurred to the petition, upon the grounds that there was no equity therein, and that there was a misjoinder of causes of action and of parties defendant. According to the allegations of the petition, one of the defendants, Vaughan, borrowed \$5,500 from the plaintiff, and, to secure the same, conveyed to the plaintiff certain land in the city of Augusta. Vaughan was at that time the plaintiff's local secretary and agent at Augusta; and, having confidence in him as such, the plaintiff sent to him the full amount of the loan, and intrusted him with the duty of paying off prior liens and incumbrances upon the land, among them the lien of one Palmer, who held a deed to the land as security for a debt. Vaughan failed to pay this debt, and allowed a verdict to be rendered in favor of Palmer's administratrix for the amount of the debt, and the land to be sold under an execution therefor, although no judgment had been entered up on the verdict. Under this execution, the land was sold by the sheriff; and, according to the petition, Vaughan was himself the purchaser, and had the bid entered in the name of another of the defendants, his sister, for the purpose of concealing the true nature of the transaction; and, for the purpose of further concealing it, he had the deed made by the sheriff to Armstrong, who is also a defendant. It further appears that the land was sold at this sale for less than an eighth of its value. It is charged that this was done in pursuance of a fraudulent scheme to free the property from the lien of the plaintiff's claim, and cause the plaintiff to lose its debt. The plaintiff prays for a judgment at law against Vaughan on his promissory note, for the foreclosure of the equity of redemption of Vaughan in the land conveyed to the plaintiff to secure the note, and for the setting aside of the sheriff's deed of the property to Armstrong, which he alleges to be fraudulent and void. It will be seen, therefore, that both legal and equitable causes of action are joined, and relief of both kinds prayed for, in the petition. Under the uniform procedure act of 1887, all this can be properly done in one suit. In the case of *De Lacy v. Hurst*, 83 Ga. 229, 9 S. E. 1054, we said: "That act conferred upon the superior courts jurisdiction to hear and determine all causes of action, whether legal or equitable or both. There is no reason now why the court should not give complete and ample relief to all of its suitors, either plaintiffs or defendants, in the same action. It has jurisdiction of the parties and the subject-matter, and, in a case such as the case at bar, can grant to the plaintiffs judgment on their claims if it is proper to do so, and at the same time, if proper parties be

made, set aside fraudulent conveyances which are in the way of the execution of that judgment." So, in the present case the plaintiff could obtain a judgment at law, against Vaughan on his note, could foreclose his equity of redemption in the land conveyed by him as security for the debt, and, if the sheriff's sale was fraudulent and void, could have that sale set aside. Under the facts alleged, there was equity in the petition. There was no misjoinder of causes of action; nor was there a misjoinder of parties defendant. See *Cohen v. Wolff*, 92 Ga. 199, 17 S. E. 1029; *Brown v. Latham*, 92 Ga. 284, 18 S. E. 421; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Ellis v. Pullman*, 95 Ga. 445, 22 S. E. 568. The court, therefore, did not err in overruling the demurrer. Judgment affirmed.

(98 Ga. 304)

### CULPEPPER v. CULPEPPER.

(Supreme Court of Georgia. April 6, 1896.)

#### DIVORCE—EXCESSIVE ALIMONY.

Where, pending an action for a divorce by a husband against his wife, she filed an application for temporary alimony, and, on the hearing of this application, it was shown by uncontradicted testimony that the man had no profession; that he did not own a dollar's worth of property; that he had persistently and repeatedly endeavored, but without success, to obtain employment; and that he had no home except upon his father's farm, where he was unable to obtain more for his services than his board and clothing,—a judgment awarding \$850 for temporary alimony accruing since the marriage, and \$25 a month for the future, together with \$300 counsel fees, was grossly excessive, and its allowance an abuse of discretion.

(Syllabus by the Court.)

Error from superior court, Houston county; John L. Hardeman, Judge.

Bill of James M. Culpepper against Sallie G. Culpepper for divorce. From an order granting alimony, defendant brings error. Reversed.

Bacon & Miller and Hardeman, Davis & Turner, for plaintiff in error. Gustin, Guerry & Hall, W. D. Nottingham, and A. T. Harper, for defendant in error.

SIMMONS, C. J. Culpepper sued for a divorce, on the ground that he was forced by duress into the marriage contract. Pending the suit, the wife applied for temporary alimony. At the hearing of the application, there was uncontradicted testimony to the effect that Culpepper was a young man, without any profession, trade, or business; that he had made frequent and persistent efforts to obtain employment, but without success; that he owned no property; and that the only support he had was what was given him by his father, who was a farmer, but did not need his services on the farm, and was unable to give him more than his board and clothing. The court below adjudged that he pay \$350 temporary alimony, \$25 per month for future alimony, and \$300 counsel fees.

While this court is always loath to interfere with the discretion of the court below in cases of this character, it does not hesitate to do so when that discretion is abused; and, in our opinion, the court below did abuse its discretion in this case. A judgment for \$650 for temporary alimony and counsel fees, besides \$25 per month permanent alimony, against a young man situated as this party was, with no property and no employment, is so grossly excessive as almost to shock the moral sense. It was argued that this judgment, and the knowledge that he would be sent to jail for contempt of court if he did not pay it, would operate as a spur or incentive to him to procure employment and the means to pay it. In my opinion, it would more probably have the contrary effect. Seeing that it would be impossible for him to pay such an amount, the probability is that he would make no effort to do so; while, if the judgment were for a more moderate sum, he might have felt it would be worth while to make an effort to raise the money, and the contempt proceeding might in that case have operated as an incentive. In these hard times, when values are shrinking, and many thousands find it impossible to get employment, and when farm laborers can be employed in this state at from \$8 to \$10 per month, it would be impossible for a person situated as this man was to pay such a judgment. It is useless to discuss the matter further. The mere statement of the facts, we think, should be sufficient to show that the court abused its discretion. Judgment reversed.

(98 Ga. 364)

**BAUGHN v. WILEY, Ordinary.**

(Supreme Court of Georgia. April 27, 1896.)

INSANITY—INQUISITION—PERSON UNDER SENTENCE—MANDAMUS.

1. Proceedings to obtain a commission de lunatico inquirendo under section 1855 of the Code, for the purpose of having a person imprisoned in the jail of a given county sent to the asylum as a lunatic, cannot be maintained when it appears that such person has been convicted of murder in another county, is subject to the sentence of death, and was confined in the jail in question under an order of the superior court in which the conviction was had.

2. In such case the writ of mandamus will not lie to compel the ordinary of the county in the jail of which the alleged lunatic is confined to entertain jurisdiction of such proceedings.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Application by W. W. Baughn, next friend of Elizabeth Nobles, for a writ of mandamus against C. M. Wiley, ordinary. From an order denying the writ, plaintiff brings error. Affirmed.

Marion Harris and Glenn & Rountree, for plaintiff in error. J. M. Terrell, Atty. Gen., for defendant in error.

**LUMPKIN, J.** Three persons presented a petition to the ordinary of Bibb county, alleging that Elizabeth Nobles, then confined in the common jail of that county, was of unsound mind, and subject to be committed to the lunatic asylum. The petition prayed for notice to two named persons as the only adult relatives of the alleged lunatic, and that a commission of lunacy should issue as provided by law. This petition seems to have been based upon section 1855 of the Code, and it makes not the slightest reference to the fact that Elizabeth Nobles had been convicted of murder in the superior court of Twiggs county, was subject to the sentence of death, and had been sent to the jail in Bibb county for safe-keeping. The ordinary passed an order for the giving of the notice prayed for in the petition, but subsequently refused to issue a commission of lunacy, or to entertain further jurisdiction of the matter; he doubtless being aware of the real state of affairs, though the record does not disclose how he became informed of the facts. At any rate, a petition for mandamus was presented to the judge of the superior court of Bibb county for the purpose of compelling the ordinary to entertain jurisdiction of the lunacy proceedings, and to obtain an order that the alleged lunatic be retained in the custody of the sheriff or jailer of Bibb county until the writ de lunatico inquirendo had been lawfully disposed of. In the petition for mandamus the facts relating to the conviction of Elizabeth Nobles and of her being sent to the jail of Bibb county under an order of Twiggs superior court were set forth, and it also appears from this petition that the sheriff of Twiggs county was about to carry the prisoner back to that county for the purpose of having the sentence of death passed upon her. The judge of the superior court refused to grant the mandamus nisi, and this action on his part is brought to this court for review.

We have not the slightest hesitation in holding that the judge was right. Section 1855 of the Code was never intended to have any application to a case of this kind. It manifestly falls under section 4666 of the Code, or else we have no statute law adapted to this particular state of affairs. That section, by its terms, can be invoked only after the sentence of death has been passed, and the convict shall have thereafter become insane. As will have been seen, one of the purposes of the application to the ordinary was to prevent the return of the prisoner to Twiggs county for the purpose of receiving the sentence of death. We are quite certain that the ordinary of Bibb county had no authority to thus interfere with the business of Twiggs superior court. The law gives him no power to review its action, or to control its proceedings. It would be, indeed, an anomalous spectacle if an ordinary could thus suspend or interfere with proceedings in the superior court, which is a higher tribunal

than that over which the ordinary presides, and which has jurisdiction to review his judgments. Nothing of the kind was ever contemplated by the law-making power. If, after Elizabeth Nobles has been remanded to the jail of Twiggs county, and the sentence of death has been passed upon her, the provisions of section 4666 can be lawfully invoked in her behalf, let the same be done. In the meantime we hold emphatically that the ordinary of Bibb county has no jurisdiction over the matter. He very properly refused to grant the writ prayed for, and the circuit judge was right in denying the mandamus. Judgment affirmed.

(98 Ga. 279)

**BIBB LAND-LUMBER CO. v. LIMA MACH. WORKS.**

(Supreme Court of Georgia. March 30, 1896.)

**SUPERIOR AND CITY COURTS—RULES—CONSTRUCTION—CONFLICT OF AUTHORITY.**

1. Where the superior and city courts of a given county, in order properly to regulate the conduct of the business pending in such courts, have mutually adopted rules which establish such a comity between the courts as to enable counsel employed in both to represent their clients in cases pending in each, and in a given case a conflict arises between such courts touching their authority under such rules, the construction of them is for the superior court, and the city court, in such event, is concluded by and must yield to the judgment of the superior court rendered thereon.

2. Under the facts disclosed by the record, it was error for the judge of the city court to refuse to "check" or suspend further proceedings in the case pending before him, so as to allow the counsel for the defendant therein an opportunity to attend the trial of cases in the superior court, which, according to the ruling of the judge of that court, communicated to the judge of the city court, were, relatively to the case in the latter court, entitled to precedence.

3. Enough appears from the record to show that because of the enforced absence of counsel for the defendant during the latter portion of the trial in the city court, the case there was not properly tried, and the ends of justice require that it should be tried again. Accordingly the superior court erred in not sustaining the certiorari.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Action by the Lima Machine Works against the Bibb Land-Lumber Company in the city court, in which there was a judgment for plaintiff. From a judgment of the superior court refusing to sustain a certiorari, defendant brings error. Reversed.

Steed & Wimberly and Hardeman, Davis & Turner, for plaintiff in error. Alex. Proudft and Anderson & Anderson, for defendant in error.

ATKINSON, J. It appears from the record that the superior court of the county of Bibb, and a city court of said county, which sits by law in the city of Macon, have by mutual agreement established a system of rules for the convenience of each, and for the conven-

ience of members of the bar who practice law in each of said courts. Among other of the rules so established was one which provided as follows: "When any case is called, and the counsel for either party shall be engaged in the trial of a case in the city or federal court in Macon, such case shall be checked until the counsel so engaged in the city or federal court shall conclude the trial of such case, when the case so checked shall be in order for trial according to its original place on the calendar." Another provides that: "After a case is set down for trial, the same will not be continued except for providential cause, or from a cause which arises subsequent to the day the case is set down, or for a cause existing at the time the case is set down, but which shall not be discovered by the exercise of due diligence on the part of attorney or party." The last clause of rule 2 (the record not indicating what the full text of the rule was) is as follows: "The judge may, in his discretion, for special cause shown, assign causes for special days later than the week succeeding the day upon which the case is assigned." The case now under review was pending in the city court of the city of Macon, and had been assigned for a day certain in that court. Certain causes pending in the superior court, in which the counsel for defendant in the present case were of counsel, had been assigned for several days earlier than that assigned for the trial of the case in the city court, but in consequence of the illness of the circuit judge these assignments had been vacated, and the case reassigned by him for the day fixed for the trial of this case in the city court. These cases reassigned in the superior court were some in which the resident circuit judge was disqualified, and he had procured the attendance of a judge of another circuit for the purpose of trying such cases. The case in the city court appears to have been called for trial at 9 o'clock a. m. (the usual time for the sitting of that court) of the day fixed for the trial thereof. The cases in the superior court were called in their order on the same day by the nonresident circuit judge. It appears that counsel for the defendant in this case, when the same was called up for trial, moved a postponement, for the time being, of the trial thereof, assigning as a reason the pendency for trial of the cases in the superior court above referred to. The motion to postpone was disallowed. The counsel then appeared in the superior court, and asked that the assignment of those cases be vacated temporarily, in order to enable them to complete the trial of the case in the city court. The superior court having deferred the trial of the cases until its afternoon session, the trial of the case in the city court in the meantime proceeding, the circuit judge, at the afternoon session of the superior court, declined to further delay the trial of the cases there pending, notice of which was communicated to the city judge, together with a renewal of the

motion to postpone further proceedings in the case in the latter court. The circuit judge requiring their presence in the superior court, the counsel were compelled to abandon the further trial of the case in the city court. It appears that, notwithstanding this conflict in the assertion of authority by the respective courts, the judge of the city court proceeded with the trial of the case therein pending, and, in the absence of counsel for the defendant, admitted evidence which might materially affect the defendant's case. Upon this state of facts, from this judgment the defendant filed a petition for certiorari, which was answered by the judge of the city court. Upon the coming in of the answer the defendant in the court below filed a traverse upon various grounds of exception, but a minute discussion of these grounds is not necessary in the determination of this case.

1, 2. In the hopeless conflict between what was alleged to have occurred and what did occur in the progress of this controversy touching the jurisdiction of the several courts, it is more than probable that the case was not tried in that calm, serene atmosphere which should surround a court in the progress of judicial investigation. It is not at all probable that the circumstances out of which this question was evolved will again occur, or that the question will itself again be raised, and hence a minute discussion of all the minor facts upon which the controversy at last may rest will be wholly unprofitable, and useless as a guide for the courts in the future dispatch of business. We deem it only necessary to say that the superior court, as a court of original jurisdiction, is one of boundless power. Within the sphere of its own jurisdiction, judgments of the city court are entitled to equal respect. In point of dignity, as measured by the respect due to them from the citizens of this state, all courts are co-equal, from that presided over by the humblest magistrate in this land to its courts of last resort. There is, therefore, no reason for the existence of jealousy between these institutions to which are committed the most sacred rights of the individual and the state. If, however, conflicts should arise between them touching rules of conduct prescribed by them for their own government and for the control of the conduct of their officers, there must be somewhere vested some power which will prevent the citizen from being ground to powder between the "upper and nether stone." Attorneys at law are officers of both courts. They are examined for license and admitted to the practice of law by the superior courts, and by virtue of a certificate of proficiency from such courts they are by law authorized to plead and practice in all the courts of this state except the supreme court. They are answerable first to the court from which they hold this commission, and are bound by law first to respond to its mandate, and the courts of inferior jurisdiction should so regulate their conduct as to conform to the order of business

established by the superior court. The rules of practice established by the superior court in this case were rules of that court. The interpretation of those rules was for the superior court, and when the circuit judge ruled that the attorneys engaged in the city court must present themselves at the bar of the superior court to proceed with the trial of cases therein pending, the judge of the city court should have yielded to such direction. We will not presume that circuit judges will abuse the discretion, or capriciously exercise the power conferred upon them in this matter; nor do we think, in view of the circumstances and facts under which the present controversy arose, that there was a disposition to unduly exercise this power. It will be borne in mind that a nonresident circuit judge was presiding in the court for the purpose of trying cases in which the resident circuit judge was disqualified; that a continuance at that time involved an indefinite postponement of these cases, at great inconvenience to the counsel and the parties, and with the constant prospect that these old cases remaining on the docket and undisposed of would seriously interfere with the dispatch of the public business in the future.

3. It was insisted upon the argument here that, whatever view this court might take of what transpired in the city court, the judgment of the city judge on the merits of the case was right, and should not be disturbed. We have looked through the record carefully, and we are not prepared to say that this is a case in which a judgment was demanded for the plaintiff. It was the right of this defendant to have its case tried according to law, and to be represented by counsel at every stage of that trial; for, if anything occurred upon the trial prejudicial to him to which he did not then object, he could not thereafter make the question upon its legality. Hence we deem it our duty, in view of the unfortunate conflict in which this defendant was involuntarily drawn, to remand this case, that it may be tried under circumstances more favorable to the administration of even-tempered justice. Judgment reversed.

(98 Ga. 375)

#### FRALEY v. THOMAS.

(Supreme Court of Georgia. April 27, 1896.)

EXECUTORS — NEGLIGENCE IN COLLECTING ASSETS — ESTOPPEL OF LEGATEE TO ASSERT.

1. Although existing facts may authorize an executor to apply to the ordinary for leave to compromise a contested or doubtful claim belonging to the testator's estate, and an order authorizing a compromise may be properly granted, this will not relieve the executor from the consequences of his own negligence in bringing about the state of affairs rendering the compromise necessary or proper, nor discharge him from liability arising on account of such negligence.

2. In such case, the acceptance by a legatee of a portion of the fruits of the compromise does not estop the legatee from holding the executor responsible for a negligent failure to col-

lect the claim at a previous time, when the money might have been made upon it if the executor had exercised the proper diligence for this purpose.

3. The evidence warranted a verdict in the plaintiff's favor, and none of the grounds of the motion for a new trial disclose any valid reason for setting it aside.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Action by M. I. Thomas against Henry Fraley, executor. From a judgment for plaintiff, defendant brings error. Affirmed.

H. T. Lewis and R. H. Lewis, for plaintiff in error. Jas. A. Harley and Jas. Whitehead, for defendant in error.

SIMMONS, C. J. An execution in favor of William Fraley against George W. Watkins, for \$10,000, came into the hands of the plaintiff's executor. The execution was issued in 1876, and we infer from the record that it came into the executor's hands soon after that time. It does not appear when the testator died or the executor qualified. When the execution came into the hands of the executor, Watkins was solvent, and owned realty worth about \$10,000, and personalty worth from \$3,000 to \$11,000. He had a good credit, and his credit continued good until 1882 or 1883. After that time it was not so good. About 1890 he became diseased physically and mentally, and his credit became very much weakened. In 1891 the executor placed the execution in the hands of the sheriff, and had it levied, but was met by an affidavit of illegality, setting up that the judgment from which the execution had been issued was dormant. Subsequently, a compromise was agreed on between Fraley's executor and the representative of Watkins' estate, and all the legatees under the will of Fraley agreed to the compromise except Mrs. Thomas, the defendant in error in this case, and, upon the application of the executor, the ordinary approved the compromise. The executor carried out the compromise, receiving, in full discharge of the execution, certain land, from the sale of which he realized about \$4,500. Mrs. Thomas received her proportion of this fund, and gave a receipt therefor, reciting that it was "on interest in estate of said William Fraley, under the will of said deceased." Afterwards the executor was cited by Mrs. Thomas for an accounting before the ordinary, and the case was taken by appeal to the superior court. There was a verdict for the plaintiff, but the amount of the verdict does not appear. The defendant made a motion for a new trial, which was overruled, and he excepted. It was insisted on the part of the executor that having obtained the consent of the ordinary to the compromise, and having executed the compromise in good faith, he was relieved from any further responsibility to Mrs. Thomas or any other person interested in the estate. The

Code (section 2535) requires an administrator or executor to place in suit every debt due the estate which he may reasonably expect to recover, and declares that "if, by his neglect or indulgence, the debt is barred by the lapse of time, or is otherwise lost to the estate, he is responsible therefor." It appears in the present case from the evidence of the executor himself that he indulged the debtor when the latter had ample means to pay the debt, and that he continued to indulge him for more than 10 years, though he knew for a considerable portion of that time that the debtor was gradually growing "weaker." It will be seen, therefore, that the failure to collect the debt in full was due to the executor's own negligence. This being so, he was liable for so much of the debt as was lost to the estate; and it could make no difference that the compromise finally effected was approved by the ordinary. The effect of the ordinary's approval was merely to show that the compromise was necessary or proper under the circumstances then existing. It could not relieve the executor from liability for the negligence which rendered the compromise necessary.

2. It was also contended by the executor that the receipt by Mrs. Thomas of the fruits of the compromise estopped her from claiming that there was any further liability on his part on account of the debt in question. If, as we have shown, the compromise did not protect the executor from liability for his negligence prior to the compromise, it follows that acceptance of the fruits of the compromise did not operate to discharge him from such liability; and there was nothing in the terms of the receipt given by Mrs. Thomas which indicated that it was intended to operate as a discharge in full.

3. The evidence warranted the verdict, and none of the grounds of the motion for a new trial present any valid reason for setting the verdict aside. Judgment affirmed.

(98 Ga. 377)

#### POSS v. HUFF et al.

(Supreme Court of Georgia. April 27, 1896.)

##### UNDUE INFLUENCE—EVIDENCE—INSTRUCTIONS.

1. One of the issues being whether or not the defendant had used undue influence to induce his mother to execute to him a deed to realty, evidence that the "defendant several times put his head in his hands in his mother's presence, and said he was going way off to the mountains," to which she replied "not to do that, that things would get better," standing alone, was inadmissible, and certainly was insufficient to show that undue influence was used.

2. No other evidence to show undue influence having been offered, it was error to charge that, if the execution of the deed was not the free act of the grantor, but the result of a substitution of the will of another for her own, the deed should be canceled.

3. The charges as to the defendant's alleged insolvency, and as to failure of consideration in the deed in controversy, were irrelevant to the case as presented by the pleadings and evidence.

The grounds of the motion for a new trial not covered by the preceding notes present no question of material importance.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; Seaborn Reese, Judge.

Action by Sarah Huff and others against John C. Poss to set aside a deed. From a judgment for plaintiffs, defendant brings error. Reversed.

S. H. Sibley, for plaintiff in error. H. McWhorter, for defendants in error.

SIMMONS, C. J. Mary S. Poss executed to her son John C. Poss a conveyance of certain realty, reciting therein that it was made "in consideration of the natural love and affection which she bears towards the said John C. Poss, and for the consideration that the said John C. Poss has been a most affectionate son, caring for party of the first part, and providing for her wants and demands, during her widowhood." At her death the grantor left eight children, including the grantee, and four of these children filed an equitable petition for the purpose of obtaining a cancellation of the deed, on the ground that at the time of its execution the grantor was of feeble mind, and that the grantee obtained it by the exercise of undue influence. The jury found in favor of the plaintiffs, and there was a motion for a new trial by the defendant, which was overruled, and he excepted.

1. It is complained in the motion for a new trial that the court erred in allowing one of the plaintiffs to testify, over the objection of the defendant, that the "defendant several times put his head in his hands in his mother's presence, and said he was going way off to the mountains," and that his mother replied "not to do that, that things would get better." We think the objection to this testimony ought to have been sustained. Standing by itself, it does not show undue influence. It shows merely that the son was despondent, and that his mother sought to cheer him. It is not connected in any manner with the execution of the deed in question. In fact the witness added that she did not remember when or where these remarks were made, or in what connection they were made. They seem to us to have been totally irrelevant to the issue on trial.

2. The court charged the jury: "The second contention of plaintiffs is that the deed was procured by undue influence of defendant upon his mother. If you find that the execution of said deed was not the free act of the grantor, and there was not an assent of both parties to the contract, but that it was the result of a substitution of the bill of another for that of the grantor, and the contract of but one of the parties, I charge you that the deed should be canceled." This is alleged to be error, because not authorized by the evidence. We have carefully read the

evidence sent up in the record, and find that the testimony referred to in the preceding division of this opinion was the only testimony offered to show undue influence; and that testimony, as we have shown, does not even tend to show undue influence. The exception to this part of the charge is therefore well taken.

3. The court also charged: "The fourth contention of the plaintiffs is that the deed should be canceled because the consideration thereof has failed, and the defendant is insolvent, and unable to respond in damages. The defendant denies these contentions of the plaintiffs, the result of which is that, if you believe that the deed was not the result of fraud or undue influence practiced by the defendant, was made by a person competent to contract, and was without failure of consideration, I charge you it is a valid deed." This is alleged to be error, because there was no evidence authorizing any charge upon the matter of failure of consideration and insolvency. This exception is well taken. The consideration of the deed, as expressed therein, was the natural love and affection of the grantor for her son, the grantee, and his having been an affectionate son, caring for her, and providing for her, "her wants and demands, during her widowhood." The charge as to insolvency and failure of consideration was therefore wholly irrelevant to the case.

Other grounds of the motion than those above dealt with present no question of material importance. Judgment reversed.

(39 Ga. 211)

#### DUNN v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

CRIMINAL LAW—APPEAL—ASSIGNMENT OF ERRORS  
—FAILURE TO CAUTION WITNESS—  
LARCENY—EVIDENCE.

1. An assignment of alleged error in admitting evidence is incomplete unless it shows what, if any, objection was made to the evidence when offered.

2. The failure of the court to caution a witness that he need not answer a question if the answer would tend to criminate him, is not cause for setting aside a verdict against one upon whose trial for a crime this witness testified.

3. There was no evidence connecting the accused with the perpetration of the alleged offense, and therefore the verdict of guilty was unwarranted.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Lafayette Dunn was convicted of larceny, and brings error. Reversed.

The following is the official report:

Lafayette Dunn, being tried on the same indictment reported in the case of Blair v. State (this term) 25 S. E. 179, was found guilty with a recommendation to mercy. His motion for new trial was overruled, and he excepted. The motion was upon the general grounds

that the verdict was contrary to law, evidence, etc. Also because the court erred in allowing the state's counsel, over the objection of defendant's counsel, to ask the witness Ida Spellars if the defendant "kept" her. It was not stated in the motion what objection was made to the evidence. Further, because the court erred in failing to caution said witness that she need not answer said question if it tended to criminate herself.

On the trial the evidence of Molder was similar to his evidence in the Case of Blair. He testified further that the soap stolen was Octagon soap; that he had opened the box of soap, and when he left the store there were 40 or 50 cakes in the box, and next morning there was no soap in the box; that he found at the two-room house in question 27 bars of Octagon soap upstairs in the loft, and downstairs 6 bars; that he found the meat upstairs in the loft, and the snuff there also; that the opening to the loft was in Myhand's room; that it is very common with people of this class for one to rent one room and one another in a house; that he never found any of the goods taken from his store in defendant's room, unless it was three or six bars of Octagon soap; and he didn't know whether that was his soap or not, as that kind of soap was sold all over town; that he had seen defendant about his store sometimes before the goods were missed; he would come sometimes and sometimes he wouldn't, like everybody else; that witness had one clerk, who left every night about 6, and his porters leave at 6 and half past 7, and there were no porters in the store when witness closed up; that when he closed up that night the snuff, the hams, and the shoulders and some cigars were there; and that he found no cigars at this two-room house. Bragg Myhand testified: "I was at home when some snuff was brought out there in November, 1895; some boxes and two sacks. I could not tell what all was put in the house. The things were brought to defendant's room by Shack Lane and Julius Blair. They knocked on the door when they came, and Shack waked up defendant, and told defendant to wake me up, and defendant did it. I asked him where they had been, and he told me he had been up the road in the commissary, taking up some goods from the commissary where he was working, and he asked me could they stay there until morning, and I told him I did not care, as far as I was concerned. Shack and Julius put the things in Fayette's room, where Fayette was in bed. I don't know where the goods came from, and don't know who put them in the loft, or how they got in the loft over my room. I left there on Friday evening, and they were on the floor then, and not in the loft. The door was open between my room and defendant's. I rented the back room and defendant rented the front room." Ida Brannon testified: "When I went home that night I did not know of them having put anything in there. I discovered that when I went out there that night,

I knocked on defendant's door, and they were asleep. When I woke them up, I think it was defendant told me I could not pass through his room; it was nailed up. I opened the door between the rooms. It was tied with a string. When I got out there, Bragg was not there, and I didn't know where he was. I think this was on Friday night. I was there that Thursday night when they all came there. I never seed anybody bring them there. Never seed anybody have anything, except Blair, who had a wooden box of snuff. When I saw it, he was in defendant's room. I said to Blair, when he came in with it: 'What are you going to do with that snuff? You ought to be off in the woods somewhere praying.' Defendant said nothing, but smiled. They had not been in the habit of nailing up the door between the two rooms. It was agreed that I could pass through that door into my room, because my back door wouldn't lock on the outside. I left there Friday morning at half past four o'clock. I never saw anything in my room. I saw some soap in defendant's room. It might have been Ida's soap, as she washed. I also saw a ham and some meat. I saw Shack Lane put some whisky at the head of defendant's bed. I don't know how the goods came in that room. Bragg was there that Friday morning, and went off before I did. When I got back Friday night, I never seed anything only those beer bottles in my closet. Don't know who put them there. I did not put the goods in the loft. They could not be put in the loft without passing through my room. When I passed out that morning, the door between the rooms was open. When I knocked on the door, and they would not let me in at first, saying the door was locked, it was Friday or Saturday morning. When I saw the meat and soap and snuff box in there, it was Friday morning. When they would not let me go through, it was Friday morning. I never went back there Friday night. Saturday morning I went out there, and I went out there Saturday night, and I could not pass through the room. It was nailed up. I didn't see Bragg any more after that Friday morning until he was brought back from Macon." Gibson testified that about six bars of Octagon soap were found in defendant's room,—the same kind of soap as that found in the loft; that when he got out there there was no one at the house, but he met defendant, and asked him where Myhand lived, and defendant told him he did not know; that the woman who occupied that front room came there, and witness and Mr. Molder went in; they offered him the key; that he searched that room, and found the soap, a lot of wine in a jug, some bottles, and a little whisky; and that he thought it was Tuesday morning that the search was made, though he was not sure whether it was Monday or Tuesday; that he first went into the back room, occupied, as he was told, by Myhand; that there is where he found the goods, and got through the hole in his room into the

loft. For the defendant, Ida Spellars testified: "There were three bars of Octagon soap in my room, furnished me by Mr. Cooper, for whom I washed, and which Mr. Molder took away. I got them back from him. He said he couldn't swear they were his, and returned them to me. I go away from home on Monday and on Friday mornings, and the balance of the time I wash and iron at home. I never knew defendant to bring anything there. No one brought any goods to my room on any night, or any morning following. Defendant went to bed a little after nine o'clock that night, and was asleep when I went to bed, after eleven o'clock. He looked like folks when they are asleep. Shack and George Blair were in Bragg's room the first part of the night, and later were lying down on the floor, and Bragg was across the bed. The door between my room and Bragg's was not locked, but just fastened with a string. Defendant and I have lived together for two or three years, and are not man and wife. I rent the room I live in. Defendant did not rent it. When I went to bed that Thursday night, I left Shack and Julius lying on the floor in Bragg's room. George was there the first part of the night. I could see them. I couldn't tell whether they came back to the house or not. If they came and knocked defendant up, I never heard it. I never saw them in my room that night. I don't know anything about their bringing the snuff, cigars, etc., there. I don't know how come them things up in the loft. I was not at home when the search of the house was made. The things were not brought there when I was there. I never seen them. There was no snuff box there on that Friday morning, in my room, while I was there. Shack Lane didn't walk around there in my room, and say it was his seat, and sit down on it." The defendant stated: "All I know about it, I was in bed sick, and I saw Julius Blair and Shack Lane come there, and go in Bragg's room, and say, could they leave some goods there until next morning, and he told them, 'Yes.'"

Blandford & Grimes, for plaintiff in error.  
J. H. Worrill and S. P. Gilbert, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

1 (98 Ga. 370)

POWELL et al. v. FRALEY.

(Supreme Court of Georgia. April 27, 1896.)

PAROL EVIDENCE—INDORSEMENT OF PAYMENT ON NOTE.

Where an action was brought against a partnership composed of two persons, and against each of them individually, on a promissory note upon which there was an entry of a payment, made after the note had become barred by the statute of limitations, which entry

was signed by one of the partners, the petition, in effect, also declaring upon the new promise evidenced by such entry, there was no error, so far, at least, as this defendant was concerned, in striking a plea alleging that he made the entry in question in consideration of a verbal agreement that he was to be liable for only one-half of the amount of the note; nor was any error committed in rejecting parol evidence offered in support of this plea.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Action by Henry Fraley, executor of William Fraley, against L. Powell and others. Judgment for plaintiff. Defendants bring error. Affirmed.

T. M. Hunt and Jas. A. Harley, for plaintiffs in error. R. H. Lewis, for defendant in error.

LUMPKIN, J. This was an action upon a promissory note, brought by the executor of William Fraley against L. Powell & Co., a partnership composed of L. Powell and L. G. Morris, and against each member of the partnership individually. It was not denied that at the time of the execution of the note it was a valid debt of the partnership, and consequently each member was originally liable for its payment. The note became, however, barred by the statute of limitations. Thereafter a payment was made upon it by Powell, and an entry of this fact was made upon the note, and signed by him; all of which appears from the allegations of the petition. The effect of this entry undoubtedly was to constitute a new promise on the part of Powell to pay the entire amount which remained due upon the note, and therefore the court did not err in striking a plea which alleged that he made this entry in consideration of a verbal agreement that he was to be held liable only for one-half of the amount due thereon, nor in refusing to admit parol evidence in support of such plea. Making and signing the entry on the note was, in law, an unconditional promise on the part of Powell to pay the whole debt evidenced by the note; and, if anything is settled, it is that a contract of this kind cannot be altered or explained away by parol evidence. Judgment affirmed.

(97 Ga. 108)

BRYANT v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

ASSAULT—PLEADING AND PROOF—ELECTION BY STATE—EVIDENCE—REBUTTAL.

1. The state is not bound to prove the commission of the offense charged in an indictment on the precise date alleged therein, but may prove its commission on any day within the statute of limitations.

2. Whether or not it would be competent for the state to prove a particular act done by the accused which would constitute the offense charged, if it affirmatively appeared that the grand jury had never passed upon or indicted him for that act, but had predicated the indict-

ment upon an entirely separate and distinct transaction, this is not made so to appear by the testimony of a witness, not a member of the grand jury, and who manifestly could not know, except by hearsay, if at all, upon what particular act of the accused the indictment was really founded.

3. The charge complained of, to the effect that if the jury believed beyond a reasonable doubt that the accused unlawfully beat the person alleged in the indictment to have been assaulted at the time charged in the indictment, or at any time within two years before the date of the filing of the same, they would be authorized to convict, even if, under any circumstances, objectionable, was not, in view of the evidence in this case, erroneous.

4. If, in the present case, the state proved two separate and distinct beatings, at different times and places, there was no motion to require the state to make any election, or direct its evidence to, and ask a conviction upon, either one of such beatings. Whether or not, in a misdemeanor case, such a motion would, in any event, be well founded, there was no error in admitting the evidence complained of, even if it related to a beating different from that referred to by a witness previously introduced; and the evidence so admitted was in rebuttal of the statement of the accused, in which he denied generally that he had ever at any time beaten the person alleged to have been assaulted.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

Henry Bryant was convicted of assault, and brings error. Affirmed.

Newton A. Morris, for plaintiff in error. L. W. Thomas, for the State.

ATKINSON, J. 1. The principle announced in the first headnote has been so often ruled in this court that it does not require further elaboration.

2. The indictment under which the plaintiff in error was tried does not appear in the record. But from the statements concerning the same which we find there, it may be assumed that it was an ordinary indictment for assault and battery, committed upon a given day, in the county of Fulton, by the defendant, upon a child therein named. Upon the trial of the case it appears that the witnesses for the state testified to the commission of a battery of the kind described and at the time charged in the indictment. Another witness testified to the commission of another battery upon the same person at a time other than that alleged in, but within two years next before the finding of, the indictment. This testimony was objected to, upon the ground that it was not competent for the state to give in evidence two distinct batteries. In cases of felony this could not be done, but in misdemeanor cases it is the constant practice to submit to the jury evidence of several misdemeanors of the same character, perpetrated by the same person. No harm can result from this practice, inasmuch as the state is permitted to give in evidence before the jury testimony showing the commission of the alleged misdemeanor at any time within two years next before the finding of the indictment. The defendant

must be prepared to answer for himself as to each occasion upon which the state may elect to prove his guilt, but with the resulting advantage that but one judgment can be given upon the same indictment; and, though he may have committed many misdemeanors of like character, a judgment of conviction as to one will protect him as to all, the indictment being general, and not specific, in its descriptive averments; and this is true, because under a plea of *autrefois acquit* or *convict* he could establish the fact that he had been tried under an indictment which covered that offense, and from which it could not be gathered that he was not convicted upon the identical evidence relied upon to convict him of the offense for which he then stood indicted. The true test as to whether a plea of *autrefois convict* or *acquitt* will prevail is whether the evidence which could have been admitted under a former indictment would support a verdict of guilty under the indictment under review. If so, the plea of former jeopardy will protect the accused against the latter indictment. *Blair v. State*, 81 Ga. 629, 7 S. E. 855. And hence, when the state elects to prosecute for one misdemeanor under an indictment which will admit evidence of many misdemeanors of like kind committed within the period of limitation prescribed for the prosecution of those covered by the indictment, its election is necessarily to prosecute for each of such misdemeanors, and a plea of conviction or acquittal under such indictment is good in bar of a subsequent indictment for any of such offenses. If the state should elect to prosecute separately for each several misdemeanor, the allegations in the indictment must be so certain in their descriptive averments as that, in case of a prosecution under another indictment for a similar offense, but committed at a different time, and under different circumstances, it could be judicially ascertained that he had not before been tried therefor. Of course, if the indictment be so general as not specifically to describe the special offense for which the defendant was indicted, the testimony of a witness, not a member of the grand jury, would not be sufficient to establish the identity of the transaction concerning which he or she testified with the transaction for which the defendant was indicted. *Hopkins' Pen. Code*, par. 2, § 1514.

3. The charge of the court as stated in the third headnote is in accord with repeated adjudications of this court.

4. The practice of compelling an election by the state has no application to prosecutions for misdemeanors. In order to avoid surprises, however, and to give an opportunity to the defendant to make his defense of which he otherwise would be deprived, the court may, in its discretion, require the state to direct its evidence to proof of a particular battery, excluding other evidence; but no proposition of this kind was submitted in this case. It does not appear that the de-

fendant was in any sense embarrassed or surprised by the testimony introduced by the state, and we do not think the court erred in admitting the evidence. Besides, the testimony of this witness was admissible in contradiction of the statement of the defendant, who denied that he had at any time, or under any circumstances, committed a battery upon the child named in the indictment. Let the judgment of the court below be affirmed.

(98 Ga. 371)

**STOWERS v. MATHEWS et al.**

(Supreme Court of Georgia. April 27, 1896.)

**EXEMPTIONS—SECOND APPLICATION.**

An exemption of personalty being void as to certain creditors for want of notice to them, it was the right of the head of the family to make another application for exemption, to give notice thereof to these creditors, and to have the same personalty exempted as to them. But if, before the allowance of the second application, the applicant had sold and parted with the title to and possession of a portion of the property, although he had included the same in the second application, the exemption thereafter allowed was, as to the property thus sold, ineffectual and void as to such creditors.

(Syllabus by the Court.)

Error from superior court, Hart county; N. L. Hutchins, Judge.

Action by Green Stowers, trustee, against A. W. & W. C. Mathews. From an order granting certain exemptions, plaintiff brings error. Affirmed.

O. C. Brown and A. G. McCurty, for plaintiff in error. Jas. H. Skelton, Jr., for defendants in error.

**LUMPKIN, J.** In the case of Manufacturing Co. v. Christopher, 68 Ga. 635, this court decided that, where a proceeding to set apart a homestead was void as to a particular creditor for want of notice to him, the head of the family could make a new application, give this creditor notice, and have the property set apart as against him. This decision was properly based upon the ground that, as the creditor in question was not estopped by the judgment rendered in the first proceeding, the family of the debtor were not concluded by it, and had the right to begin de novo as to this creditor, and have set apart a homestead which would be good as against him. This is good law, and we adhere to it. It appears, however, in the present case, that a head of a family made an application for an exemption of personalty, of which application he failed to give one of his judgment creditors notice; that, after the exemption had been allowed, the applicant sold and parted with the title to and possession of certain cotton which had been included in the exemption. The creditor referred to afterwards caused this cotton to be levied on while in the hands of the applicant's vendee, as the property of the applicant; and the latter then filed a

second application for exemption, including therein the cotton in question, this time giving the creditor due notice. The second application was allowed; and the question is: Did the exemption thus obtained relate back and relieve the cotton from the lien of the creditor's judgment? We think not, and for the reason that, when the second application was made, the debtor no longer owned or controlled the property, and consequently had no right to have it exempted. He could not do so for the benefit of his family, because it had gone beyond his reach; and he had no right to have it exempted for the benefit of another into whose hands it had gone at a time when it was clearly subject to the creditor's judgment. Judgment affirmed.

(97 Ga. 107)

**HOPKINS et al. v. FLORIDA CENT. & P. R. CO.**

(Supreme Court of Georgia. July 8, 1896.)

**EMINENT DOMAIN—APPROPRIATION OF GRAVEL—CONSTITUTIONAL LAW.**

The power conferred upon a railroad company "to take," "for obtaining gravel and other material, as much land as may be necessary for the proper construction, operation, and security of its railroad," as conferred by paragraph 4 of section 9 of the general act for the incorporation of railroads, includes the power to condemn for the purposes indicated, and is itself a power which, in the exercise of the right of eminent domain, the general assembly may lawfully confer upon a railroad company. The power thus conferred authorizes the appropriation of such land lying outside of the right of way of such railroad, for the purpose of obtaining such gravel and other material, as may be "necessary to the proper construction, operation, and security of its railroad"; and the statute conferring the power is not in conflict with the constitution of this state.

(Syllabus by the Court.)

Error from superior court, McIntosh county; R. Falligant, Judge.

Action by the Florida Central & Peninsula Railroad Company against O. C. Hopkins and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Gignilliat & Stubbs, for plaintiffs in error. A. A. Lawrence and Clifton & Fraser, for defendant in error.

**ATKINSON, J.** This case is here upon a writ of error from the judgment of the judge of the superior court overruling a demurrer. It appears from the record that under the general act for the incorporation of railroads, approved October 21, 1891, a charter was granted to the Florida & Northern Railroad Company. Its charter was afterwards amended under the general act approved December 17, 1892, it thereby obtaining all the rights which might accrue to, and subjecting itself to all the liabilities imposed upon, railroads chartered under that act. Afterwards it was merged into and consolidated with the Florida Central & Peninsula Railroad Company, a corporation which appears to have been incor-

porated under the laws of the state of Florida; and thereafter it assumed the name of the Florida corporation. A proceeding was begun by the defendant in error to appropriate to its use certain lands of the plaintiffs in error, lying contiguous to its right of way, it being alleged that such appropriation was necessary for the purpose of securing gravel, sand, ballast, and other material necessary for the construction, operation, and security of its line of railroad situated in this state. Assessors were appointed under the provisions of the act above referred to, for the purpose of assessing the sum to be paid as compensation to the plaintiffs in error for their damages resulting from the appropriation of their property to the use of the railroad company; and from the report of the assessors the plaintiffs in error demurred upon the following grounds: (1) Said proceedings are illegal and void, because the statute grants no power to said railroad to condemn land for the purpose of procuring ballast. (2) Said proceedings are illegal, and should be dismissed, because the law under which said railroad seeks to condemn said land is unconstitutional in so far as it seeks to grant the power to condemn said land outside of the right of way.

The railroad company bases its claim of the power to appropriate the property in question to the uses stated in paragraph 4 of section 9 of the act of 1892. See Acts 1892, p. 42. By the terms of that section of the act referred to it is provided that railroad companies incorporated under its provisions shall have power "to lay out its road not exceeding in width 200 feet, and to construct the same, and for the purpose of cuttings and embankments, and for obtaining gravel and other material, to take as much land as may be necessary for the proper construction, operation and security of its road, \* \* \* making compensation therefor as provided by this act for property taken for the use of such company." With respect to the first ground of the demurrer of the plaintiffs in error, the contention seems to be that the maximum quantity of land which the corporation is authorized to appropriate under the act in question is the 200 feet; and that, while it may appropriate as much land within this limit as may be necessary for the purposes mentioned in the act, an attempt to appropriate land other than such as lies within the 200 feet, for the accomplishment of the purposes stated in the act, is ultra vires. Upon this point the parties seem to be at issue, for, on the other hand, it is the contention of the defendant in error that the statute gives it the power not only to appropriate to its use 200 feet for laying out its road, and for the ordinary uses of the company, but that for the purpose of obtaining gravel, sand, and other material, such as may be necessary for the proper construction, operation, and security of its road, it may appropriate other lands.

In determining exactly what the meaning of a statute is, the prime consideration should be to ascertain the legislative intent; and, in seeking for that intent, we will first address ourselves to the language employed by the legislature in the expression of its purposes. If the language be clear and unambiguous, there is no room for interpretation, but it is the duty of the courts to give expression to the obvious meaning of the general assembly. It is always helpful, however, in the construction of statutes, to bear in mind the subject-matter concerning which the legislative body is speaking. Statutes of this kind, involving the exercise of the right of eminent domain, and the consequent appropriation of the property of the owner to public uses, must be strictly construed, and will not be extended beyond the express words or the necessary implications of the statute conferring the power. Looking to the terms of the act in question, giving the words employed by the general assembly their ordinary signification, there is little room to doubt that the general assembly intended to confer upon the railroad company incorporated under this act the right, not only to lay out its right of way 200 feet in width, but likewise the right to appropriate to its own use, upon just compensation, for the purposes for which this condemnation proceeding was instituted, lands other than those embraced within the 200-foot limit. Had the legislative purpose been to limit the right of appropriation to such land only as lay within the 200 feet, it would not have employed the general terms appearing in the statute, but, on the contrary, would have stated, "And for the purpose of cuttings and embankments, and for obtaining gravel and other material," to take as much land within the said 200 feet as may be necessary, etc. The words actually employed authorize the appropriation of the 200 feet, and, in addition thereto, such other land as may be necessary, etc. In the construction of such statutes, the following is laid down as a correct rule by a standard author upon the subject, and is to be found in Lewis on Eminent Domain (section 279): "It is the province of the legislature to determine the quantity as well as the estate which may be taken for public use. If the quantity is specified, or a maximum prescribed, no more can be taken. If the authority permits the acquisition of as much as may be necessary, or, in still more general terms, confers the power to condemn property for the purposes of the undertaking, it will be construed to authorize the taking of so much as may be reasonably necessary under the circumstances." See, also, cases cited by the author. Applying this rule to the present case, it will be observed that the statute gives, first, the power to lay out its road, not to exceed in width 200 feet; and it would seem that this would exhaust the power of the corporation to appropriate land for the purpose of laying out its road, because, by the terms of the act, the amount authorized to be appropriated for

this purpose is limited to 200 feet in width; but with respect to the matter of making cuttings and building embankments, if, in the course of the construction of its road, it became necessary to build an embankment sufficiently high to require a base greater than 200 feet in width, or to make a cut requiring a width greater than 200 feet at the top, there is ample authority for the appropriation of land in addition to that authorized to be appropriated in the first instance. Under ordinary circumstances, 200 feet in width is all that the railroad company would be authorized to appropriate for laying out its road; but, if the exigencies of the particular situation required that it appropriate more than this for the special purpose of cuttings and embankments, then other property necessary to this use may be appropriated. So, if, in the course of the construction of the railway, it becomes necessary in order to obtain gravel and any other material which reasonably might be necessary to the proper construction, operation, and security of the road, under the provisions of the same act, as much land, in addition to the 200 feet in width, may be appropriated as shall be necessary.

Looking at the whole act under which this company was incorporated, it will be observed that the same general language is employed in conferring power to acquire all such real estate or other property as may be necessary in the construction, operation, and maintenance of said railroad and the stations, wharves, docks, terminal facilities, and all other accommodations necessary to accomplish the object of said corporation, and to condemn, lease, and buy any land necessary for its use. See Act 1892, p. 42, par. 3, § 9. Here the power to condemn property for depots and other terminal facilities is given in the same terms as those employed in the paragraph which gives the power to condemn for material, the limitation in each being that only so much as is necessary shall be taken; and surely it will not be contended that the power to appropriate land for wharves, docks, and terminal facilities is intended to be confined within the 200-foot limit; and it is equally unreasonable to suppose that the legislature intended that the corporation, in procuring material to construct the road, should be confined to the narrow limits of 200 feet. It will be observed, further, referring to section 11 of the act in question, that, while the same method is prescribed for condemning property for each of the other purposes indicated in the act, yet the act distinguishes "right of way" from each of such other purposes. If the contention of the plaintiffs in error be well founded, and it should develop that, in the progress of the work of construction, it was impossible to obtain material sufficient within the 200-foot limit to construct the road, then the very end sought to be accomplished by the general assembly in the grant of the charter

would be defeated by the limitations imposed upon the power of the corporation by the charter itself; and we cannot presume that any such purpose was designed by the general assembly.

We come now to consider whether the power conferred by the general assembly to appropriate land lying outside the right of way of the railroad for the purpose of obtaining gravel and other material necessary to the proper construction, operation, and security of the road can, conformably to the constitution of this state, be conferred by that body upon a railroad company. The constitution of the United States provides that private property shall not be taken for public use without just compensation. The constitution of the state of Georgia (paragraph 1, § 3, art. 1; Code, § 5024) provides that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid. Sections 2222-2225 of the Code recognize the right of eminent domain, and provide the manner of its exercise, and reserve to the state the power, in the exercise of the right of eminent domain, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state, and authorize the legislative appropriation of the same to public purposes, enumerating certain public purposes, among others including the opening of roads and private channels for trade or travel. It is made the province of the general assembly to judge of the exigencies which may require the exercise of the right, and the only limitation imposed upon this power is a denial of the right, under the pretext of public necessity, to appropriate the property of one person to the private use of another. It is provided in express terms that the legislature may either exercise this right directly through the officers of the state, or through the medium of corporate bodies, or by means of individual enterprise. If the Code were not clear and unambiguous upon this subject, whatever doubt may have arisen as to the power of the general assembly in the premises has been resolved by the judgment of this court, for it was early held that it was the province of the legislature to determine what objects are or are not of such public importance as to justify them in appropriating property. See *Mims v. Railroad Co.*, 3 Ga. 338. In the same case it was held that the appropriation of private property to a railroad company for the purpose of building a railroad under the right of eminent domain conferred by its charter was the exercise of that power for a public use; and, by the same decision of this court, it was held that the state could lawfully delegate the power to corporations chartered like railroad companies for a great public use. The doctrine of this decision has been steadily adhered to and approved, but this court has never hesitated, where, un-

der the guise of a public use, the legislature has attempted to confer upon a corporation the power to appropriate the property of one person for the private use of another, to declare such statute inoperative and void. Accordingly, it was held in the case of *Loughbridge v. Harris*, 42 Ga. 501, that while, in a general sense, grist mills and the like are public, and their tolls and the manner of rotation among customers regulated by law, they were not public in the sense that the legislature could lawfully authorize the appropriation of private property for their construction as for a public use. On the contrary, however, our courts have uniformly held that the right of eminent domain was lawfully exercised when the power was conferred upon railroad companies, in the construction of these great channels of travel, to appropriate private property for their necessary uses. The statute now under consideration authorizes only the appropriation of property necessary to the construction, operation, and security of its road. On the face of the declaration, the property sought to be appropriated is alleged to be necessary for those purposes. The purpose being public, and the allegation being that the appropriation was necessary, which latter fact the demurrer admits, the court did not err in overruling it. Judgment affirmed.

(98 Ga. 372)

**BROWN v. BENSON.**

(Supreme Court of Georgia. April 27, 1896.)

**FIRES SET BY LOCOMOTIVE—EVIDENCE.**

There being evidence from which the jury might have inferred that the plaintiff's woods were burned by a fire originating from sparks which escaped from a locomotive operated by a servant of the defendant, and ignited straw and other combustible material on the railroad right of way, and that the fire thus started burned continuously until it reached the plaintiff's land, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Action by U. S. Brown against E. B. Benson, receiver of the Hartwell Railroad Company. Plaintiff was nonsuited, and brings error. Reversed.

O. C. Brown, Jas. H. Skelton, Jr., and T. W. Rucker, for plaintiff in error. A. G. McCurry, for defendant in error.

**SIMMONS, C. J.** Brown sued Benson, receiver of the Hartwell Railroad Company, alleging in brief that on April 21, 1894, he was the owner and in possession of a certain tract of land in Hart county; that on that day while defendant was operating the railroad, by reason of the violent puffing and condition of a locomotive engine running thereon, sparks were thrown out of the smokestack into a heavy growth of grass, weeds, etc., which the defendant negligent-

ly permitted to grow and accumulate on the railroad right of way, whereby said grass, etc., were ignited, and, the wind blowing very hard, the fire spread thence to the adjoining lands, until it reached the land of the plaintiff, and burned over 125 acres of his land, killing trees, etc.; that the engine was defective and dangerous, the spark arrester being out of order, and unfit for use, and the engine throwing sparks dangerously, which defendant knew, or could have known by reasonable care, etc. At the trial the plaintiff introduced witnesses who testified that at the time alleged a train on the Hartwell Railroad passed the place where the fire appeared to originate, and within five or ten minutes after the train passed smoke rose up on the railroad bed and right of way; that the wind was blowing hard, and blew the smoke from the smokestack of the engine down on the ground on the side where the fire originated; that the fire started in dead broom straw on the railroad bed and right of way, and spread to rotten cross-ties on the edge of the right of way, and thence extended to the plaintiff's land, burning his timber, etc.; that there was no fire at the point in question before the train passed; that the engine was going upgrade, exhausting and throwing sparks; that the smokestack and spark arrester of the engine were in a defective condition at the time, and had a short time before, on different occasions, thrown out sparks, causing fires. There was also evidence as to the extent of the pecuniary damage sustained by the plaintiff. Under this evidence, we think the court erred in granting a nonsuit. It was argued, that the burden was upon the plaintiff to show that the fire originated from the defendant's locomotive, and that the evidence did not show this, but showed merely that it might have come from that source. It was not necessary, however, that the cause of the fire should be shown by direct evidence. It could be shown by evidence wholly circumstantial. The evidence in this case showed a strong probability that the fire originated from the engine, and was sufficient to authorize the submission of the case to the jury. See *Railway Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828; 8 Am. & Eng. Enc. Law, "Fires by Railways," p. 7, and cases cited; 2 Shear. & B. Neg. § 675; *Smith v. Railway Co.*, L. R. 6 Q. P. 14; *Fremantle v. Railway Co.*, 10 C. B. (N. S.) 89; *Railroad Co. v. Doak*, 52 Pa. St. 379; *Railroad Co. v. Stranahan*, 79 Pa. St. 405; *Kenney v. Railroad Co.*, 70 Mo. 243; *Karsen v. Railway Co.*, 29 Minn. 12, 11 N. W. 122; *Woodson v. Railway Co.*, 21 Minn. 60; *Railroad Co. v. Shipley*, 39 Md. 251. The case of *Inman v. Railroad Co.*, 90 Ga. 663, 16 S. E. 958, relied on by counsel for the defendant in error, was very different in its facts from the present case. In that case it was not shown that the smokestack or spark arrester of the locomotive was defective, and it was shown

that the fire was probably caused by a cotton-gin engine, and that it was very improbable that it was caused by an engine of the railroad company. Besides, that case was submitted to the jury. Judgment reversed.

(98 Ga. 275)

**FINDLAY et al. v. MINERALIZED RUBBER CO.**

(Supreme Court of Georgia. March 30, 1896.)

**DEPOSITIONS—TRANSMISSION—CERTIFICATE OF POSTMASTER.**

1. Even though answers to interrogatories be taken under the provisions of section 3891 of the Code, a due transmission, according to the terms of section 3888, of the package containing the interrogatories and answers, is essential to their reception as evidence. Hence, where such interrogatories and answers are transmitted through the mail, and it does not appear from certificates upon the envelope in which they were inclosed that the package was received by a postmaster from the commissioner named, and duly forwarded by mail, and that the same was received by the postmaster at the point of destination by due course of mail, upon objection timely made, upon the ground that such certificates do not appear, the answers should be excluded.

2. Inasmuch as the questions presented in the motion for a new trial, other than that dealt with in the preceding note, cannot be intelligently passed upon except in the light of the evidence which should have been excluded, they are not properly before this court for determination.

(Syllabus by the Court.)

Error from city court of Macon; John P. Ross, Judge.

Action by the Mineralized Rubber Company against George W. Findlay and others. From a judgment for plaintiff, defendants bring error. Reversed.

Grace & Jones, for plaintiffs in error. Willingham & Lane and John R. L. Smith, for defendant in error.

**ATKINSON, J.** The plaintiff recovered a judgment. The defendants, among other grounds, moved for a new trial upon the ground that the court erred in overruling certain exceptions taken by the defendants to a set of interrogatories, and in allowing the answers to such interrogatories to be read in evidence. The exceptions were in writing, and notice thereof given to the opposite party in due time. The answers were taken upon consent by a single commissioner, under section 3891 of the Code. The exceptions were: (1) Because, the package or envelope in which the said interrogatories are contained having been sent by mail, the postmaster, having received it from the commissioner, has not certified to that fact; (2) because the postmaster delivering the same to the court has not certified to the fact of its reception by due course of mail; (3) because a part, or what purports to be a part, of the interrogatories, to wit, those marked "Exhibit K," are not contained in the same envelope with the questions or with the cer-

tificate of the commissioner. The motion for a new trial recites that the facts stated in said exceptions were admitted to be true, and it was further admitted that the package containing the interrogatories came to the clerk of the court by registered mail.

1. The question is, ought the answers, under these circumstances, to have been excluded? We think so. Due transmission of the result of the labors of a commissioner to take testimony is as necessary to its judicial recognition as is due execution of the commission itself, and, so far as concerns the mere transmission of the answers taken, the provisions of section 3888 of the Code apply as well to answers taken under section 3891 as to answers taken upon a commission regularly sued out. It has been ruled by this court that where interrogatories are taken by consent, as under section 3891 of the Code, the execution and return are not controlled by the usual provisions of the statute. *Shorter v. Marshall*, 49 Ga. 31. The execution of a commission is the act of requiring the witness to appear before the commissioners, and depose in response to the interrogatories propounded. The return is the statement made by commissioners to the court touching the execution of the interrogatories. The execution of the interrogatories and return by the commissioners must be complete before they are ready for transmission. When they are ready for transmission, section 3888 of the Code provides how and in what manner that may be accomplished. Before they can be received, they must be duly accredited to the court. They may be delivered by the person named as commissioner in person, or they may be delivered by some private hand. In the latter case the person receiving and delivering them in court must make affidavit of the fact that they were delivered to such person by such commissioner, and of their freedom from alteration. They may be transmitted by mail. In that case the statute requires that the postmaster receiving them from the commissioner must certify to that fact, and the postmaster delivering them to the court must certify to their reception by due course of mail. So, it will be seen that, whatever method of transmission is adopted, the progress of the package from the time it leaves the hand of the commissioner until it is delivered into the court must show that it, has not, in the act of transmission, come into the control of any person unauthorized to assist in its delivery to the court. There is no authority for the substitution of a transmission by registered letter for the special method of transmission through the mail, pointed out by the statute. This is essential to the due authentication of the evidence contained in the answers, because otherwise the court could never know that the testimony received by it for use was the same actually transmitted to it by its commissioner who

was designated by the parties to take the depositions of the witness. It will be observed by reference to the cases of *Shorter v. Marshall*, 49 Ga. 31, and *Fry v. Shehee*, 55 Ga. 208, that they were both cases in which the question turned upon the execution of the consent entered into in lieu of a commission, and the return of the commissioners thereon. As to what constitutes the return of a commission, see *Flournoy v. Bank*, 78 Ga. 222, 2 S. E. 547. So, it will be seen that the question here is upon due transmission, and not upon the improper execution or return. The case of *Davis v. Railroad Co.*, reported in 60 Ga. 329, is to the effect that where counsel acknowledged service and waived copy, waived commission and commissioners, consented that the witness write out his own answers, and swear to them before a notary public, and seal them up, and deliver them to the clerk without further formality, and read as if his answers had been regularly taken, if some of the interrogatories are not fully answered, this defect in the execution of the consent is no reason for the suppression of the interrogatories. In the present case the interrogatories were not transmitted to the court in the manner prescribed by law. There was nothing from which the court could legally presume that the answers which came into the court were the same answers taken by the commissioner, and they should not have been allowed to go to the jury.

2. The other questions made upon the motion for a new trial are so largely dependent upon the evidence thus illegally admitted that without it they cannot be considered, and, indeed, could not arise, and hence their discussion is unnecessary. Judgment reversed.

(98 Ga. 262)

**MECHANICS' & TRADERS' INS. CO. OF  
NEW ORLEANS v. MUTUAL REAL-  
ESTATE & BUILDING ASS'N.**

(Supreme Court of Georgia. March 30, 1896.)

**INSURANCE—WAIVER OF BREACH OF CONDITIONS—  
EVIDENCE—PREMIUMS—NECESSITY OF ADVANCE  
PAYMENTS—NEW TRIAL.**

1. Where a policy of fire insurance contained stipulations or conditions reciting that, unless such and such things were true, the policy was to be void, and the declaration in an action thereon showed affirmatively that one or more of these things was not true, it was demurrable, but was saved by an amendment alleging in substance that the company's agent by whom the policy was delivered to the insured knew at and before the time of making the delivery all the facts to which such stipulations or conditions related, and that consequently the company waived the benefit of the same. In such case it was, of course, incumbent upon the plaintiff to prove the waiver as alleged.

2. Where a general agent of an insurance company, by a writing duly executed and attached to a policy, continued it in force after the date originally fixed for its expiration, but extended credit to the insured for the payment

of the renewal premium, and charged himself therewith, the renewal was as binding upon the company as if such premium had been paid to the agent in cash.

3. The defendant having filed a plea admitting its liability to the plaintiff on the policy sued upon in an amount stated, in which plea it averred that it had tendered this amount to the plaintiff before the action was brought, and also that "it was, at the time of said tender, and has been always since that time, ready to pay the sum aforesaid, and has said sum now in court to render to the plaintiff," and having supported this plea by introducing evidence showing that after the loss and before suit the company, upon a full and thorough investigation, deliberately, explicitly, and unconditionally admitted such liability and made such tender, the jury were warranted in treating such plea and evidence as sufficient proof of the waiver alleged in the amendment to the declaration.

4. This being so, and the only remaining question at issue, under the evidence and the law applicable, being what was the value of the insurable interest of the insured in the property, and there being sufficient evidence to sustain the verdict as to amount, and it appearing that no material error was committed at the trial, and also that there has been a previous finding in favor of the plaintiff, who was the assignee of the insured, this court cannot undertake to say that the trial judge abused his discretion in refusing to grant a second new trial.

(Syllabus by the Court.)

Error from city court of Richmond county;  
J. R. Lamar, Judge pro hac.

Action by the Mutual Real-Estate & Building Association against the Mechanics' & Traders' Insurance Company of New Orleans. From a judgment for plaintiff, defendant brings error. Affirmed.

F. H. Miller, W. K. Miller, and Harrison & Peeples, for plaintiff in error. J. S. & W. I. Davidson, for defendant in error.

SIMMONS, C. J. The Mutual Real-Estate & Building Association sued the Mechanics' & Traders' Insurance Company of New Orleans, alleging that the defendant was indebted to it in the sum of \$1,875 upon a certain fire insurance policy. It appeared from the declaration that the policy was issued by the defendant on October 6, 1891, to P. J. Skinner, for \$2,000, on property described as "his one-story frame, shingle-roof dwelling house," located at a place named, "in course of construction"; that Skinner was a contractor, and was erecting the building upon a lot belonging to the plaintiff, and under a contract with one Bigelow, who, upon the completion of the building, expected to receive from the plaintiff a bond for titles to the property, and to pay for the house by installments according to the method adopted by the plaintiff in providing for the purchase and building of homes for its patrons; that the policy was originally issued to expire December 5, 1891, and was renewed and extended in writing to January 6, 1892; that on December 13, 1891, the house, then almost completed, was totally destroyed by fire, from some cause unknown to the plaintiff or to Skinner; that the house was of the value of \$2,500, and the loss total; and that

on December 15, 1891, Skinner, the owner of the policy, being largely indebted to the plaintiff for money advanced to and used by him for the purchase of material, etc., in the building, transferred the policy to the petitioner in writing. The declaration also alleged that the requirements of the policy as to furnishing proof of loss, etc., had been complied with. The policy, a copy of which was attached to the declaration, stipulated that it should be void if the insured had concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or if the interest of the insured in the property was not truly stated in the policy; and that the policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the interest of the insured was other than unconditional and sole ownership, or if the subject of the insurance was a building on ground not owned by the insured in fee simple. The defendant demurred generally to the declaration, as not setting forth a cause of action, and demurred also on special grounds, the main ground insisted upon being that the declaration did not show that the interest of the assured at the time of taking out the insurance was no other than unconditional and sole ownership of the property, and that the declaration showed on its face that the subject of the insurance was a building on ground not owned by the assured in fee simple. By an amendment to the declaration the plaintiff alleged that at and before the issuing of the policy, and also before it was renewed, the defendant had full notice that Skinner was only a contractor, and that he had no interest in the land or in the house in course of construction, except that of a contractor and builder; that the policy was issued, and also renewed, for the purpose of covering a contractor's or builder's risk; that the agents of the company, before the issuing of the policy, went themselves, and examined the premises, and had full knowledge of all the facts, and at the time of renewing the policy also had full knowledge of all the facts, and intended to cover the interest of Skinner in the premises as a contractor and builder; that the agents of the defendant themselves did the writing, and assured Skinner at the time that the policy as originally issued and as extended and renewed was ample and sufficient to cover the interest of Skinner in the premises as a contractor and builder. It was further alleged that the interest of Skinner in the building at the time of the fire was equal to more than \$1,875. The defendant insisted upon its demurrer to the declaration, but the court overruled the demurrer, and to this ruling the defendant excepted.

1. Stipulations and conditions in a policy of insurance, such as those above stated, are binding upon the insured, and call for a disclosure on his part as to the matters to which they refer, and, if he accepts the policy with-

out making such disclosure, the policy will be void. See Rich. Ins. § 136; *Lasher v. Insurance Co.*, 86 N. Y. 423, 426; *Waller v. Assurance Co.*, 10 Fed. 232; *Insurance Co. v. Bohn*, 12 C. C. A. 531, 65 Fed. 171, and cases cited; *Diffenbaugh v. Insurance Co.*, 150 Pa. St. 270, 24 Atl. 745; *Mers v. Insurance Co.*, 68 Mo. 127; *Collins v. Insurance Co.*, 44 Minn. 440, 46 N. W. 906; *Weed v. Insurance Co.*, 116 N. Y. 106, 22 N. E. 229; *Waller v. Assurance Co.*, 64 Iowa, 101, 19 N. W. 865; *McFetridge v. Insurance Co.*, 84 Wis. 200, 54 N. W. 326; *Insurance Co. v. Boulden*, 96 Ala. 508, 11 South. 771. The declaration, as it originally stood, was therefore demurrable, it appearing therefrom that the subject of the insurance was a building on ground not owned by the insured in fee simple, and it not appearing, either from the policy itself or from any allegation in the declaration, that this fact was known to the insurance company, or that the conditions of the policy touching the ownership of the property had been waived. This, however, was cured by the amendment. It is well settled that where an agent who is authorized to issue and deliver policies in behalf of an insurance company issues and delivers a policy with knowledge of the true state of the title, the knowledge of the agent is the knowledge of the company, and the delivery of the policy with such knowledge amounts to a waiver of conditions relating to the existing state of the title. "Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered," and limitations therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or indorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy. See 1 May, Ins. § 143, and authorities cited. In the present case, according to the allegations of the declaration, the person to whom the policy was issued had an insurable interest in the subject of the insurance. A builder constructing a house on contract has the property in the house until it is delivered, or at least until it is ready for delivery and approved; and he may insure the building. 1 May, Ins. § 95a. The policy was therefore valid if, as alleged by the plaintiff in its amendment to the declaration, the defendant or its agents who issued the policy had, at the time it was issued, full knowledge of all the facts relating to the interest of the insured in the premises.

2. It appeared from the evidence that the policy was renewed on December 6th by the agents who had originally issued it, and that they did not then collect the premium, but, as had been frequently done by them in other instances, extended credit therefor to the insured, and accounted for it to the insurance company, charging themselves with the amount due as if the same had been collected. The fire occurred on the 13th of the same

month, and on the 21st the insured paid the premium to the agents, who gave it a receipt for it, and transmitted the money to their principal. It was contended on the part of the insurance company that the agents had no authority to grant a renewal without prepayment of the premium, and that, the premium not having been paid before the loss occurred, the renewal did not become effectual. The policy does not contain any stipulation making prepayment of the premium a condition precedent. It says that "it may, by a renewal, be continued under the original stipulations, in consideration of premium for the renewal term," but says nothing as to when the premium shall be paid. There is no evidence whatever that the insured had notice of any limitation upon the authority of the agents as to the extension of credit for the amount of the premium. Moreover, it is held that, even where the policy contains a stipulation requiring prepayment, the stipulation is waived where the policy is delivered, and credit for the premium extended by a general agent with authority to issue and deliver policies. *Rich. Ins.* §§ 93, 95; 11 *Am. & Eng. Enc. Law*, "Insurance," p. 333, and cases cited; *Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co.*, 20 *Fed.* 232; *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio Sup.) 35 *N. E.* 1060; *Insurance Co. v. Humes* (Pa. Sup.) 8 *Atl.* 163. It appears in the present case that the agents who dealt with the insured were general agents, having authority to issue and deliver policies and renewals thereof. The company represented by them was, therefore, as much bound by the renewal as if the premium had been paid.

8. The plaintiff having, by its amendment to the declaration, alleged a waiver of the conditions of the policy as to title, etc., it was incumbent upon it to prove the same. There was no direct proof of the facts alleged as constituting a waiver, but it appears from the evidence that the defendant, in its dealings with the plaintiff after the loss, treated the policy as valid, and objected merely to the amount of the plaintiff's claim. It filed a plea admitting its liability on the policy in an amount stated, and averred that it had tendered this amount to the plaintiff before the action was brought, and that "it was at the time of said tender, and has always been since that time, ready to pay the sum aforesaid, and has said sum now in court, ready to render to the plaintiff"; and at the trial it introduced in evidence a letter, written after the loss and before suit, and after a full and thorough investigation, in which it explicitly and unconditionally admitted such liability, and made a tender of the amount admitted to be due. Whether this of itself amounted to a waiver or not, the jury could treat it as evidence tending to show that the company had made such a waiver as alleged by the plaintiff.

4. The only remaining question at issue, under the evidence and the law applicable, being what was the value of the insurable inter-

est of the insured in the property, and there being sufficient evidence to sustain the verdict as to amount, and it appearing that no material error was committed at the trial, and also that there had been a previous finding in favor of the plaintiff, this court cannot say that the court below abused its discretion in refusing to grant a new trial. Judgment affirmed.

(38 Ga. 301)

**SPARKS v. MAYOR, ETC., OF CITY OF MACON et al.**

(Supreme Court of Georgia. April 6, 1896.)

**RAILROADS—MUNICIPAL TAXATION—UNIFORMITY.**

According to the principles ruled in the case of *Railway Co. v. Wright*, 15 *S. E.* 293, 89 *Ga.* 574, the act of December 24, 1890 (*Acts* 1890-91, vol. 1, p. 152), "to make railroad companies subject to municipal taxation," is not violative of paragraph 1, § 2, art. 7, of the constitution.

(Syllabus by the Court.)

Error from superior court, Bibb county; *J. M. Griggs*, Judge.

Action between *W. B. Sparks*, receiver, and the mayor and common council of the city of Macon and others. From a judgment for the latter, the former brings error. Affirmed.

*Gustin, Guerry & Hall*, for plaintiff in error. *Hill, Harris & Birch*, *B. F. Whittington*, *Anderson & Anderson*, *Park & Gerdine*, *A. W. Lane*, *C. C. Kibbee*, *Wm. Brunson*, *E. A. Cohen*, and *Minter Wimberly*, for defendants in error.

**LUMPKIN, J.** This case, in principle, is controlled by the decision of this court in the case of *Railway Co. v. Wright*, 89 *Ga.* 574, 15 *S. E.* 293, the opinion in which was very carefully prepared. The reasoning there is, to a large extent, applicable here, and need not be repeated. In that case the conclusion was reached that, for the purpose of distributing for taxation the unlocated personality of the corporation among the several counties through which the railway ran, so as to subject this personality to county taxation in proper proportions, the corporation might be treated as "residing, sub modo, in all the counties along its line of road, and therefore in one as much as in another." We think it equally proper to treat the corporation, in so far as its track and roadbed are located within the limits of incorporated cities or towns, as residing, sub modo, in them. The track and roadbed outside these municipalities are "country" property, which is not subject to city or town taxation. In other words, as to its realty situated outside of cities or towns, the corporation is a "rustic" person; and, as to that inside of them, it is a "town" person. But, certainly, if it "resides" in a county so far as its track and roadbed therein are concerned, it must be true that it, in like manner, "resides" in a city or town as to so much of its track and roadbed as lie within the municipality.

A simple illustration will show to a demonstration that the act of December 24, 1890, (Acts 1890-91, vol. 1, p. 152), so far as it relates to the taxation by municipalities of the unlocated personality of these corporations, will operate justly, fairly, and in perfect harmony with the views above presented.

Suppose that the taxable property of a railway company, which traversed only three counties, A., B., and C., in which were located, respectively, cities G. and H., and town L., all incorporated, was as follows:

	In A.	In B.	In C.
Value of track and roadbed	\$244,800	\$147,800	\$28,600
Value of other realty	8,900	1,700	1,000
Value of located personality	2,000	1,000	300
	\$255,700	\$150,500	\$29,900

	In G.	In H.	In L.
Value of track and roadbed	\$14,700	\$9,800	\$4,900
Value of other realty	3,800	800	900
Value of located personality	1,500	400	200
	\$20,000	\$11,000	\$6,000

Value of rolling stock and all other unlocated personality to be distributed among counties and municipalities for taxation.....	\$100,000
The total value of all the company's located property will be.....	500,000
And the total value of its property located in the cities and town will be.....	37,000

Pursuing the method pointed out on page 588 of the volume above cited, the third items of the several proportions below stated will disclose what amounts of the \$100,000 are taxable for the benefit, respectively, of county B., the three municipalities in the aggregate, and city G., city H., and town L. separately. Thus:

\$150,000	\$500,000	\$30,000	\$100,000
37,000	500,000	7,400	100,000
20,000	500,000	4,000	100,000
11,000	500,000	2,200	100,000
6,000	500,000	1,200	100,000

It appears, therefore, that county B., which has within its borders \$150,000 of located property, taxes \$30,000 of the unlocated personality; and that town L., with \$6,000 of located property inside the corporation, which is  $\frac{1}{25}$  of \$150,000, taxes \$1,200 of the unlocated personality, which is  $\frac{1}{25}$  of \$30,000. It also appears that the two cities and the town, having within their limits \$37,000 in the aggregate of located property, will tax \$7,400 of the unlocated personality; and the correctness of the amount last stated is verified by adding together \$4,000, \$2,200, and \$1,200, the amounts upon which the municipalities, respectively, are entitled to have taxes assessed for their benefit, when taken separately.

This illustration is in a somewhat condensed form, but its meaning will be easily understood if the figures used are given a proper examination. If, however, any difficulty in this respect should present itself, it will only be necessary to consult, in this connection, the opinion in the case above cited. The two cases, read together, will make the whole matter clear and intelligible; and the correctness of the decision made in the pres-

ent case will, we think, be perfectly apparent. Judgment affirmed.

(99 Ga. 229)

**MACON, D. & S. R. CO. v. MOORE et al.**  
(Supreme Court of Georgia. July 13, 1896.)  
**RAILROAD COMPANIES—ACTION FOR INJURIES—RESPECTIVE EARNINGS—PRESENT VALUE—HOW ASCERTAINED—MORTALITY TABLES—COMPARATIVE NEGLIGENCE—INSTRUCTIONS.**

1. On the trial of an action for personal injuries, alleged to be permanent, the mortality tables are not proper evidence; and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services, or capacity to earn money.

(a) In the present case there was sufficient proof as to the plaintiff's age, and as to the nature of her services, to render the tables admissible, but there was no proof as to value.

2. The present value of prospective earnings through a series of years cannot properly be arrived at by ascertaining the entire amount, and deducting 7 per cent. from the whole. See *Railroad Co. v. Burney* (Oct. term, 1896).<sup>1</sup>

3. The law embraced in section 2972 and the latter part of section 8034 of the Code should not be given, in immediate connection with each other, without making the proper explanation as to the class of cases to which the latter section is applicable. *Railroad Co. v. Luckie*, 13 S. E. 105, 87 Ga. 6.

4. The following charge stated the law too strongly against the defendant company: "A carrier is liable for injuries on its cars, caused by a sudden jolting of the cars in starting or coming to a stop; and a railroad company is not relieved from liability by reason of its failure to keep its train intended for passengers with all the appliances which extraordinary diligence would require on trains adapted for transporting passengers."

5. The objections to some of the interrogatories complained of as leading or otherwise illegal were well taken, but there was no error in overruling any of the objections which would be of sufficient materiality to require a new trial.

(Syllabus by the Court.)

Error from superior court, Twiggs county; C. O. Smith, Judge.

Action by Mrs. L. E. Moore and husband against the Macon, Dublin & Savannah Railroad Company. From a judgment for plaintiffs, defendant brings error. Reversed.

The following is the official report:

Mrs. Moore and her husband brought suit against the railroad company for damages claimed to have accrued as the result of personal injuries she sustained from the negligence of defendant's servants in the management of a train upon which she was a passenger. They alleged that in August, 1893, after having purchased a ticket at a station on defendant's railroad, she entered the passenger car of a train as soon as it stopped, and was proceeding to a seat, when, without fault on her part, and by the gross carelessness of the company, the train was violently jerked, and she was thrown down, and seriously and permanently injured by the fall. The defense was that the company exercised all due care and diligence; that if Mrs. Moore was hurt,

<sup>1</sup> The opinion in this case had not been filed September 12, 1896.

It was by reason of her own negligence; and that her condition was not produced by the fall, but by previous sickness, and the injuries she thereby sustained were not permanent. Upon conflicting evidence, the jury found for the plaintiffs \$3,700, and defendant's motion for a new trial was overruled. The grounds of the motion are that the verdict is contrary to law and evidence, and to a portion of the charge of the court, as follows: "That if jolts and jars are usual, necessary, and unavoidable in running a mixed train, carrying both freight and passengers, and much more so than in running a passenger train, and a passenger takes passage on such mixed train, he takes the risk of the usual and necessary jolts and jars which happen in the operating and running of such trains. But, when a railroad takes a passenger on such mixed trains, they are required, under the law, to use extraordinary care in preventing unusual and unnecessary jolts and jars, so as to protect the passenger, just as they would be required to do to prevent jolts and jars on a passenger train which would be likely to injure the passengers." - And the further charge: "If you find from the evidence that the plaintiff was injured, in order for her to recover you must believe that she was hurt on the train, and that it was the direct and proximate cause of her injury. If you find from the testimony that at this time, and since the time of the alleged injury, she has been sick and confined to her bed from this hurt, but that it was not the direct cause of her sickness, then I charge you that she would not be entitled to recover. If this is the result of a disease contracted prior to that time. I charge you she would not be entitled to recover." And the further charge as follows: "Understand, before the plaintiff would be entitled to recover, you must believe that she could not have avoided the accident or injury sustained, by the use of ordinary care. It makes no difference how negligent the railroad was, she could not recover if she could have avoided it by ordinary care."

Because the court erred in admitting the mortuary tables in 70 Ga. 843-848, over the objection of defendant's counsel; said objections being based upon the ground that there was neither any proof of plaintiff's age, nor any proof whatever of what amount she had been previously earning, if any, or able to earn, or did ever earn, monthly, annually, or otherwise, or what her net earnings were, or her necessary expenses,—such evidence being necessary, as a basis of any calculation under said tables.

Because, as contended by defendant, the court, in the absence of such proof, admitted said mortuary tables, and gave the following charge, based thereon or referring thereto: "Certain life tables will be out, and you will have them before you in this matter, and upon that question I give you this in charge: See from the life tables what would have

been the probable length of the life of the plaintiff, provided you find she would be entitled to recover. See what would have been the probable length of her life. Then see what would have been her net earnings each year. I mean to say what she could earn, less her necessary expenses. Deduct from that a due proportion for her continuing ability to labor, provided you find she would be able to labor in the future. Then deduct the amount for probable diminution of ability to labor by reason of old age, provided you find that she would be able to work, and a due proportion for plaintiff's contributory negligence, provided you find there was any contributory negligence, under the law and doctrine which I have just given you in charge, and see what the entire amount would be. Deduct from the entire amount seven per cent., and that would be the present value of her life, whatever you find that amount to be,"—which charge the defendant says is erroneous.

Because the court erred in stating in his charge, in immediate connection, two distinct rules of law, thus qualifying the former by the latter, as follows: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agent of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him,"—and without proper explanation, and in the same connection, stated also the following: "The carrier of passengers is bound to use extraordinary diligence on behalf of itself and its agents to protect the lives and persons of its passengers, but it is not liable for injuries to persons after having used such diligence. Extraordinary diligence is that extreme care and caution which every prudent and thoughtful person uses in securing and preserving their own lives or property. The absence of such diligence is termed 'slight neglect.' If the plaintiff, by ordinary care, could have avoided the consequences of her act, the defendant would not be liable, and she would not be entitled to recover; but, in order for this cause to relieve them, the plaintiff must in some way have contributed to the injuries sustained."

Because the court erred in the following charge: "It is the duty of the railroad company to use properly constructed cars, and all reasonably needful appliances which extreme care and caution would suggest, in order to protect the lives and persons of its passengers; and the failure of the railroad company to furnish a reasonably safe passenger train, reasonably provided with everything necessary to save the passengers against dangers, shall not afford the railroad company any excuse against the duty of

extraordinary diligence which the law requires. A carrier is liable for injuries to passengers in the cars, caused by a sudden jolting of the cars in starting or coming to a stop; and railroad companies are not relieved from liability by reason of their failure to equip their trains intended for passengers with all the appliances which extraordinary diligence would require in trains adapted for transporting passengers."

Because the court erred in instructing the jury as follows: "If you should find from the evidence that the train was liable to sudden and dangerous jolts, then you would be authorized to consider that circumstance in passing upon the question whether the railroad company exercised the extreme care and diligence which the law exacts, to allow her a reasonable time and opportunity to get seated in the car, beyond the reach of danger from such source."

Because the court further erred in instructing the jury: "If the plaintiff is entitled to recover, and you believe that she has received personal injuries, and is suffering from the hurt she received, and the railroad company was negligent, and did not exercise that extreme care and diligence the law requires it to do, she would be entitled to recover the value of her net earnings for the remainder of her life, whatever that may be, less the interest, which would be seven per cent."

Because the court erred in the following charge: "If you find that she was partly at fault, and the railroad company was partly at fault, then it would be contributory negligence, and the rule of contributory negligence would apply; and this would reduce the amount, provided you find that she would be entitled to recover, and it would reduce it down in proportion to her negligence. If she could have avoided the injury, she could not recover; but if you find from the testimony that defendant exercised that extreme care and caution which the law requires, and which I have just given you in charge, though she may not have been at fault, she cannot recover."

Because the court erred in overruling defendant's objection to the eighth direct interrogatory sued out for plaintiff, which was as follows: "State whether or not you boarded said train as a passenger. State whether or not you had purchased a ticket previous to boarding said train, and from what point you purchased said ticket." And to the ninth direct interrogatory, as follows: "State whether or not said train was a regular train, or an extra train. State whether or not said train was a regular train for passengers for Macon on said railroad. How many other passenger trains for Macon were run on said road at that time?" And to the twenty-seventh direct interrogatory, as follows: "State whether or not such injuries were such as to compel you to take

your bed." All of which interrogatories being objected to as leading. And to the seventeenth interrogatory, as follows: "State whether or not you had time after the train had stopped to get on the car and get seated before the train started." To the nineteenth, as follows: "What happened to you on said cars? How soon was it after you entered said cars? State whether or not you had time to get seated." And to the twenty-ninth, as follows: "State whether or not said injuries have been permanent. State whether or not you have ever recovered from said injuries,"—on the grounds of objection filed with said interrogatories, that the same were leading and illegal, in that they sought to have the witness answer questions which are solely for the determination of the jury, and among the main questions in the case to be decided upon by their verdict. And also to the thirtieth direct interrogatory, as follows: "What physician has attended you, as a result of said injuries, and how long was it necessary for you to remain under the treatment of a physician?"—on the ground that the witness was not an expert, or skilled in medicine or surgery, and expert testimony was necessary to ascertain whether or not the injuries were permanent; and because the court allowed the answers to said interrogatories read to the jury. The court sustained the objection to the twenty-ninth interrogatory, except allowing that portion of the answer to be read as follows: "I have never recovered from it."

John M. Stubbs, Minter Wimberly, and Harrison & Peeples, for plaintiff in error. Steed & Wimberly and L. D. Moore, for defendants in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(39 Ga. 175)

TRAVIS et al. v. CLARK et al.  
(Supreme Court of Georgia. June 12, 1896.)  
FRAUDULENT CONVEYANCES — KNOWLEDGE OF  
GRANTEES—EVIDENCE—APPEAL—RE-  
VIEW OF FACTS.

There was no error in overruling the demurrer to the defendants' answers, nor in admitting evidence; and, the issues involved being mainly questions of fact, this court will not overrule the refusal of the trial judge to grant the injunction prayed for, the record disclosing that there was amply sufficient evidence to support the judgment rendered.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by one Cooper and others against the Bank of Americus, in which W. F. Clark was appointed trustee. Eugene M. Travis & Co. intervened as parties plaintiff, asking that a trust deed be canceled, and that the trustee be required to account, and for in-

junction. From a judgment against them, interveners bring error. Affirmed.

The following is the official report:

Under a petition filed on January 20, 1893, by Cooper et al. v. The Bank of Americus, a temporary restraining order was granted, and a temporary receiver of the assets of said bank was appointed. Negotiations ensued between the bank's officers and W. W. Flannagan, representing certain banks in New York, Boston, and Louisville, looking to an arrangement by which the Bank of Americus could, by the assistance of the other banks referred to, reopen, and resume business; and on March 4, 1893, Flannagan wrote to A. L. Miller, attorney for the New York and Boston banks, a letter, setting forth a plan offered for the reorganization in contemplation. A week afterwards, upon consent of all parties to the litigation, the court passed an order in substance as follows: It being represented to the court that the Bank of Americus has nearly completed an arrangement by which it will be enabled to resume business, and in the course of time meet and discharge all of its liabilities, and that certain formal action by resolution on the part of the directors of said bank, as well as making certain conveyances, is necessary to said adjustment, it is ordered that the restraining order be modified to the extent of allowing the directors to pass such resolutions and to execute such conveyances, assignments, and transfers as may be found necessary to perfect such arrangements above described; that upon the performance and completion of all the acts necessary to said adjustment to the satisfaction of the temporary receiver, the restraining order be dissolved and annulled, and he be directed to deliver to the defendant, or to such person or persons as it may designate, all of the assets in his possession as receiver, upon which delivery he be discharged as such; but that the equitable petition remain of file and pending until further order, not to be disposed of or dismissed except by order of the court, granted upon due notice to all parties at interest. On March 20, 1893, the receiver took from the bank's president a receipt for all the assets in his possession, and certified that all the necessary acts had been done by the bank's directors to enable it to resume business as contemplated in the order of the court. On the same day, under authority of the directors, a deed of trust was executed for the bank to Flannagan as trustee for the New York, Boston, and Louisville banks. On August 16, 1894, upon the petition of the beneficiaries in said deed, an order was passed accepting the resignation of Flannagan as trustee, and appointing W. F. Clarke as trustee in his stead. Before this, however, an order had been passed, dated July 8, 1893, upon the petition of some of the parties to the original petition, whereby a permanent

receiver, Wheatley, was appointed for the Bank of Americus; the order directing that he take possession of all its assets, and hold them subject to order of the court, etc. The bank had opened and resumed business on May 20th, but the effort to continue failed, and the directors had turned over its assets to Wheatley for the purpose of winding up its affairs. On June 1, 1895, Travis & Co., alleging themselves to be creditors of the bank in the sum of \$115.95, brought their petition to be allowed to intervene in the original petition of Cooper et al., and to have all the rights and equities the original petitioners had. They prayed for judgment against the bank; that the deed of trust be canceled; that the trustee, and Wheatley, as his agent, account for all the assets therein described, with Wheatley as receiver, and said assets be turned over to him to be administered; that Wheatley, as agent, Clarke, as trustee, and the beneficiaries of said deed be enjoined from collecting the choses in action described therein, and from instituting suits on certain accommodation notes given in connection with the deed against the bank as indorser thereon, and from paying over any money to any of the beneficiaries in the deed; and for general relief. Upon a hearing the prayer of the petition was denied, and the injunction refused. To this ruling, and to the overruling of numerous objections to evidence, and of their demurrer to the answer, the interveners excepted.

The deed of trust recites a consideration of \$60,000 advanced to the Bank of Americus to enable it to resume business by the three banks for which Flannagan is named as trustee, and conveys a large amount of real and personal property, choses in action, etc., for the following uses, trusts, and purposes: Flannagan, as trustee for the three banks named, is to convert into money, by sale and collection, all the property herein conveyed to him, said fund to be collected and held by him for the joint account and benefit of said three banks, and paid over to them pro rata to the amount advanced by each of them to the Bank of Americus, and by them applied to the payment of any indebtedness due by the Bank of Americus as principal or as indorser to them respectively. Power is given the trustee to take all necessary steps in his discretion for converting the property into money, and to sell any or all of the realty at public or private sale for cash or on time, to make titles to the purchasers, to institute such proceedings as he deems necessary for collecting the notes and accounts, to compromise any or all of the choses in action, to take such action as he deems necessary for realizing on collateral securities, and to reserve from the money realized a reasonable compensation for his services, such amount to cover all necessary expense of employing an agent at Americus; he agreeing to use the Bank of Americus as his agent so far as

possible, and to operate through it so long as the management continues satisfactory to him; the powers conferred on him to be irrevocable on the part of the Bank of Americus, and the intention being to grant to him the widest discretionary power, etc. The petition of Travis & Co. alleges that the Bank of Americus was insolvent on January 20, 1893, and has been so ever since; that only a small portion of the \$60,000 recited as the consideration of the deed was advanced by the trustee or the beneficiaries; that the execution and delivery of the deed, and the arrangement inducing the Bank of Americus to execute it, was a device to defraud said bank, and operated to the injury of petitioners and all other creditors; that the trustee or beneficiaries never intended to advance said sum, but intended to get possession of all the assets of the bank, and to appropriate them to their own benefit; that Wheatley, at the time the deed was made, was a director of the bank, was cognizant of the consideration of the deed, and knew that the sum therein expressed was not paid over, but, although acting as receiver, he accepted the agency therein referred to, and aided the trustee in collecting the assets, and as receiver failed and refused to take charge of the assets, or demand them of the trustee; that as agent of the trustee he holds a large amount, derived from the collection of the assets, which he will turn over to the trustee or the beneficiaries unless enjoined, which assets should legally be in his hands as receiver; that prior to the making of the deed, Flannagan, as trustee, and the beneficiaries, had notice of the condition of the bank, and were not innocent purchasers, and the deed was not made for the benefit of the creditors and stockholders of the bank, but for the exclusive benefit of the trustee and beneficiaries named; that at the instance of Flannagan, trustee, prior to the execution of the deed, the bank secured of its directors and friends accommodation notes to the amount of \$60,000, indorsed by the bank, and delivered to Flannagan for the use and benefits mentioned in the deed; that the entire sum was to be paid over by the beneficiaries in cash to the bank, and the beneficiaries were to extend the time on all past indebtedness due them by the bank, amounting to \$75,000, or other large sum, and give the bank time to pay the same, and thus enable it to reopen and do business; that it was further understood or known to the beneficiaries just how the \$60,000 was to be disbursed, to discharge the most immediate and urgent demands against the bank, viz. about \$10,000 due the state of Georgia, about \$15,000 due the S. A. & M. Ry. Co., about \$10,000 due the city of Americus, together with other claims which the beneficiaries knew were pressing upon the bank; that they have failed and refused to extend the time upon all of their past indebtedness as agreed, but are pressing their claims for collection against the bank,

are suing it upon its indorsement of said accommodation paper, and have absolutely failed and refused to pay over said sum of money as agreed; that to this extent the consideration of the deed has failed, and the beneficiaries should not be allowed to obtain judgment on the indorsement of the bank as to said accommodation paper; that when the deed was executed the beneficiaries held certain accommodation notes to the amount of \$23,000, which sum had been advanced on them prior to the execution of the deed, and was then payable, or soon to become payable, which notes were executed by the board of directors, or some of them, to the bank, and this indebtedness was secured by the deed of trust, as well as all past indebtedness from the bank to the beneficiaries, for which reason also the deed is void; and that the deed has no list of creditors or schedule of property attached to it, for which reason it is void, being an effort to make an assignment under the laws of Georgia. By amendment the interveners alleged that upon the theory of defendant the deed is void for usury, for the bank gave the accommodation notes signed by various parties, for the \$60,000, due at six months, and bearing interest at 8 per cent. after maturity, which were delivered to Flannagan, trustee, at the time the deed was delivered; and, if the bank was to allow the sum of \$20,000 to remain to its credit, not subject to be drawn, then the notes contained \$18,400 usury,—that is, the bank received only \$40,000, the interest on which would have been \$1,600.

The answers at the hearing took issue with the allegations of the interveners' petition, and set up that the deed was made as the result of negotiations of the bank's officers with Flannagan, who represented the beneficiaries therein; that the object of such negotiations was to enable the bank to resume business, and the deed was taken bona fide, and without notice that the bank was insolvent, but upon assurance of its officers that it was solvent, and only temporarily embarrassed, and needed only a temporary loan of money, and a sufficient extension of time upon its obligations to its principal creditors; that the entire plan for enabling it to resume business is set out in a letter of March 4, 1893, from Flannagan to Miller, a copy of which is exhibited, which plan was substantially adopted, with some slight modifications, upon the terms and conditions in said letter contained; that the so-called "accommodation notes," indorsed by the bank, and delivered to the beneficiaries, were voluntarily given by the makers to aid the bank in resuming business, their actual value being much less than their face value, owing to the insolvency of some of the makers; that it was not understood and agreed that the consideration for the assets described in the deed and said accommodation notes was to be \$60,000, to be paid by the beneficiaries, and they in no wise to press the bank on its

past indebtedness, but to give it time within which to pay the same, and to enable it to reopen and do business; that there was no express time agreed upon within which the indebtedness of the bank to said beneficiaries was to be paid, but it was contemplated by all parties that, if the bank successfully resumed operations; and continued business, such time would be afforded as might be necessary; and that no one of the beneficiaries has at any time refused the bank any extension asked for, but the bank, after making an effort to resume with the funds furnished by the beneficiaries, voluntarily abandoned the same, closed its doors, and went into liquidation, and has at no time complained that it has not received ample indulgence from the beneficiaries in the deed; that they paid over to the bank every dollar agreed to be advanced, and claim the absolute title to the property covered by the deed, etc.

The substance of the letter of Flannagan to Miller is as follows: The Southern National Bank of New York (of which Flannagan was president), the Louisville Banking Company, and the Tremont National Bank of Boston are to advance to the Bank of Americus \$60,000, of which the Southern advances \$30,000, and the others \$15,000 each, with the understanding that \$20,000 of such advance is not to be drawn for, but shall remain to the credit of the Bank of Americus with the other banks named, in the proportion of their advances. Twelve named persons are to execute their several notes to the Bank of Americus for stated amounts (the whole aggregating \$60,000), payable six months from March 1, 1893; these notes to be discounted by said bank, and the proceeds (being the face value) are to be placed on the books of the bank to the credit of each of the respective parties. Then each of them is to draw his check for the amount of his note, for which is to be issued to him a certificate of deposit of the bank, payable to his order. Upon receipt of the same, he is to indorse thereon: "This certificate of deposit is not payable until the debts, either as principal or indorser, due by the Bank of Americus to, or which may hereafter be contracted by said bank with," the other banks named, respectively, "are paid in full, and such payment be evidenced by the indorsement hereon of the president or cashier of the Southern National Bank of New York." Such certificates are then to be placed in the hands of any reliable third party the persons finally entitled to the same may select, to be held to the joint order of himself and of the officers of the bank named. Outstanding certificates of deposit aggregating \$23,000, issued to four named persons, are to be collected, indorsed, and deposited as before provided. The following property and securities are to be turned over to Flannagan as trustee, to be held and collected by him for the joint account of the banks making the advance, pro rata, to be applied by

them to the payment of any indebtedness by the Bank of Americus as principal or indorser to them respectively. (Then follows a list of realty and personalty, notes, etc., with amounts opposite, aggregating \$97,237.18; also \$150,000 second mortgage bonds S., A. & M. Ry., and all equity in lands of A. I. Co.) Provide reasonable compensation for the trustee, that he may have an agent in Americus to look after the real estate, and dispose of it. Miller is to supply anything omitted which is necessary for a proper title to the property to be transferred, and to act in the matter for the interest of the banks represented by Flannagan, etc.

Among the large amount of evidence introduced at the hearing was an affidavit of Miller, in substance as follows: The law firm of which he is a member is counsel for the Southern National Bank of New York, the Tremont National Bank of Boston, and Flannagan, trustee. He alone has acted for the firm throughout the entire transaction referred to in the petition, the greater portion of which rests within his personal knowledge by reason of the fact that his clients were nonresidents, and the transaction was conducted by deponent in person, as the representative of his clients. Very shortly after the Bank of Americus was placed in the hands of a temporary receiver, in January, 1893, Flannagan came from New York, and employed deponent's firm to represent and advise him with regard to all questions arising out of the condition of affairs then existing as to said bank. They proceeded to Americus, and found that a committee had been appointed from the board of directors of the bank, for the purpose of investigating its financial condition, and of ascertaining whether it would be able, by proper efforts on the part of directors and stockholders, to overcome its then pending embarrassments and resume business. As deponent now recollects, at the first conference he attended between the officers of the bank, the committee of directors, and Flannagan, the members of the committee were decidedly despondent, and appeared to be of the opinion that it was useless for the bank to endeavor to resume business. The meeting was adjourned, with the agreement on their part to meet Flannagan on the following day, and in the meantime they were to continue their investigation into the affairs of the bank. When the parties met again the following day, the committee, consisting of Wheatley, Glover, and Dodson, appeared to be in a very much more hopeful frame of mind, and each stated to Flannagan and deponent that the affairs of the bank were in a very much better condition than they had hoped to find them, and that a more thorough investigation of its assets and liabilities had satisfied them, by securing the necessary financial aid at that time, the bank would be able to resume business, finally work out its embarrassments, pay all of its

possible, and to operate through it so long as the management continues satisfactory to him; the powers conferred on him to be irrevocable on the part of the Bank of Americus, and the intention being to grant to him the widest discretionary power, etc. The petition of Travis & Co. alleges that the Bank of Americus was insolvent on January 20, 1893, and has been so ever since; that only a small portion of the \$60,000 recited as the consideration of the deed was advanced by the trustee or the beneficiaries; that the execution and delivery of the deed, and the arrangement inducing the Bank of Americus to execute it, was a device to defraud said bank, and operated to the injury of petitioners and all other creditors; that the trustee or beneficiaries never intended to advance said sum, but intended to get possession of all the assets of the bank, and to appropriate them to their own benefit; that Wheatley, at the time the deed was made, was a director of the bank, was cognizant of the consideration of the deed, and knew that the sum therein expressed was not paid over, but, although acting as receiver, he accepted the agency therein referred to, and aided the trustee in collecting the assets, and as receiver failed and refused to take charge of the assets, or demand them of the trustee; that as agent of the trustee he holds a large amount, derived from the collection of the assets, which he will turn over to the trustee or the beneficiaries unless enjoined, which assets should legally be in his hands as receiver; that prior to the making of the deed, Flannagan, as trustee, and the beneficiaries, had notice of the condition of the bank, and were not innocent purchasers, and the deed was not made for the benefit of the creditors and stockholders of the bank, but for the exclusive benefit of the trustee and beneficiaries named; that at the instance of Flannagan, trustee, prior to the execution of the deed, the bank secured of its directors and friends accommodation notes to the amount of \$60,000, indorsed by the bank, and delivered to Flannagan for the use and benefits mentioned in the deed; that the entire sum was to be paid over by the beneficiaries in cash to the bank, and the beneficiaries were to extend the time on all past indebtedness due them by the bank, amounting to \$75,000, or other large sum, and give the bank time to pay the same, and thus enable it to reopen and do business; that it was further understood or known to the beneficiaries just how the \$60,000 was to be disbursed, to discharge the most immediate and urgent demands against the bank, viz. about \$10,000 due the state of Georgia, about \$15,000 due the S. A. & M. Ry. Co., about \$10,000 due the city of Americus, together with other claims which the beneficiaries knew were pressing upon the bank; that they have failed and refused to extend the time upon all of their past indebtedness as agreed, but are pressing their claims for collection against the bank,

are suing it upon its indorsement of said accommodation paper, and have absolutely failed and refused to pay over said sum of money as agreed; that to this extent the consideration of the deed has failed, and the beneficiaries should not be allowed to obtain judgment on the indorsement of the bank as to said accommodation paper; that when the deed was executed the beneficiaries held certain accommodation notes to the amount of \$23,000, which sum had been advanced on them prior to the execution of the deed, and was then payable, or soon to become payable, which notes were executed by the board of directors, or some of them, to the bank, and this indebtedness was secured by the deed of trust, as well as all past indebtedness from the bank to the beneficiaries, for which reason also the deed is void; and that the deed has no list of creditors or schedule of property attached to it, for which reason it is void, being an effort to make an assignment under the laws of Georgia. By amendment the interveners alleged that upon the theory of defendant the deed is void for usury, for the bank gave the accommodation notes signed by various parties, for the \$60,000, due at six months, and bearing interest at 8 per cent. after maturity, which were delivered to Flannagan, trustee, at the time the deed was delivered; and, if the bank was to allow the sum of \$20,000 to remain to its credit, not subject to be drawn, then the notes contained \$18,400 usury,—that is, the bank received only \$40,000, the interest on which would have been \$1,600.

The answers at the hearing took issue with the allegations of the interveners' petition, and set up that the deed was made as the result of negotiations of the bank's officers with Flannagan, who represented the beneficiaries therein; that the object of such negotiations was to enable the bank to resume business, and the deed was taken bona fide, and without notice that the bank was insolvent, but upon assurance of its officers that it was solvent, and only temporarily embarrassed, and needed only a temporary loan of money, and a sufficient extension of time upon its obligations to its principal creditors; that the entire plan for enabling it to resume business is set out in a letter of March 4, 1893, from Flannagan to Miller, a copy of which is exhibited, which plan was substantially adopted, with some slight modifications, upon the terms and conditions in said letter contained; that the so-called "accommodation notes," indorsed by the bank, and delivered to the beneficiaries, were voluntarily given by the makers to aid the bank in resuming business, their actual value being much less than their face value, owing to the insolvency of some of the makers; that it was not understood and agreed that the consideration for the assets described in the deed and said accommodation notes was to be \$60,000, to be paid by the beneficiaries, and they in no wise to press the bank on its

past indebtedness, but to give it time within which to pay the same, and to enable it to reopen and do business; that there was no express time agreed upon within which the indebtedness of the bank to said beneficiaries was to be paid, but it was contemplated by all parties that, if the bank successfully resumed operations, and continued business, such time would be afforded as might be necessary; and that no one of the beneficiaries has at any time refused the bank any extension asked for, but the bank, after making an effort to resume with the funds furnished by the beneficiaries, voluntarily abandoned the same, closed its doors, and went into liquidation, and has at no time complained that it has not received ample indulgence from the beneficiaries in the deed; that they paid over to the bank every dollar agreed to be advanced, and claim the absolute title to the property covered by the deed, etc.

The substance of the letter of Flannagan to Miller is as follows: The Southern National Bank of New York (of which Flannagan was president), the Louisville Banking Company, and the Tremont National Bank of Boston are to advance to the Bank of Americus \$60,000, of which the Southern advances \$30,000, and the others \$15,000 each, with the understanding that \$20,000 of such advance is not to be drawn for, but shall remain to the credit of the Bank of Americus with the other banks named, in the proportion of their advances. Twelve named persons are to execute their several notes to the Bank of Americus for stated amounts (the whole aggregating \$60,000), payable six months from March 1, 1893; these notes to be discounted by said bank, and the proceeds (being the face value) are to be placed on the books of the bank to the credit of each of the respective parties. Then each of them is to draw his check for the amount of his note, for which is to be issued to him a certificate of deposit of the bank, payable to his order. Upon receipt of the same, he is to indorse thereon: "This certificate of deposit is not payable until the debts, either as principal or indorser, due by the Bank of Americus to, or which may hereafter be contracted by said bank with," the other banks named, respectively, "are paid in full, and such payment be evidenced by the indorsement hereon of the president or cashier of the Southern National Bank of New York." Such certificates are then to be placed in the hands of any reliable third party the persons finally entitled to the same may select, to be held to the joint order of himself and of the officers of the bank named. Outstanding certificates of deposit aggregating \$23,000, issued to four named persons, are to be collected, indorsed, and deposited as before provided. The following property and securities are to be turned over to Flannagan as trustee, to be held and collected by him for the joint account of the banks making the advance, pro rata, to be applied by

them to the payment of any indebtedness by the Bank of Americus as principal or indorser to them respectively. (Then follows a list of realty and personalty, notes, etc., with amounts opposite, aggregating \$97,237.18; also \$150,000 second mortgage bonds S., A. & M. Ry., and all equity in lands of A. I. Co.) Provide reasonable compensation for the trustee, that he may have an agent in Americus to look after the real estate, and dispose of it. Miller is to supply anything omitted which is necessary for a proper title to the property to be transferred, and to act in the matter for the interest of the banks represented by Flannagan, etc.

Among the large amount of evidence introduced at the hearing was an affidavit of Miller, in substance as follows: The law firm of which he is a member is counsel for the Southern National Bank of New York, the Tremont National Bank of Boston, and Flannagan, trustee. He alone has acted for the firm throughout the entire transaction referred to in the petition, the greater portion of which rests within his personal knowledge by reason of the fact that his clients were nonresidents, and the transaction was conducted by deponent in person, as the representative of his clients. Very shortly after the Bank of Americus was placed in the hands of a temporary receiver, in January, 1893, Flannagan came from New York, and employed deponent's firm to represent and advise him with regard to all questions arising out of the condition of affairs then existing as to said bank. They proceeded to Americus, and found that a committee had been appointed from the board of directors of the bank, for the purpose of investigating its financial condition, and of ascertaining whether it would be able, by proper efforts on the part of directors and stockholders, to overcome its then pending embarrassments and resume business. As deponent now recollects, at the first conference he attended between the officers of the bank, the committee of directors, and Flannagan, the members of the committee were decidedly despondent, and appeared to be of the opinion that it was useless for the bank to endeavor to resume business. The meeting was adjourned, with the agreement on their part to meet Flannagan on the following day, and in the meantime they were to continue their investigation into the affairs of the bank. When the parties met again the following day, the committee, consisting of Wheatley, Glover, and Dodson, appeared to be in a very much more hopeful frame of mind, and each stated to Flannagan and deponent that the affairs of the bank were in a very much better condition than they had hoped to find them, and that a more thorough investigation of its assets and liabilities had satisfied them, by securing the necessary financial aid at that time, the bank would be able to resume business, finally work out its embarrassments, pay all of its

debts, and save something for the stockholders. This statement was strongly confirmed by the president, cashier, and assistant cashier of the bank. Various conferences were held with said committee and officers by Flannagan, at most of which deponent was present. He cannot state what actual examination was made of the books and papers of the bank by Flannagan, as he was not present on every occasion when Flannagan was conferring with the parties before named. Deponent himself made no investigation of said books and papers, nor was he requested so to do by either party. Certain statements, however, were furnished by the bank's officers to Flannagan as to the assets and liabilities of the bank, and various propositions were submitted with reference to furnishing additional securities to the three banks represented by him, in order to secure for the Bank of Americus the advance of funds necessary to enable it to meet its most pressing liabilities, and resume business. Deponent conferred and advised with Flannagan as to the value of the securities and the various legal questions arising in the transaction. During this negotiation, neither Hawkins, the president, nor any one of the committee of the directors, seemed to have any personal knowledge of the actual condition of the bank's affairs. Their entire information as to its financial status appeared to be derived from the cashier and assistant cashier. Hawkins stated that, for many months prior to the bank's suspension, he had no actual control of its affairs, although being the nominal president; and the three members of the committee stated that, while they were directors, they had not exercised any active and personal supervision of the bank, and that it had been practically carried on and controlled by the cashier and assistant for a year or more before the appointment of the temporary receiver. At all interviews at which deponent was present, Flannagan appeared to be entirely willing to furnish the bank the necessary financial aid from the banks represented by him, provided the same could be reasonably secured, and would result in enabling the bank to resume business, and work out its existing embarrassments. He did not urge upon said parties the execution of the plan finally adopted and now complained of. On the other hand, after the interview of the first day, the officers of the bank and the members of the committee seem to be confident that if they could secure the desired financial assistance from the banks represented by Flannagan, it would be of immense benefit to the Bank of Americus, and would result, not only in enabling it to resume, but to successfully overcome its pending difficulties, and not only to pay its debts, but also to save something from the wreck for the stockholders; and to that end they repeatedly and earnestly, in deponent's presence,

insisted that Flannagan should have said banks furnish the funds desired. What had passed between the parties prior to this visit of Flannagan is contained in certain epistolary and telegraphic correspondence, and about this deponent has no personal knowledge. The result of the negotiation was that Flannagan returned to New York without deciding upon the propositions submitted, but agreeing to report all the facts to the banks represented by him, and, after conferring with them, to advise the Bank of Americus of the result. Certain correspondence then took place by wire and letter, until March 4, 1893, when deponent received the letter before set out, a copy of which was sent at the same time by Flannagan to the committee in Americus. Acting on the directions therein contained, deponent entered into negotiation with said committee and the officers of the bank upon the line therein indicated. What transpired through said negotiations was with deponent alone, except as appears from the daily telegraphic correspondence between himself and Flannagan and the committee and assistant cashier in Americus with the cashier, who was in New York during the negotiation. The transaction, as completed, which resulted in the trust deed, was nearly exactly as outlined and required by the Flannagan letter, which was constantly referred to during the entire negotiation. It is not true that the entire assets of the bank were submitted to deponent or to Flannagan, or both of them, from which to select the securities desired. On the contrary, said committee and officers submitted to Flannagan and deponent certain securities which were valued by them to secure the new advance of money; and both deponent and Flannagan examined said list of securities, and conferred with other parties as to their probable market value, and simply finally accepted such as were offered upon the statement of the committee and officers that the same was the very best that could be done by the bank. It was distinctly understood between the members of the committee, the assistant cashier, and the president, that while the three banks named were to advance the Bank of Americus \$60,000, one-third of the same was not to be drawn for, but was to remain as a standing balance to the credit of the Bank of Americus with the three banks named, in proportion to such advance. It is not true that the full amount of \$60,000 named in the deed was to be paid over in cash to the Bank of Americus, and that such was the condition upon which the deed was to be executed. Deponent repeatedly and in the strongest and most unequivocal terms called the attention of the members of the committee, the president, and assistant cashier to the fact that under the terms of the letter, while they were nominally to receive \$60,000, the provision as to the standing cash balance made the advance

only the actual amount of \$40,000; and deponent went so far as to advise said parties that they could not hope successfully to resume their banking operations with the \$40,000 expected from the transaction. It was replied by them that the cash balances required were only such as were customary in banking business, and that since the suspension of the bank about \$13,000 had been realized from the collections made by the temporary receiver, and that the bank had various other assets not covered by the deed of trust, from which additional amounts could be drawn, and that with the \$40,000 actually to be advanced they expected to be able successfully to resume business, and work out of their difficulties. The other changes made in the transaction were with reference to certain details which are not now complained of, and which were mutually agreed upon by the parties at interest. Realizing the importance of the transaction, and being all the while of the opinion that it was neither to the interest of his clients nor of the stockholders of the bank that the transaction should be consummated, deponent proceeded throughout with the utmost deliberation, giving the parties ample time from day to day to examine and consider the matter in all of its bearings, and never for one moment urging or advising that the transaction as finally made should be entered into. He was particular to deal with the parties representing the bank with the utmost frankness, stating in explicit terms every feature of the transaction in all of its bearings, so that there could be neither mistake nor misapprehension on the part of any person interested. From information derived from conversation had with the officers of the bank and the members of its board of directors, deponent is satisfied that Flannagan, as trustee, and the three banks represented by him in the transaction, have in every respect and detail carried out in the utmost good faith their entire agreement with the Bank of Americus, and never heard of any complaint to the contrary until the suit of Ingram et al. was instituted.

The assignments of error in the bill of exceptions are as follows: (1) Plaintiffs demurred to the answers made, and objected to their introduction in evidence (they having been sworn to), as well as to the Flannagan letter of March 4, 1893. The grounds of demurrer and objection were that it was sought to vary the terms of a written contract (the trust deed) by oral testimony, and no reason was shown why the terms and conditions set forth in the answers and the letter were left out of the deed; that the deed is in no wise ambiguous; that it was sought to introduce in this case statements of certain terms and conditions by a stranger to this litigation, to wit, W. W. Flannagan, president (he having signed the letter as such), and such statements were irrelevant; that such statements

were made long prior to the execution of the deed, and whatever may have transpired between the bank and the trustee or beneficiaries was merged into the deed by which the litigation was finally consummated. Plaintiffs objected to the affidavit of Miller for the same reasons, and because it was irrelevant, and the greater portion of it tended to vary the terms of the deed. The demurrer and objections were overruled. (2) Plaintiffs objected to the introduction in evidence of the consent order of March 11, 1893, previously set out, and the objection was overruled. The grounds of objection were that the order was irrelevant and immaterial, and interveners, not being parties when it was passed, were not bound by it; and that the court had no authority to allow the directors of the bank, after the filing of a bill and the appointment of a receiver, to make a deed of trust or conveyance of any kind which would tend to give one creditor preference over another, interveners not being parties to the original petition at that time. (3) Defendants introduced a number of letters and telegrams from various officers and directors of the Bank of Americus to Flannagan and officers of the three banks he represented in the negotiations in question, bearing various dates from December 2, 1892, to May 28, 1893, and relating to the condition and affairs of the Bank of Americus, and to sundry details connected with the negotiations referred to. These were objected to by plaintiffs as irrelevant and immaterial, but the objection was overruled. (4) Defendants offered in evidence the minutes of the board of directors of the bank of January 2, 1893. Plaintiffs objected that the books had not been identified as the minutes kept by the bank. Defendants' counsel called attention to the fact that the books were brought to court under an order at plaintiffs' request, and were produced by the receiver. The plaintiffs further objected that the resolutions on the minutes were irrelevant and immaterial, and that defendants had failed to show that Flannagan, trustee, or the three banks named in the deed, had any knowledge or notice of the resolutions prior to its execution. The objections were overruled. Defendants then offered the minutes kept by the board of directors of the bank of a meeting held March 13, 1893, to which plaintiffs objected—First, that the book had not been identified as minutes of the bank; second, that it did not appear that the minutes had ever been confirmed or approved by the board of directors; third, that they were incomplete, inasmuch as they referred to the letter of March 4, 1893, which was not recorded on the book (the resolution directing the secretary to carefully file away and preserve for further reference the copy letter from Flannagan to Miller, mentioned in resolutions just adopted by the board), and the minutes showing that a deed was directed to be made in accordance with said letter, with some changes, but not stating wherein chan-

ged; and, fourth, that the board of directors had no authority to authorize the execution of a deed to the bank's assets so as to affect interveners' rights during the pendency of the petition of Cooper et al., and while Dodson was temporary receiver, interveners not then being parties to the petition, nor consenting thereto. The objections were overruled. It is noted by the judge that complainants and respondents had both asked the court to have the receiver produce all the books and papers of the bank, to be used by either side if desired; and the court had so ordered. The receiver stated that he would have the books at the hearing. The hearing was continued, and the receiver left the books with the clerk; and when respondent called for the minutes of the bank the book admitted by the court was brought into court by the clerk, and no objection was made that it was not the same book that the receiver had so produced and left with the clerk. After the objections were overruled, complainants introduced in evidence several parts of the same book of minutes. (5) Error in refusing the injunction and relief prayed, for the following reasons: First. The evidence and pleading established the insolvency of the bank at the time of the execution of the deed, and notice of such insolvency to Flannagan as trustee, or reasonable grounds to suspect the same; the deed being to secure present advances and past indebtedness, and not for the benefit of all the creditors and stockholders of the bank. Second. No valid deed could be made while the petition of Cooper et al. was pending, and a receiver in charge of the assets of the bank, especially none to secure past indebtedness under such circumstances, thereby preferring certain creditors. Third. Evidence shows the bank to have been insolvent and to have suspended business prior to the making of the deed, which fact was known to the trustee and beneficiaries. Fourth. Deed void for usury, as alleged in the interveners' petition; and, if not so void, the consideration had failed to the extent of the sum unadvanced. Fifth. Under the evidence, the deed is an assignment, and as such is void for want of a list of creditors and schedule of property attached to it. Sixth. The beneficiaries thereunder are nonresidents, and without the jurisdiction of the court except in this proceeding; "and, should the jury decide plaintiffs in error have equity in their petition, they would be remediless without proper protection from a court of equity, and would save a multiplicity of suits; but, on the other hand, if their relief prayed for be granted, the rights and equities of all parties at interest would be preserved."

R. L. Maynard and W. P. Wallis, for plaintiffs in error. Bacon & Miller and W. M. Hawkes, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 250)

# HOLTON v. HOLTON et al.

(Supreme Court of Georgia. July 18, 1896.)

ADMINISTRATION OF ESTATE—ASSETS—CANCELLATION OF DEED.

1. An administrator is under no duty of administering as a portion of his intestate's estate property which did not belong to the latter.

2. The verdict, upon the substantial merits of the case, was manifestly right, and therefore should not be set aside, even if the charge of the court was not in all respects accurate and correct.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

The following is the official report:

This suit was brought by T. L. Holton against G. J. Holton and Quitman Holton to cancel a deed, and to obtain a decree vesting in plaintiff the title to lot 123 in the Second district of Appling county. There was a verdict for defendants, and plaintiff's motion for a new trial was overruled, and he brings error. Affirmed.

It appears from the evidence that J. R. Holton entered upon the land as a squatter, and without any title, in 1867 or 1868. He built thereon a dwelling, crib, smokehouse, etc., and remained in possession until his death, in 1873. While so in possession, he stated that he had no title to the land, but that he was going to work on it, and, if the owner ever came, he (Holton) would buy it; and, if the owner was a gentleman, he would not ask more than the original value for it, and, if not, he could but pay for the improvements. Holton left a will dated August 20, 1872, wherein he directed that all his property, after payment of his debts, be divided between his wife and his son, the plaintiff; the half devised to his wife to be hers for life, and at her death to become the sole property of the plaintiff. The will does not identify any particular property as belonging to the testator. On April 7, 1873, defendant G. J. Holton qualified as executor of this will, and subsequently became guardian for the plaintiff, who was a minor. His mother died in 1885 or 1886, and he became of age on February 9, 1888. In April thereafter a settlement was had between him and G. J. Holton, as his guardian, in which said guardian turned over to him land lot 110 in the Second district of Appling county, 87 head of cattle, and \$76.56, for which plaintiff receipted in full, entire, and complete satisfaction of all demands against Holton as his guardian. It further appears that the land now in question, lot 123, was not appraised as a part of J. R. Holton's estate, and was not taken charge of by G. J. Holton as executor. Plaintiff, with his mother, remained upon the land a short time after the death of his father, and then G. J. Holton paid the widow \$25 for her possession, and she, with the plaintiff, and her husband (she having remarried a month or two previously), abandoned possession, and G. J.

Holton entered, and has remained in possession ever since. In evidence appears a chain of titles, beginning with a grant from the state, to the land in dispute, and ending with a deed from one Mason to G. J. Holton, dated December 8, 1877, reciting a consideration in the sum of \$22.70. Plaintiff brought suit in ejectment against G. J. Holton in September, 1888, for this land, and dismissed the case in March, 1891. The present action was commenced in September, 1891.

The grounds of the motion for a new trial are that the verdict is contrary to law and evidence, and as follows: The court erred in charging: "That the title to land in this state usually consists of a plat and grant from the state, and a complete chain of titles down to the party claiming the land. There is also another title to land, which is called 'title by prescription'; that is, where a party has not the plat and grant from the state, and a complete chain of title, but who has bought the land, taking a deed to himself, in good faith, believing he was getting a good title, and under such claim of title enters upon the land, taking full charge and control of the same, and holding such continuous and notorious possession for a period of seven years. That would give him a paramount title, which would enable him to hold the land even against the one holding the plat and grant from the state and a full chain of title, which the court has explained to you. A person may hold actual possession of land under a bona fide right to it, and continuing in that possession for a period of twenty years in the way and manner pointed out by law, having a good right and title by prescription to so much as he may have in actual possession. The court charges you that if a person be living upon a lot of land, holding a claim under a title of right of possession in any of the modes and ways which the court has explained to you, and should be seised and possessed of it, it should constitute a part of his estate to be administered; but if such person had entered upon the land as a squatter, though he may have built him a home and lived upon it any number of years, and should at the time of entering and during his occupancy disclaim any title or ownership or right of possession to the land, and should die while living upon it, the court charges you that within the true meaning of the law he would not die seised and possessed of the land, and it would not, under any sense, constitute any part of his estate, or be appraised or be taken charge of by his administrator or his executor." Because the court erred in charging the jury as follows: "The court instructs you that it is a rule of law that one who is simply in possession of land without holding a title or right or claim of possession may have a right of action against a mere wrongdoer or trespasser; but the court charges you that, while this rule of law is true, it has no application or cen-

nection at all with the rules in favor of administrators. As to the rights of estate, it is simply a rule of law which places the party in possession in position of agent for the true owner as against a mere wrongdoer or trespasser, and, as the court has said, has no application beyond that."

Because the court erred in charging the jury as follows: "If, in going through the testimony, you should find the truth to be that John R. Holton entered upon this lot of land in possession under some honest claim of right, claiming some right or title or interest in it honestly and in good faith as his own, the court charges you that should you find that to be true; that, although this lot of land may not have been appraised and returned by the appraisers, or exhibited by the executor, or claimed as a part of the estate, or subsequently claimed by him as guardian of T. L. Holton, if you find that to be true, and that under the instructions which the court has given you G. C. Holton was not fully acquitted and discharged from accounting for this lot of land, and that it was understood at the time that the receipt was signed that this lot of land was not to be included in it, or the ward barred by it, the court charges you he would have no title, provided you find such to have been the claim; and if you find that G. J. Holton, as executor, took charge of this lot of land as the property of the estate, and after he had bought an adverse title, and under that took possession and claimed it as his own, and against the right and estate of his ward, and not holding it for the benefit of the estate or the trust, then in a suit upon the part of T. L. Holton, as in this case, he would be entitled to recover the land upon the payment by him to his guardian of the money paid out for the purchase of the title, with the interest thereon, less any amount of rents and profits." Because the court erred in charging the jury as follows: "If you should find the truth to be that John R. Holton simply entered upon this land as a mere squatter, without any right or title, and that he continued in possession up to the time he died, without having any title, or setting any such up, the court charges you that a mere possession without a deed, he living upon the land, would not in any sense make the land any part of his estate, or give to the beneficiaries of his estate any right or title to it. If you find that to be true, and find that subsequently this defendant, G. J. Holton, bought from the true owner a title to this lot of land, and made a deed of gift to his son, Quip Holton, if you find this to be the truth of the matter from the testimony, you would be authorized, and it would be your duty, to return a verdict in favor of the defendant." Because the court erred in charging, immediately after the charge excepted to in the ground last above, as follows: "If you should find that the estate had some interest in it which the executor

was bound to protect, and that this descended to the ward, and that there was a final settlement between them, and a receipt was given with a full knowledge and without fraud or concealment, that would be an estoppel, as the court charged you, and you would be authorized, and it would be your duty, in that event, to find for the defendants." Because the court erred in charging the jury as follows: "Certain documentary evidence has been introduced, which you will have out with you, and which you will consider in connection with parol evidence. You will have a certified copy of the estate of John R. Holton, and also a final receipt given by T. L. Holton to G. J. Holton, and you will also bear in mind the items taken from the record, and arrive at your verdict under the rules of law and under the instructions given by the court." Because the court erred in failing to charge the jury the law applying to settlements between guardian and ward as prescribed in section 1847 of the Code of 1882, although not requested so to charge. Because the charge of the court was misleading, and was more favorable to the defendants than to the plaintiff. Because the court failed to charge the jury the law applicable to the facts and issues of the case. Because the court erred in failing to charge the law governing all the issues made by the pleadings and evidence in the case.

E. P. Padgett and E. D. Graham, for plaintiff in error. G. J. Holton & Son and Atkinson & Dunwoody, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 126)

SIBLEY et al. v. AMERICAN EXCH. NAT. BANK.

(Supreme Court of Georgia. July 15, 1895.)

DEPOSITIONS—RATIFICATION—EVIDENCE—BURDEN OF PROOF—NEGOTIABLE INSTRUMENTS—NOTICE OF PROTEST—WHO ENTITLED TO.

1. Where documents are attached to interrogatories for the purpose of proving their execution, the party at whose instance the answers thereto are put in evidence is not bound to offer also such documents; and it is improper practice for the court to require him to do so. If, however, any portion of the answers read by such party are unintelligible without the documents or a part of them, the court may require the party reading the answers to offer also the documents, or such part of them as may be necessary to the understanding of the answers, upon penalty, in case of refusal, of excluding those answers to the understanding of which such documents are necessary.

2. Where, in the trial of an action, the liability of a partner for a debt incurred by a co-partner in the firm name for the account of a third person depends upon the ratification of the unauthorized act of such co-partner by the partner sought to be charged, the burden of proof is upon the plaintiff to establish the fact of ratification by a preponderance of the testimony; and a written request to that effect should have been given.

3. Actual knowledge of the character of such a debt, and of the circumstances under which it was incurred, are not necessary to bind by a subsequent ratification the partner sought to be charged. If he ratify the unauthorized act of his co-partner, and assume personally to pay the same, with notice of such facts only as would put a reasonably prudent man upon inquiry, he is thereby charged with knowledge of all such facts as he might have discovered if inquiry had been pressed with due diligence; and hence a request to charge, which makes actual knowledge the test of the binding force of such ratification, leaving entirely out of consideration the effect of such constructive knowledge as might have been acquired by inquiry, was properly refused by the court.

4. All persons liable as indorsers upon a note or bill of exchange, as distinguished from mere sureties by indorsement, if the paper indorsed be payable, or intended to be negotiated, at a chartered bank, are entitled to protest and notice of nonpayment. A person who merely writes his name on the back of such a paper to guaranty its payment, but whose indorsement is neither essential to nor proper in the due transmission of title in the course of negotiation, is a surety only, and is not entitled to notice as an indorser.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

An action by the American Exchange National Bank against R. P. & G. T. Sibley and others. From a judgment for plaintiff, defendants Sibley bring error. Reversed.

J. R. Lamar, for plaintiffs in error. Jos. B. & Bryan Cumming, for defendant in error.

ATKINSON, J. The plaintiff, the American Exchange National Bank, brought suit against the Georgia Construction & Investment Company, a Georgia corporation, as maker, and Alden Howell, D. S. Boyd, W. H. Penland, G. W. Susong, Robert P. Sibley, and Robert P. Sibley and G. T. Sibley (co-partners, under the firm name of R. P. & G. T. Sibley), upon a promissory note, of which the following is a copy: "\$5,000.00. Augusta, Ga., August 15th, 1888. On December 1st, after date, we promise to pay to the order of W. H. Penland five thousand dollars, at American Exchange National Bank, New York. Value received. \$10,000 first mortgage bonds Carolina, Knoxville & Western Railway as collateral security. [Signed] Georgia Construction & Investment Co., by R. P. Sibley, President." Indorsed: "Alden Howell. D. S. Boyd. W. H. Penland. G. W. Susong. Robert P. Sibley. R. P. & G. T. Sibley." To this action, R. P. and G. T. Sibley, in their capacity as co-partners, acting through G. T. Sibley upon behalf of said partnership, and as well upon his own behalf, made answer and pleaded as follows: (1) The general issue. (2) That the indorsement sued on was not the act and deed of the partnership; that the indorsement was placed thereon by R. P. Sibley, one of the members of the firm, without the knowledge or consent of G. T. Sibley, the other member of the firm; that the firm did not receive any of the benefit

of said note, or use the proceeds thereof; that the indorsement was an accommodation indorsement, solely for the benefit of the maker of said note; and that the plaintiff discounted the same with the full knowledge that said indorsement of R. P. & G. T. Sibley was an accommodation indorsement; and that the same was placed thereon without the knowledge or consent of G. T. Sibley, the other member of said firm. Defendants further show that said G. T. Sibley has never ratified or acquiesced in the said indorsement, and, as soon as he learned of the fact, repudiated the same, and so the defendants say that neither the said G. T. Sibley nor said firm is liable upon the note.

Upon the trial of the case, the plaintiff introduced the note sued on, and closed. The defendants introduced and read in evidence certain depositions of Dumont Clark, who testified that he is, and was in August, 1888, the vice president of the American Exchange National Bank of New York City, the plaintiff in this case; that his bank discounted the note for \$5,000, made by the Georgia Construction & Investment Company, and indorsed, among others, by the firm of R. P. & G. T. Sibley; that the bank refused to discount the note unless it was first indorsed by the firm of R. P. & G. T. Sibley, and passed through their regular account; that he knew this indorsement was for accommodation, and that G. T. Sibley was ignorant of it at the time; that R. P. Sibley actually indorsed the note, and assured him he would acquaint his brother with the fact of indorsement as soon as he returned to Augusta, and would procure his brother's ratification of the act. The proceeds of the note were placed to the credit of R. P. & G. T. Sibley, and were drawn out by them in September and October, 1888. The checks upon which the money was paid have been canceled and returned to the maker, and it is impossible to tell by which member of the firm they were signed. "On August 24, 1888, immediately after the discounting of the note, we mailed to the firm of R. P. & G. T. Sibley the usual notice of the discounting of the note in suit. On or about the last days of August, September, and October, 1888, we sent the firm, by mail, the usual statement of their account with us, showing all transactions between us and them during these months, and the balance to their credit at the end of each month." The statements referred to were attached to the depositions. In answer to each of the statements, the bank received a letter from the firm, which was written on a printed blank form, admitting the correctness of the statements. Those letters are annexed to the depositions. Witness testified that he knew the handwriting of each member of the firm; that one of the letters was signed by R. P. Sibley, and the other two by G. T. Sibley. On or about December 11, 1888, the bank received another letter,

in the handwriting of and signed by G. T. Sibley, and, except as indicated in the letters above referred to, the bank had received from G. T. Sibley no express ratification of the indorsement. Witness cannot recollect whether he knew at the time of the discounting of the note sued on that R. P. Sibley was president of the Georgia Construction & Investment Company. He is quite sure the bank had no connection with that company prior to the discounting of the note in suit, but at this date he cannot speak positively. To the note discounted, there was attached \$10,000 of first mortgage bonds of the Carolina, Knoxville & Western Railway Company, as collateral security. The bank supposed that these bonds belonged to the Georgia Construction & Investment Company. The bank discounted the note upon the credit of the indorsements and the bonds deposited as collateral security, and knew nothing further about the matter; nor did the bank know anything about the relation between the defendant company and the Carolina, Knoxville & Western Railway Company. At the time the note was offered for discount, there were on it as indorsers the names of Alden Howell, D. S. Boyd, W. H. Penland, G. W. Susong, R. P. Sibley, and R. P. & G. T. Sibley. Witness knew only the Sibleys. The indorsement of R. P. & G. T. Sibley was not on the note when first offered for discount, but was subsequently affixed. Witness knew in a general way that the note was for accommodation, but did not know for whose benefit it was discounted, or what disposition was made of the proceeds. R. P. Sibley had talked with him about the defendant company, and had asked him to discount its notes upon the pledge of the bonds of the Carolina, Knoxville & Western Railway Company, as collateral security. Witness emphatically refused to do so, unless the notes were satisfactorily indorsed. Witness did not agree to discount this note before the name of R. P. & G. T. Sibley was indorsed upon it. On the contrary, the bank expressly refused to discount it. In consequence of such refusal, the note was then indorsed by them, and, on the additional security of this indorsement, the bank discounted it. The bonds pledged as collateral security came to the bank from R. P. & G. T. Sibley. Witness did not know where they obtained them; has no recollection of any special deposit of such bonds; and did not think the bank had any such deposit, but cannot swear positively at this date. Witness did not know that the Georgia Construction & Investment Company was interested in the building of the Carolina, Knoxville & Western Railway. The three letters from R. P. & G. T. Sibley to the bank, referred to in the testimony of Clark, were in form and substance as follows, save only the variations in the dates and the sums represented in the several statements: "To American Exchange Na-

tional Bank, New York: Your account rendered to August 31st, 1888, showing a balance of \$6,325.92 due us, agrees with our books, with the following exceptions [which it is immaterial to here set out]. Respectfully, R. P. & G. T. Sibley." The individual letter from G. T. Sibley to the bank, above referred to, is as follows: "American Exchange National Bank, New York. I have bought out the interest of R. P. Sibley in the firm of R. P. & G. T. Sibley, and will continue the business in all of its branches. The notes of R. P. & G. T. Sibley that you hold will be paid by me, as I have assumed the liabilities of R. P. & G. T. Sibley. Hope to remit you soon for balance due on demand note of October 15th. Yours truly, G. T. Sibley." The defendants likewise introduced a bill of sale from Robert P. to Grigsby T. Sibley, by which the former conveyed to the latter all his interest in the assets of the firm of R. P. & G. T. Sibley, of every character whatsoever, upon the consideration of five dollars, and upon the further consideration "that G. T. Sibley has agreed to and in fact assumed all the debts of the firm, whose assets, so far as I have interest therein, are hereby conveyed and assigned." G. T. Sibley testified for the defendants that R. P. Sibley was his uncle, and that they were in partnership in 1887, under the firm name of R. P. & G. T. Sibley, as cotton factors; that R. P. & G. T. Sibley owned some stock in the Georgia Construction & Investment Company, and allowed it to keep its accounts on the books of the firm for a while. "R. P. Sibley had the books kept there, and then employed some one to write the books off from our books." Witness did not keep the books. "Mr. Nixon was the bookkeeper of our firm. The books of the firm show that this \$5,000 note that was discounted was placed to the credit of the Georgia Construction & Investment Company, and in a short time was checked out. The net amount, after the discount, was \$4,915. We kept their entire books on our books, and the checks that they drew went through our books as their records, as they had no books of their own. These checks are those of R. P. & G. T. Sibley on the American Exchange National Bank. I suppose Mr. Nixon drew the checks, and I signed them. R. P. Sibley was out of town most of the time, and he would write and instruct us what to do. We checked out the money for the Georgia Construction & Investment Company right away. Those on the American National Exchange Bank were for the Georgia Construction & Investment Company. We also paid out money through the national bank here for it, and then made a draft on the American Exchange National Bank of New York to make that check good. We paid out \$4,920 for the Georgia Construction & Investment Company by the 5th of September, 1893. (?) The net proceeds of the note were \$4,915, and we

checked out more than that much for the Georgia Construction & Investment Company. We checked out that much in one or two days. I did not get notice that our firm's name was on the paper until some time in December following. R. P. Sibley was out of the city. His mail had accumulated, and Mr. Nixon opened it. In the mail he found a letter to R. P. Sibley. He opened it, and showed me the contents. It was a notice of the protest of the Georgia Construction & Investment Company's note. They had the regular long notice made to Mr. R. P. Sibley, and a batch of little small ones, with instructions to please send these to the different parties. One read, 'R. P. & G. T. Sibley,' and I was dumfounded. R. P. Sibley had never mentioned the matter to me. I did not intend by the letter written to the American National Bank to assume responsibility for the note now sued on. I wrote to the bank that all the notes of R. P. & G. T. Sibley would be met as they fell due, just as I wrote to other creditors. We had some 15 or 20 notes. I did not intend to assume that \$5,000 note. It did not appear on our list of liabilities or on our books as a debt of R. P. & G. T. Sibley. I have been in business in Augusta since the summer of 1883." On cross-examination, he testified that he did not know whether R. P. Sibley had the note discounted and put there or not. He did not know but that R. P. Sibley, as president, had it discounted, and had placed it to the firm's credit. The notice he received conveyed to him the fact that the note made by the Georgia Construction & Investment Company had been discounted, and the net proceeds of the discount (\$4,915) placed to the credit of his firm. Witness could suppose that it could be put to the credit of R. P. & G. T. Sibley, without their having indorsed it, in several ways. "R. P. Sibley could have had it discounted as president, and drawn it right out, and placed it to our credit; or he could have had it discounted, and instructed them right then and there to have it placed to the firm credit. I have known a note to be placed to the credit of a person who had not indorsed it. I do not see why they could not. I have discounted notes for customers on my books, and had the proceeds put to the credit of other parties, and we just make a journal entry of it. If I take a note of one of my customers, and it is made payable to G. T. Sibley, and I should wish to discount it, and have it placed to my credit, I would have to indorse it, if I am the indorser. But, if the other indorser was good, it would not have to be indorsed by me. I think I have heard my father speak of where it was done otherwise than by indorsing it." There was much additional testimony introduced upon the part of the plaintiff and defendants, as coming from the defendants, and likewise from various witnesses who testified as experts upon the question whether or not, in

view of the communications addressed by the bank to R. P. & G. T. Sibley, G. T. Sibley should have had notice that the paper was discounted upon the credit and for the use of the firm of R. P. & G. T. Sibley; but we do not deem a further statement of the testimony upon this question necessary to an understanding of the points now decided.

A verdict was rendered in favor of the plaintiff. The defendants moved for a new trial: (1) Upon the general grounds. (2) Because, after the defendants' counsel had read the questions and answers taken under commission to take the testimony of Dumont Clark, the court ruled that, having introduced and used the interrogatories, defendants would have to read the exhibits attached to the interrogatories as a part thereof. (3) Because the court erred in refusing to give the following charges as requested, in writing: "(a) If the jury find from the evidence that the act or acts of ratification relied on by plaintiff were done by Grigsby T. Sibley without knowledge of all the material facts connected with the indorsement, then Grigsby T. Sibley is not bound thereby. The material facts necessary to have been known by G. T. Sibley for the indorsement to have been ratified are: (1) The character of the note, and who were the parties thereto. (2) That the indorsement of R. P. & G. T. Sibley was made as an accommodation indorsement. (3) That the bank knew it was an accommodation indorsement, and expected R. P. Sibley to get G. T. Sibley to ratify it. (4) That the money so raised was to be the property of the maker. (b) Before any act relied on by the plaintiff as a ratification of the unauthorized indorsement can render G. T. Sibley liable therefor, the jury must be satisfied that such act was intended by him to be a ratification. (c) Before plaintiff can recover in this suit, it must prove that the note sued on was duly presented, and demand made for payment, and, upon same being refused, that the same was protested, and notice of the protest duly given the indorser. (d) Plaintiff cannot recover without proof that the note was protested, and notice thereof given the indorser. (e) The burden of proving ratification is upon the plaintiff, and it must satisfy you of such ratification by a preponderance of the testimony." The defendants' motion was overruled, and error is assigned upon the judgment denying them a new trial.

1. It does not appear from the record in this case whether the commission to take the testimony of the witness Clark issued upon the suit of the plaintiff or the defendants; but the answers to his interrogatories were offered by the defendants. Attached to the direct interrogatories were certain letters alleged to have been written by the defendant G. T. Sibley, proof of the execution of which might have been material to the plaintiff's case; and, whether they were attached as exhibits for the purpose of proving their exe-

cution either on behalf of the plaintiff or the defendants, we do not think that the party offering the answers was bound, at all events, to read as evidence coming from him the documents the execution of which was proven by the answers. The rule with respect to this matter of practice does not differ from that which prevails upon the oral examination of a witness in open court. It is perfectly competent to prove by a witness upon oral examination, either upon direct or cross-examination, the execution of papers, without tendering them in evidence, or offering them to the other side, except for the purpose of cross-examination touching the fact of execution. It may develop that, in the progress of the cause, the party proving the execution of the papers may never desire to introduce them at all. In that event, the court, upon motion, would exclude from the jury, as irrelevant, that testimony which bore upon the fact of execution. But if, in the course of the oral examination, questions were propounded to the witness which involved the contents of the documents, and which made an inspection of them necessary to an understanding of the answers of the witness, the proper practice would be for the court to direct the introduction of the documentary evidence, and, upon refusal by the person by whom it was withheld to submit it, to withdraw entirely from the consideration of the jury all of the answers of the witness bearing upon the contents of the paper. The examination by interrogatories or depositions is but a substitute for the oral examination in the presence of the court; and the court is not authorized, in dealing with the testimony of a witness who appears by interrogatories, to impose upon the party offering such testimony harsher rules than those which would be applied if the witness were present and being examined. Of course, if one party declined for any reason to introduce in evidence such documents, the other party would have the right to do so. We do not understand how this could have been especially harmful in the present case, except, in so far as it might have influenced the jury against the defendants, it appearing that the testimony relied upon by the plaintiff as an admission of liability was offered by the defendants on the trial, the jury might have felt authorized to treat it as a kind of continuing admission of liability to the plaintiff. We do not rest the reversal of the judgment upon this ground, though we think the action of the court was erroneous.

2. In the present case it appears from the evidence and the record that the defendants R. P. & G. T. Sibley, as a partnership, were sued as indorsers upon a promissory note. G. T. Sibley, one of the members of the firm, filed a plea denying that the indorsement was authorized by the partnership, alleging in his plea that the indorsement sued on was executed by R. P. Sibley, a member of the firm, without authority from him, without his

knowledge or consent, and that he had at no time subsequently ratified the action of his partner. He alleged that the indorsement was made by his partner in the firm name for the accommodation of a third person, and without consideration to the partnership of which he was a member. There is no evidence that G. T. Sibley had actual knowledge of the indorsement of the paper by his partner, but subsequently thereto G. T. Sibley bought out the interest of his partner, assumed the liabilities of the firm, and wrote to the plaintiff a letter advising it that he had so assumed the liabilities of the firm, and promising at an early date to provide for the payment of another paper referred to in the letter. The defendant G. T. Sibley contends that this letter was written in ignorance of the fact that R. P. Sibley had previously, for the accommodation of the Georgia Construction & Investment Company, in the name of the partnership, indorsed the paper now sued on. The defendant G. T. Sibley insists that whatever act may have been done by him which might be construed as an acknowledgment, either of his liability or of the liability of his firm for the payment of the note in question, was done in ignorance of the true state of affairs between them. It cannot be open to serious question, even under the testimony of the vice president of the plaintiff bank, that the note sued upon was indorsed by R. P. Sibley in the firm name for the accommodation of the Georgia Construction & Investment Company, and the liability of the partnership must therefore ultimately depend upon whether or not the members of the partnership sought to be held (other than he who in fact executed the indorsement) with knowledge of the character of the indorsement, and the purpose for which it was executed, either expressly or by implication, ratified the unauthorized act of the other member of the firm. By the provisions of our Code (section 1914), a guaranty or an accommodation indorsement is not within the legitimate business of ordinary partnerships. Inasmuch, then, as such a transaction is not within the legitimate business of an ordinary partnership, and partners are bound by the acts of co-partners only within the legitimate business of the partnership, if one accept from a member of a partnership such an indorsement, and seek subsequently to bind the partnership assets or other partners upon such an obligation, this can only be done by proving a subsequent ratification, express or implied, of the unauthorized act. Inasmuch, then, as proof of ratification is essential to the plaintiff's case, the burden of proof is upon it to establish such ratification by a preponderance of the testimony. The rule of law is that the burden of proving a given fact in any case rests upon the party to the maintenance of whose contention the proof of such fact is necessary. When, therefore, as in the present case, the liability of the

partner G. T. Sibley depended upon a ratification by him of the unauthorized act of his partner, R. P. Sibley, the burden of proof was upon the plaintiff to establish the ratification; and it was error for the court to refuse to charge a written request to that effect timely made.

3. The plaintiff having sued upon a note indorsed by a co-partnership, and the indorsement of promissory notes being such a transaction as did not necessarily lie without the scope of the partnership business, it could prove its case by the introduction of the note. This was done. The defendant pleaded and proved that the making of the indorsement by his partner was unauthorized, and for the accommodation of a third person, which of itself placed the transaction outside the scope of the partnership business. The plaintiff rejoined, however, by evidence that the partnership was liable upon the note for the reason that, admitting the act of the partner who executed the indorsement to have been unauthorized, his unauthorized act was subsequently ratified by the partnership through the remaining partner, and further replied to the plea of the defendant that G. T. Sibley was liable because of his express assumption of the debt in question as one of the debts of the partnership. Any act done by the partnership through the members of the firm other than the one who executed the indorsement, which amounted either to an express or implied affirmance of the unauthorized act, would be a ratification thereof; but, in order for such act to amount to a ratification upon the part of such partner, it must have been done with notice, either express or implied, that the indorsement had been made in the name of the firm, that it was an accommodation indorsement or an indorsement for the benefit of some person other than the co-partnership, and he must not only have had notice of these facts, but he must have intended that the act done by him was for the purpose of ratifying and making good this previous unauthorized transaction. This intention might be express, or the intention itself might be implied from the circumstances attending the act, provided the act were not done in ignorance of his right. Of course, if he had knowledge that the indorsement had been made, and, with this knowledge, applied the proceeds of the paper to the uses of his partnership, this would in law amount to a ratification, whatever might have been his intention in the premises. If he accepted the fruits of the indorsement, knowing it, he would thereafter be estopped to deny its validity. The notice necessary to bind him need not have been actual. If he have knowledge of such facts as would put a prudent man upon inquiry, a jury might have been authorized to impute to him knowledge of whatever facts he would probably have discovered had he prosecuted the inquiry thus suggested with reasonable diligence; and if it should appear that, in the

prosecution of such inquiry, he could have discovered facts sufficient to bring home to him knowledge of the transaction, the subsequent declarations made by him might be fairly presumed by the jury to have been made in view of that knowledge. The whole question of ratification is finally one for the jury, and the question as to whether the acts claimed by the plaintiff to have been done by G. T. Sibley amounted to a ratification must, of necessity, depend upon whether he had either actual knowledge of the indorsement, or any sufficient ground for believing that the note had been discounted on the credit of his firm, for, in the absence of that, no ratification could be imputed to him. As to whether or not the letter which appears in the record is an express assumption by G. T. Sibley of this particular debt depends necessarily upon whether it is a debt of the partnership, or was so regarded by G. T. Sibley at the time the letter was written; for, if the partnership was not liable for the debt, he did not assume to pay it, and the question as to whether it was a partnership debt is, at least, referable to the inquiry: Was the act of the partner making the indorsement unauthorized, and, if so, was his unauthorized act thereafter ratified? We think the requests submitted by the defendants on this subject made actual knowledge upon the part of the partner sought to be charged the test of the binding force of acts of ratification, and left out of consideration the effect of such knowledge as a jury might have fairly imputed to him as resulting from his conduct upon which the claim of implied ratification is based, and therefore the requests were properly refused.

4. The defendants requested the court, among other things, to charge the jury as follows: "Before the plaintiff can recover in this suit, it must appear that the note sued on was duly presented, and demand made for payment, and, upon the same being refused, that the same was protested, and notice thereof given the indorser. The plaintiff cannot recover without proof that the note was protested, and notice thereof given the indorser." Whether or not the defendants were entitled to this instruction would depend upon whether the defendant partnership was an indorser. If its relation to the contract which was evidenced by the note sued upon was that of a guarantor of a surety only, it would not be entitled to notice. If it were an indorser, it would be. The contract of indorsement is one which in its very essence involves the transfer of title to promissory notes and bills of exchange; and before one can become an indorser at all, or be classed as such, his contract must involve the transfer of title to that class of securities. The mere fact that one's name appears to have been written upon the back of a note does not make him necessarily an indorser of that paper. His liability is not to be determined by the physical relation of

his name to the paper, but by his legal relation to the contract. If his legal relation to the contract were such that in the course of its due transmission from one holder to another, the name of the person appearing on the back was properly indorsed in order to accomplish that result, then he may be properly classed as an indorser, whether his name was placed upon the back of the paper in the capacity of a bona fide holder transferring to another, or in the capacity of one who, without consideration, but for the accommodation of the real beneficiary for whom the paper was drawn, had indorsed his name upon it; but if he be a stranger to the note, the legal title thereto never having been in him, nor in fact passed through him as an indorsee, a mere blank indorsement of his name upon it renders him liable as a guarantor or surety, as his contract may be, and without the right to notice of nonpayment. This latter is one of the rights incident to the contract of indorsement in its strict technical sense, and does not extend to sureties or guarantors who do not fall within the definition of the term "indorser." The word "indorsement," as employed in its conventional sense, implies the writing of one's name or the making of an entry in writing upon the back of a paper, but, as applied to notes and bills of exchange, it has a limited technical meaning. In its exact legal sense, it is the transfer of a negotiable note or bill of exchange by the indorsement of some person who has a right to indorse. There can be no indorsement in this sense of the word except by the payee of the note or bill, but he may be the original payee, or he may have become, by previous indorsement, a second or subsequent payee. The word "indorsement" implies the transfer of title to the note or bill indorsed. 2 Para. Notes & B. § 1. To the same effect, see Tied. Com. Paper, § 262.

The act of indorsement is designed to accomplish a twofold purpose. The one is the assignment of the bill or note; the other, to guaranty its payment. The contract between the indorser and indorsee does not consist exclusively of the writing popularly called an "indorsement," though that indorsement be a necessary part of it. The contract consists of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser, and received by the indorsee. Wood's Byles, Bills, \*155. Since these elements enter into and inhere in the very nature of the contract of indorsement, it would seem that one who himself did not hold the legal title to the paper indorsed, since he could not effectuate the contract of indorsement by delivery, would be wanting in capacity to enter into, with respect to that paper, the technical contract of indorsement. The question is not whether such a person assumed liability as a

surety or as a guarantor of the paper, but whether he is such a person as was legally competent to enter into, and did actually enter into, a completed contract of indorsement. In 2 Pars. Notes & B. § 2, the writer undertakes to enumerate those persons who are competent to indorse, according to the legal significance of that term, a note or bill, and the rule laid down is as follows: "Although only he can indorse who is originally payee, or has been made payee by indorsement to him, yet the owner of a note may obtain, as an accommodation or otherwise, any number of indorsements by persons who have as yet no connection with the paper, but are willing to add their credit to it. But, in the theory of the law, each one of these indorsers held the note by a previous indorsement to him. And this theory must be carried out where either of these indorsers is sued. It is carried out in practice by means of the rule that every holder of a note having on it a blank indorsement, or a name with nothing attached to it, may write over his name anything not inconsistent with what he knew to be the purpose of such indorsement. \* \* \* Indorsements, however, are not unfrequently made by persons who are not payees or indorsees. And such indorsement will make one a maker or a guarantor, according to the circumstances of the case and the law of the place where it is made." The right to notice of nonpayment is limited by the common law, and as well by the Code of this state, to indorsers; and we are not to assume that either the courts, in formulating rules designed for the protection of this particular class of persons, or that the legislature, in its enactments with reference to the same subject, intended to employ the term "indorser" in any other than its strict legal sense; and, so employed, it extends as well to persons who are indorsers for accommodation as those who are indorsers for value, and includes all of such persons falling within either class whose indorsement is either essential or proper, in the process of negotiation, to the due transmission of title to each of the successive holders. Every person who places his name upon the back of a note or bill of exchange as an accommodation to the maker, and to give credit to the paper, is not necessarily an indorser. If the paper be drawn in the first instance to his order as payee, so as to render an indorsement by him necessary or proper in the negotiation of the paper, or if, the paper being already indorsed by the payee, he thereafter indorse it in blank, being himself the person to whom it had been previously delivered by a former indorser as indorsee, in such a case he would be a technical indorser of the instrument, and consequently entitled to all the privileges of the statute or the rule of the common law above referred to, because, while in the latter instance his indorsement might not be necessary to the further negotiation of the paper, yet it was a proper act. It amounts in law to the creation of a new bill

or contract, and therefore makes him an indorser; and whether he be such for accommodation or not, and though, under our Code, an accommodation indorser is a mere surety, yet, being an indorser, though for accommodation, he is nevertheless entitled to the benefit of the rule requiring notice. A different rule, however, would apply if, being neither the original payee nor an indorsee in the regular succession of indorsements made in the course of the negotiation of the paper, he had, at the request of the drawer, indorsed his name upon the back of the paper, for, not being entitled to deliver the paper in pursuance of his act of indorsement, he is wanting in capacity to enter into the contract of indorsement, and is therefore not entitled to the privileges of those persons who are indorsers in a strict legal sense.

The only case in this state which seems in any sense to militate against the proposition here announced, and which would seem not to confine the right of notice to accommodation indorsers who indorse in the due transmission of title in the course of the negotiation of the paper, is the case of *Randolph v. Fleming*, 59 Ga. 776; and the apparent conflict between that case and the present results from the fact that the record as reported in the opinion does not contain a complete statement of all the facts. The suit was against R. A. Fleming, as indorser. An inspection of the original record in the cause shows that he was the payee of the note, and, being the payee of the note sued upon, he was properly an indorser, and hence was entitled, as the court there decided, to notice of nonpayment, even though he was an indorser for accommodation only. In the absence of this explanation, the opinion would seem to indicate that, although it did not appear that he was a regular indorser, he was, nevertheless, entitled to notice, and this without regard to whether or not his indorsement was made in the course of the negotiation of the paper, and whether or not title passed through him either as payee or indorsee. The case of *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171, is authority for the proposition that where a negotiable instrument, made payable at a chartered bank, is indorsed by the payee for accommodation, he is entitled to notice of nonpayment. This is true, because, being the payee, his indorsement was proper in the course of the negotiation of the paper, and therefore he was an indorser, and entitled to notice. The cases of *Collins v. Everett*, 4 Ga. 266, and *Camp v. Simmons*, 62 Ga. 73, were cases in which the papers sued on were, in the former, a promissory note, and, in the latter, a domestic bill of exchange, and were neither drawn in such form as to be payable, nor with the intention that they should be negotiated, at a chartered bank. They therefore fell directly under the terms of the act of 1826, which expressly provided that notice was not required to be given indorsers of such papers; and, further, that whenever any per-

son whatever indorsed such a paper, he should be held and taken and considered as security to the same, and be in all respects bound as security until such note was paid off or discharged. So, that, whether the persons there sued were indorsers or not, they were, under that act, properly held liable as sureties. According to the rule of the common law, the indorsers in those cases stood in their relation to each other, the one as second indorser, the other as first; and unexplained by parol testimony, whatever might have been the considerations moving them to make the blank indorsements, such circumstances could not be proven to the contrary as would change what was upon its face the apparent relation between these parties to the contract indorsed by them.

But, according to section 8906 of the Code, the rule of the common law which prevented the admission of parol evidence to explain indorsements has been abrogated in so far as the same applies to indorsements in blank, and now, under the section of the Code above referred to, such indorsements are always open to explanation as between the parties themselves and those taking with notice of dishonor or actual knowledge of the facts. Under authority of that section of the Code, in the case of *Stapler v. Burns*, 43 Ga. 832, it was decided that in such a case the indorser in blank should be allowed to prove that, at the time of the execution of his indorsement, he only did so for the purpose of transferring the title to the paper, and that it was distinctly understood that he was not to be liable thereon as an indorser. The effect of this ruling was to allow him to submit proof changing the entire nature of his contract from that of an apparent indorsement, with its attending liabilities, to that of a mere assignment, without recourse. In the case of *Hardy v. White*, 60 Ga. 454, a suit was brought upon two promissory notes against Frank White and Christopher White, as makers. As appears from the original record, the notes attached to the declaration were drawn in the singular number, and were signed by Christopher White, Frank White's name appearing only to be indorsed upon the notes. A demurrer was filed to the declaration by Frank White, upon the ground that the suit could not be maintained against him as maker, his name appearing only in the capacity of indorser upon the notes, and upon the further ground that there was no allegation that he had been served with notice of nonpayment. Yet this court held in favor of the holder that the declaration could be maintained against Frank White, as maker, by the introduction of parol evidence, under the section of the Code above cited, and reversed the judgment of the court below sustaining the demurrer. So that in the present case, whatever may have been the apparent relation of this alleged indorser to this contract, this relation, illuminated by the parol evidence which was introduced at the trial, discloses the fact that

the apparent indorser was never in fact at any time an indorsee of this paper, in the sense that he would be authorized in his character as indorsee to complete the contract of indorsement by the delivery of the paper indorsed. On the contrary, the evidence shows that the paper never at any time passed out of the possession of the maker, for whose accommodation it was indorsed, into that of the alleged indorser, but that the possession thereof passed directly from the maker to the present plaintiff. These facts were well known to the party who discounted the paper, the plaintiff in the present case, because, previous to the indorsement by the firm of R. P. & G. T. Sibley, R. P. Sibley (himself being the president of the Georgia Construction & Investment Company) had requested the plaintiff bank to discount the paper for the account of the investment company. This request was refused by the bank except upon condition that the paper be indorsed by R. P. & G. T. Sibley, and upon the further condition that the proceeds of the discount should pass through the regular accounts of R. P. & G. T. Sibley. It is not pretended that the firm of R. P. & G. T. Sibley had ever had the slightest interest in the discounted note, or had any title thereto. On the contrary, the president of the plaintiff bank was advised that the discount was for accommodation; and we think the evidence demonstrates quite clearly that he knew that it was for the accommodation of the Georgia Construction & Investment Company, the maker of the note. The whole transaction, in so far as it required the proceeds of the discount to pass through the accounts of R. P. & G. T. Sibley, was colorable only; and, while the apparent liability of R. P. & G. T. Sibley was that of an indorser, their real liability to the bank was that of a surety only; and hence, being merely a surety, they were not entitled to notice, and the court did not err in refusing to give the charge requested. Judgment reversed.

LUMPKIN, J., not presiding.

(97 Ga. 473)

# FISHER v. SAVANNAH GUANO CO.

(Supreme Court of Georgia. Oct. 28, 1895.)

PLEADING—TIME FOR FILING PLEA—EXCEPTIONS  
—SETTING ASIDE DEFAULT.

1. Where certain pleas to an action brought under the pleading act of 1893 were stricken on general demurrer to the same, to which no exception was taken at the term when this was done, and at the next term a judgment for the plaintiff was rendered by default, error, if any, in striking the pleas at the former term, would be no cause for setting this judgment aside, nor for granting a new trial; nor was there any error in refusing, at the latter term, to entertain a motion to vacate the order of the previous term striking the pleas, on the ground that it was improvidently granted.

2. Where, in such case, the court, after striking the defendant's pleas, granted his counsel further time during the same term at which this action was taken within which to file another plea, and no other plea was filed during

that term, the court was not bound, at the next term, to allow a plea to be then filed as matter of right, nor to hear any excuse for the failure of counsel to file a plea at the previous term, under the permission then granted.

3. The action being upon an unconditional contract in writing, an unsworn plea, even if meritorious, presented no obstacle to the rendition of a judgment by the court in favor of the plaintiff; and the court did not err in refusing, after it had orally announced its judgment in the plaintiff's favor, to allow the defendant to verify his plea, because the judgment had not yet been signed and entered upon the minutes.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. O. Smith, Judge.

Action by the Savannah Guano Company against A. K. Fisher, in which there was a judgment for plaintiff by default. From an order denying a new trial, and refusing to vacate the default, defendant brings error. Affirmed.

Cutts & Hixon and Hal. Lawson, for plaintiff in error. Tom Eason and E. A. Smith, for defendant in error.

ATKINSON, J. The action in the present case was brought under the pleading act of 1893. The written pleas filed by the defendant were, upon a general demurrer to them, stricken, but no exception appears to have been taken to the order striking these pleas. During the term at which they were stricken, and after that was done, the court granted to the defendant's counsel further time during the same term at which that action was taken to file another plea, but no other plea was in fact filed during that term. At the next term the court directed that a judgment be entered up as by default in favor of the plaintiff against the defendant, and declined to allow a plea to be then filed, or to hear from counsel his reasons for not having filed one within the time limited under the first order. A motion was made for a new trial and to vacate the order entering judgment by default.

1, 2. We do not think that after the first term of the court the defendant's counsel was entitled, as matter of right, to further indulgence in the matter of filing his plea. The grant of time within which to file pleas was equivalent to a statement of terms upon which such indulgence was granted by the court; and the defendant, having failed to comply with the terms imposed upon him by the court, must appeal to the discretion of the court, and not to any right which inheres in him as a party to have further indulgence in the premises. Nor does it change the nature of the case that at the time the judgment was actually signed the defendant had in fact sworn to and offered to file a written plea which would have been a substantive defense to the plaintiff's action. Such plea, even if filed without the consent and allowance of the court, might have been disregarded, and ordered from the

files, as having been entered without legal authority; and, inasmuch as the terms imposed by the court in the first instance seem to us reasonable, we are not disposed to interfere with its discretion in refusing further time to the defendant to enable him to make his defense. The defendant not having excepted in the first instance to the judgment of the court striking his pleas, the court did not err at a subsequent term in refusing to entertain a motion to vacate the order of the previous term striking them, on the ground that it was improvidently granted.

3. The action was upon an unconditional contract in writing. The plea of the defendant, even if meritorious, presented no obstacle to the rendition of a judgment by the court in favor of the plaintiff at the time it was granted, for the reason that it was not sworn to in the first instance, and had not been allowed as an amendment to any other plea after it was sworn to at the time of the rendition of the judgment; and no error was committed by the court, after it had orally announced judgment in the plaintiff's favor, in refusing to recognize as a defense a plea sworn to and in the meantime filed by the defendant without allowance by the court; and this is true, notwithstanding judgment had not then been actually signed and entered upon the minutes, it appearing, as we have before indicated, that the whole matter then rested in the discretion of the circuit judge, and that the defendant was not entitled at that time, as matter of right, to file a plea to the action. Judgment affirmed.

(97 Ga. 479)

#### STIGER v. MONROE.

(Supreme Court of Georgia. Nov. 15, 1895.)

REVIEW ON APPEAL—RECORD—FAILURE TO PRODUCE BOOKS—JUDGMENT BY DEFAULT.

1. Where a plea of *res adjudicata* was "submitted to the court upon an agreed statement of facts," and the plea stricken, the supreme court is unable to determine whether striking the plea was erroneous or not when there is nothing whatever in the record to show what facts appeared in the "agreed statement" upon which the trial court acted.

2. In order to entitle the plaintiff to a judgment, under the provisions of section 3510 of the Code, against the defendant, as by default, because of a failure by the latter to produce books or papers, under notice given in accordance with section 3508, it must appear that the court, by an order, peremptorily required the production of the books or papers in question, and that the defendant failed or refused "to comply with such order." *Parish v. Machine Co.*, 7 S. E. 138, 79 Ga. 682; *Mining Co. v. Findley*, 11 S. E. 775, 85 Ga. 431.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Hardeman, Judge.

Action by W. F. Monroe against J. M. Stiger. Judgment for plaintiff. Defendant brings error. Reversed.

Hitch & Myers, for plaintiff in error. Leon A. Wilson, for defendant in error.

ATKINSON, J. 1. It appears from the record in this case that the defendant in error sued the plaintiff in error upon a breach of warranty of title to land. The defendant below filed a plea of *res adjudicata*, and upon this plea as a separate substantive defense to the plaintiff's action the court made the following order: "The within plea having been submitted to the court upon an agreed statement of facts, and it appearing by the evidence offered that it is insufficient to support the plea, it is ordered that the same be, and it is hereby, overruled and stricken." Exception was taken to this order of the presiding judge overruling the plea of the defendant. When we look into the record, we find no "agreed statement of facts" accompanying the plea, and which was submitted with it for the judgment of the court. Hence, whether or not error was, in this respect, committed, we are not able to declare. If there was in fact an agreed statement of facts, it should have been either incorporated in the brief of evidence or set out in the bill of exceptions. If the agreed statement of facts consisted of the recitals of facts set out in the plea, it should have been so certified to this court, to the end that we might judicially determine that we had before us the evidence upon which the circuit judge acted in rendering his judgment upon the plea.

2. After striking the plea of *res adjudicata*, the court proceeded with the trial of the cause. It appears that the plaintiff in the court below gave to the defendant notice to produce "at the next term of the court, and from term to term, until said case is disposed of, the plats and grants, together with the entire chain of title down to and including yourself, to lots of land Nos. 606 and 607 in the Twelfth district of Ware county, to be used by the plaintiff as evidence in said case." In obedience to this notice, the defendant, through his counsel, produced and turned over to the plaintiff a general deed from his grantor to himself, which included the lots in controversy, with the statement that this was the title upon which he, the defendant, relied, it being all the titles the defendant had to the premises in dispute. The plaintiff accepted this deed without objection, and put it in evidence. Later on, during the course of the examination of the defendant as a witness, it appeared that, in addition to the deed which he had given the plaintiff, he had some of the back titles to the lots in controversy at his home, some 15 or 20 miles from the courthouse, and which he was advised it would not be necessary for him to produce in response to the notice. When this fact was brought to the attention of the court, the presiding judge suspended the trial of the case, directed a verdict in favor of the plaintiff against the defendant, and made an

order, which was in the following words, to wit: "In this case, the defendant having appeared and filed a plea of the general issue, and it further appearing that under section 3509 of the Code of Georgia of 1882 the plaintiff, on the 5th day of October, 1893, in compliance with said law and the law of Georgia in such cases made and provided, notified and required the defendant, J. M. Stiger, to produce in said court at the next term thereof, and from term to term until said case is disposed of, the plats and grants, together with the entire chain of title down to and including himself, to lots of land numbers 606 and 607 in the Twelfth district of Ware county, to be used by the plaintiff as evidence in said case; and it further appearing that the defendant is in possession of the papers called for by said notice, and that the same are material to the plaintiff's cause of action, but that he has wholly failed and refused to produce in court said papers, without sufficient cause for such failure and refusal: It is thereupon ordered that the said defendant's plea of the general issue be, and the same is hereby, stricken; and, further, that the plaintiff do have and recover of and from the said defendant the principal sum of four hundred dollars, and the further sum of three hundred and fifty dollars and seventy-seven cents, being interest on said principal at the rate of seven per cent. per annum from the 15th day of November, A. D. 1882, to the 25th day of April, 1895, and the further sum of ten dollars and twenty-five cents as costs of court in this behalf expended; the plaintiff having proved facts to support this judgment and the verdict of the jury of this date in said case in this court, before it was ascertained that the defendant had said papers in his possession. And it is further ordered that said verdict, being in amount the same as this judgment, is hereby made the judgment of the court. Granted in open court, this April 25, 1895." We do not think that the mere failure of the defendant, without more, to produce at the trial all of the papers called for, whether material or immaterial, was a sufficient reason for the peremptory striking of his plea of the general issue and for the peremptory direction of a verdict against him. The direction contemplated by sections 3508-3510 of the Code is in the nature of a penalty inflicted as for a contempt of the authority of the court, and before it can be invoked there must have been a formal order of the court peremptorily directing the defendant to produce the papers called for, and a refusal upon his part to comply with this order. Such was the ruling of this court in *Parish v. Machine Co.*, 79 Ga. 682, 7 S. E. 138. To same effect, see *Minibg Co. v. Findley*, 85 Ga. 431, 11 S. E. 775. To justify a resort by the court to this extreme measure, the party against whom the penalties prescribed are sought to be enforced ought at least to be re-

quired by order of the court to produce the paper or papers, and to have an opportunity first to comply with this order. We think the ruling of the court in striking the plea and directing a verdict was error. The judgment is accordingly reversed.

(97 Ga. 681)

**SPENCER et al. v. BROOKS.**

(Supreme Court of Georgia. Jan. 27, 1896.)

**RAILROAD RECEIVERS—ADOPTION OF CONTRACTS OF COMPANY—FELLOW SERVANTS—WHO ARE.**

1. A written contract of service between one of its employes and a railroad company, which, after the making of such contract, is put into the hands of receivers, who retain this employe in their service, is not necessarily and at all events binding between the receivers and the employe. To make it so, there must be, as between these parties, some agreement to this effect, either express or implied.

2. As a general rule, a conductor in charge of a regular passenger or freight train, and having, as such conductor, full control of its movements, is not, while in the performance of his usual and ordinary duties with reference thereto, a fellow servant of an engineer, fireman, or brakeman working under his orders. Under such circumstances the conductor is the vice principal of the railroad company or of receivers operating it under the orders of a court.

3. There is nothing in the facts of this case taking it out of the rule above stated; and the charges complained of, being, under the evidence, adjusted to this rule, were not improperly based upon the assumption that the plaintiff and the conductor were not fellow servants; nor were they in other respects erroneous.

4. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by J. F. Brooks, by next friend, against Samuel Spencer and others, receivers of the Richmond & Danville Railroad Company. From a judgment for plaintiff, defendants bring error. Affirmed.

The following is the official report:

Brooks, by his next friend, sued the receivers of the Richmond & Danville Railroad Company for damages from personal injuries, alleging: About July 15, 1893, he was in the employ of defendants in the operation of the railroad as brakeman on a freight train, which arrived on the evening of that day at Tallapoosa, Ga. It became necessary for the train to take on a freight car standing on the side track at this point, and to this end plaintiff was ordered by the conductor, one Payne, who was defendants' vice principal in charge of the train, to go over to said car to open the knuckle of the patent bumper thereof, preparatory to attaching the car to the car attached to the engine. At this time the car on the side track was stationary, and so was the train. Plaintiff had made no signal to move, and it was their duty not to move without a signal from him or the conductor. He stepped up to the car on the side track, and was engaged in opening the knuckle of the bump-

er, having his back to the engine. While he was in this position, and relying upon the engineer waiting for the signal before he moved back, the engineer suddenly, negligently, and recklessly moved back his engine and cars upon plaintiff, and before plaintiff was aware thereof the car approaching struck him on the back, and he at once sprang to the side of the track to extricate himself, but defendants had negligently and carelessly allowed the roadbed to be in a dangerous condition at this point. There was a deep space, four or five inches deep, between the cross-ties, which should have been filled up level to the top of the ties, into which space plaintiff's foot went, and he was thrown violently to the ground, before the two moving cars. The person in charge of the engine was one O'Neill, who was only a fireman by occupation, and was then acting as engineer, with defendants' consent, and was utterly incompetent and unfit for the position of engineer, and was so known to be by defendants, and, had they exercised ordinary care, they would have been bound to have known it. No signal was given said engineer, and, if any was given, plaintiff was not aware of it, and if it was given him to come back, it was by the conductor, and the conductor represented defendants in the running and operation of the train. Tallapoosa is an important station, having side tracks and foundry tracks, and much switching and coupling is done in defendants' yard at this point. It was incumbent on defendants to keep the track and roadbed in a condition reasonably safe, so that employes could safely couple cars on said track, and to exercise ordinary care to that end. This defendants failed to do, and the track had remained in its unsafe condition for many months. Defendants knew thereof, and, had they exercised ordinary care, were bound to have known it. Plaintiff was not aware thereof. The declaration then set out with more particularity the alleged defective condition of the roadbed, the nature of petitioner's injuries, his earnings, age, etc. By amendment it was alleged: The conductor negligently signaled the engineer to come back, before plaintiff had finished his work of opening the knuckle, and while plaintiff was in such position that any movement of the car would injure him. Said conductor had no right to give such signal until plaintiff was out of danger. Plaintiff was in plain view of the conductor. The conductor saw plaintiff, and knew what he was doing. Had the conductor exercised ordinary care, he was bound to have seen plaintiff, and have known his perilous condition. Plaintiff was ordered by the conductor to open the knuckle of a car which, with other cars, was attached to the engine, and was obeying this order when injured. Said cars were then standing still, and when the knuckle was properly opened were to be moved back and coupled to other standing cars. The engine and cars were negligently moved back as aforesaid and run

over plaintiff. The conductor was negligent, in that he had entire supervision and control of the train and represented defendants, and negligently allowed the engineer to leave his engine, and allowed the fireman, who was incompetent as an engineer, to handle the engine, and the fireman was moving the engine when plaintiff was hurt, and the conductor knew the fireman was incompetent as engineer. The fireman was guilty of the negligent act set out in the declaration. By further amendment it was alleged: The conductor saw plaintiff fall, as set out in the declaration, and saw that the wheel of the car was about to run over him, and did not signal the fireman in charge of the engine to stop. The engine had just started, and was going slow, and could have been stopped by the fireman if the conductor had signaled him so to do, and would not have run over plaintiff's arm; and, if it had not stopped before reaching plaintiff, it would have struck him with so little force that it would not have run over his arm. Said failure so to signal the fireman by the conductor, as it was his duty to do, was negligence on the part of the conductor, who was representing defendants in the management of the train. There was a verdict for plaintiff for \$1,500, and, defendants' motion for new trial being overruled, they accepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc., and because it was so excessive in amount as to shock the moral sense, and indicate bias and prejudice. Also because the court excluded from the jury the following contract in writing, which was offered in evidence, and duly proved to have been executed and signed by plaintiff: "Richmond & Danville Railroad Company, Lessee, the Georgia Pacific Railway. Atlanta, Ga. 11/10, 1892. I fully understand that the Richmond and Danville Railroad Company positively prohibits brakemen from coupling or uncoupling cars except with a stick, and that brakemen or others must not go between cars under any circumstances for the purpose of coupling or uncoupling, or for adjusting pins, etc., when engine is attached to such cars or train; and in consideration of being employed by said company I hereby agree to be bound by said rule, and waive any and all liability of said company to me for any results of disobedience or infraction thereof. I have read the above carefully, and fully understand it. [Signed] John Foster Brooks. Witness: J. D. Patterson." "I hereby certify that John Foster Brooks signed the above, as appears by 'his mark.' I read the same over to him, and carefully explained it. Note: Before any one is allowed to enter the service of this company as brakeman, flagman, switchman, or fireman, he must sign one of these forms; and, previous to his signing, he must insert, in his own handwriting, above his signature, the words: 'I have read the above carefully, and fully understand it.'"

Error in charging: "I put the question in this form because the conductor of a train out on the road is the representative or vice principal of the absent master, and not the fellow servant with the brakeman, while he is engaged in governing its movements. He has control and direction of its movements,—to start it or stop it; and if he be guilty of negligence in these respects it is the master's own negligence." Alleged to be error, for the reason that the question whether the conductor of the train was or was not a fellow servant with the plaintiff, under the facts of the case, was a question of fact for the jury to decide, and the same should have been submitted to them for their decision, it not being competent for the court to decide such issue of fact.

Error in charging: "If the conductor, who, as I have said, stood for and represented the absent master in the governance of the train, with power by virtue of his headship to start or stop it as any emergency of service demanded, if he saw the plaintiff stumble and fall, and saw the efforts he was making to extricate himself from his perilous situation, and saw the train moving upon him while in that prostrate position, and in a situation of imminent peril, and failed to use ordinary care in reference to commanding the stop of the train to save him, when, by the use of such care, he could have saved him, you would be authorized to find that the defendants were negligent." Alleged to be error, because the charge virtually takes from the jury the determination of the substantive issue of fact as to whether, under the circumstances disclosed by the record, the conductor of the train was or was not a fellow servant of the plaintiff, and assumes to instruct the jury that such conductor was vice principal of defendants, and represented the defendants in such manner as to make them liable for his acts or omissions. Further, because there is no allegation in the declaration, and no evidence in the record, to justify a charge based upon the failure of the conductor to use ordinary care in reference to saving the plaintiff after the conductor saw the plaintiff in a position of peril. The declaration tenders no such issue and makes no such charge, and the record fails to show that any evidence was introduced tending to show negligence on the part of the conductor in failing to stop the train after plaintiff stumbled and fell upon the track and was in a position of peril. Further, because the defendants would not be liable for the mere omission of the conductor to avert from the plaintiff injurious results following his stumbling and falling upon the track. Unless the conductor had some part in bringing about the position of peril, or was guilty of some negligence in that regard, even assuming him to have been not a fellow servant, but the vice principal, of defendants, his mere failure to stop the train under the

circumstances disclosed by the evidence would not constitute actionable negligence against the receivers. The jury's attention is not directed, in connection with this charge, to the fact that before the defendants would be liable the conductor must have himself been guilty of negligence in bringing about the situation of peril, but the jury are told that, even though the conductor had no part in the movement of the train, even though he was not responsible for the negligent moving back of the train, even though the plaintiff himself had signaled the train back, and had put himself in a position of peril, even though the position of peril resulted from no negligence on the part of any one, yet the mere fact that the conductor failed to intervene promptly to avert the consequences of the negligence or misfortune of the plaintiff, would entitle the plaintiff to a verdict.

Error in charging: "The question for you to decide on this branch of the case is, did the conductor discover that the plaintiff had stumbled and fallen in front of the advancing train, and was he guilty of negligence in failing to use due care in stopping it in time to avoid the catastrophe?" Alleged to be error, because the liability of the defendants is made to depend upon the mere failure of the conductor to stop the train in time to avoid the catastrophe, after discovering that the plaintiff had stumbled and fallen in front of the advancing train, and without reference to the question whether the conductor was responsible for plaintiff's perilous situation upon the track, or whether the plaintiff's perilous situation was brought about by the conductor's want of due care. Further, because the declaration contains no sufficient charge against the defendants by reason of the mere failure of the conductor to obviate the perils of plaintiff's situation by signaling the engineer to stop after his perilous situation became known. The theory of the declaration is that the injury was caused by affirmative acts of the conductor in signaling the train back, and there is no averment in the declaration, and no evidence in the record, to justify a charge upon the want of care on the part of the conductor in failing to stop the train in time to avoid plaintiff's injury.

Error in charging: "If, therefore, you believe from the evidence that the conductor knew that Mr. Brooks was standing on the track, trying to pull the knuckle back, the train then being at a standstill, and you further believe from the evidence that the conductor himself ordered the engineer to come back, and the engineer did so, and that the conductor was negligent in so ordering, in view of the actual occasion and situation as known to him, you would be authorized to find that the master, the defendant sued here, was negligent." Alleged to be error, because it takes from the jury the consideration of the question of whether the relation

of the vice principal existed between the conductor and the defendants, and whether the conductor, under the facts, was a fellow servant of petitioner. Further, because on the undisputed evidence it appeared that the conductor was the fellow servant of petitioner, and was not, at the time plaintiff received his injuries, engaged in the performance of any duty resting upon the master as such, but was engaged in a servant's duty, and was, therefore, the fellow servant of petitioner, for whose acts the defendants are not liable.

Error in charging: "Again, if you believe from the evidence that the train started, whether in obedience to a signal from the conductor or without any signal at all, and that plaintiff, as he turned from the knuckle to get off the track, stepped into a hole between the cross-ties, and stumbled and fell, and, being on his all fours, scrambled along the track a certain distance in an effort to keep from being caught by the train, and the conductor discovered this in time, by the exercise of ordinary care, to signal the engineer, and stop the train before it caught and mangled plaintiff, and negligently failed to do so, you would be authorized to find that his negligence in this regard was the negligence of the defendant." Alleged to be error, because, even if the facts recited in the charge and the supposition presented by the charge were true, the proximate cause of plaintiff's injury would be the negligent act of the engineer in moving back his train without a signal from petitioner, and the mere fact that the conductor did not interpose to avert the consequences of acts of negligence for which neither the defendants nor the conductor himself was primarily responsible, would not be sufficient to charge the defendants with legal liability. Further, because, even if the law of the charge were correct, and the defendants were liable as supposed in the charge, the court should have taken into account the fact of the great alarm of the conductor, as shown in the evidence, and should have charged the jury, in connection therewith, that the conductor, being so alarmed, and without fault on his part, and seeing petitioner in a situation calculated to excite great consternation and alarm in the mind of the conductor, would not, under such circumstances, be held to the exercise of that calm and deliberate judgment which a man should exercise who was not under the influence of such excitement and alarm. Further, because this portion of the charge is no more manifestly error for the reason that in subdivision 14 of the court's charge the court instructed the jury, with reference to the conduct of the plaintiff, as follows: "Where one is put, by the negligence of another, under circumstances of grave peril, and he must choose instantly between two courses of conduct, both of them hazardous, and he chooses a course which results in injury,

whereas, if he had chosen the other, he would not have been hurt at all, the law will leave it to the jury to say whether, under the particular circumstances, he exercised a due care, commensurate with the actual circumstances as they were presented to him at the time." Defendants submit that the same principle of law which, in a position of danger not brought about by his own carelessness, would exonerate the plaintiff from the exercise of a high degree of care, would, under the circumstances in which the conductor was placed, be equally applicable to him, and, if the defendants are to be charged with liability for the failure of the conductor to promptly act, while in the presence of an overwhelming peril to another, the jury should have been charged that the same principle was equally applicable to the conduct of the conductor. Alleged to be error, further, because the conductor was, under the evidence, the co-servant of petitioner, and not the vice principal.

Error in charging: "On the other hand, if you believe from the evidence that after the conductor discovered that plaintiff had stumbled and fallen on the track, that owing to the shortness of the interval both as to time and distance, and the close proximity of the train, and the speed at which it was moving, and the position in which the conductor stood, that he could not signal the engineer sooner than he did signal him, or that he used due care as to the signal he gave, and that the engineer was negligent in not more promptly responding to it and stopping the train, or that without negligence on the part of either the conductor or the engineer the train could not have been stopped in time to save the plaintiff, then you would be authorized to find that the defendants were not negligent upon this branch of the case." Alleged to be error, because the charge makes the liability of the defendants to depend, as stated above, upon the failure of the conductor to interpose to avert plaintiff's injury, without reference to whether plaintiff's perilous position was caused through plaintiff's own negligence or by the negligence of the engineer, in neither of which cases would the defendants be liable. Further, because there is nothing in the declaration or in the evidence to justify the charge. Further, because it undertakes to summarize, or select and group together, certain conditions which, if the jury believed they existed, would exonerate the defendants from liability, and limits the jury to the facts recited, virtually taking from them the consideration of the great alarm of the conductor in view of plaintiff's great peril, together with such other facts as they might take as bearing upon the question.

Error in charging: "If you believe from the evidence that the conductor \* \* \* was not guilty of negligence in making timely efforts to stop the train, if it was coming back without his instructions, and not at

plaintiff's own instance, there can be no recovery. On the other hand, if the injury of which plaintiff complained was attributable to the negligence of the conductor in either of the two respects mentioned, the plaintiff would be entitled to recover, provided the plaintiff could not, by ordinary care on his part, have avoided the consequences to himself of the negligence." Alleged to be error, because defendants are not liable by reason of the mere failure of the conductor in making timely efforts to stop the train, if the train came back without the instructions of the conductor, and without the instructions of plaintiff. In such event, defendants submit that the proximate cause of the injury would be manifestly the negligence of the engineer or other persons, for whose acts the defendants would not be liable, such persons—the engineer or fireman—being petitioner's fellow servants. Further, because there was nothing in the declaration or in the evidence to justify the jury in basing its verdict upon the failure of the conductor "to make."

Glenn, Slaton & Phillips, for plaintiffs in error. J. I. Pendleton and Arnold & Arnold, for defendant in error.

SIMMONS, C. J. Brooks, a minor, was employed by the receivers of the Richmond & Danville Railroad Company as brakeman on a freight train, and while so employed sustained serious personal injuries by reason of his being run into by the train when engaged in opening the "knuckle" of the bumper of a car, under the direction of the conductor of the train, preparatory to coupling that car to others belonging to the train. By his next friend he sued the receivers for damages, alleging negligence on the part of the defendants and the conductor, and recovered a verdict for \$1,500. The defendants made a motion for a new trial, the grounds of which are set out in the reporter's statement, and to the overruling of the motion they excepted.

1. It is complained that the court erred in excluding, when offered in evidence by the defendants, a contract in writing between the plaintiff and the Richmond & Danville Railroad Company, whereby the plaintiff agreed to be bound by a rule of the company prohibiting brakemen from going between cars for the purpose of coupling or uncoupling, etc., and agreed to waive liability of the company to him for any results of infraction of the rule. There was no error in excluding this contract. It was not a contract with the receivers, but one entered into with the company prior to the receivership. When the company ceased to operate the road, and the receivers took charge of it, the latter were not bound to retain the employees of the former, and the contracts of the company with its employees were not binding on the receivers unless adopted by them; nor, in the absence of such an obligation on the part of the receivers,

ers, were such employes bound to abide by the terms of any contract entered into with the company. The contract in question, therefore, was not necessarily binding between the plaintiff and the receivers, and there was no evidence showing any adoption of it as between them, either directly or by implication.

2, 3. It was complained that the trial judge, in his charge to the jury, erred in assuming that the conductor was the alter ego of the defendants on the occasion in question, thereby excluding the theory of the defendants that they were fellow servants, and that the company was, therefore, not liable for any injury resulting from the negligence of the conductor. Ordinarily, the conductor of a train has control of its movements, and brakemen connected with the train are, while engaged in coupling cars to the train at stations, subject to his orders and under his control; and he is not, when directing the movements of the train, and giving orders to the brakeman and the engineer in connection therewith, a fellow servant of such employes, within the meaning of the rule as to fellow servants, but is a vice principal of the master. See *Mills v. Railway Co.*, 87 Ga. 105, 13 S. E. 205; *Prather v. Railroad Co.*, 80 Ga. 436, 9 S. E. 530, and cases cited. The evidence in this case discloses nothing which would take it out of the general rule above stated. It shows that the conductor was in fact directing and controlling the movements of the train, and that the plaintiff and the engineer were acting under his orders at the time of the injury. The instructions complained of were, therefore, not improperly based upon the assumption that the plaintiff and the conductor were not fellow servants.

4. The charge was not, in other respects, erroneous. The evidence warranted the verdict, and there was no error in denying a new trial. Judgment affirmed.

(87 Ga. 489)

**BRUNSWICK & W. R. CO. v. GIBSON.**

(Supreme Court of Georgia. Nov. 15, 1895.)

**RAILROAD COMPANIES—STREET ACCIDENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

1. The instructions of the court as to the law of contributory negligence, taken all together, were substantially in accord with the rule laid down in *Railroad Co. v. Luckie*, 13 S. E. 105, 87 Ga. 6, and were correct. The request to charge on this subject was covered by the charge given.

2. It appearing that the deceased was killed by a locomotive moving backwards upon a railroad track running longitudinally through a public street in a city, and the declaration expressly alleging that the defendant company was negligent in failing "to have a flagman or some other person standing on the rear end of said locomotive while it was being run backwards as aforesaid," there was no error in submitting to the jury for their determination the question whether or not such failure was an act of negligence.

3. The requests to charge, except the one above referred to and one other, which was of

no serious importance, were properly refused, because, in effect, their purpose was to obtain instructions from the court that such and such acts, not per se negligent in law, would be in fact negligent.

4. The evidence warranted the verdict, and, this being a second finding in the plaintiff's favor, this court will not overrule the discretion of the trial judge in refusing to set it aside. (Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Lucretia Gibson against the Brunswick & Western Railroad Company to recover for the death of her son. From a judgment for plaintiff, defendant brings error. Affirmed.

Goodyear, Kay & Brantley, for plaintiff in error. Symmes & Bennet, for defendant in error.

SIMMONS, C. J. 1. In the case of *Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, this court, construing sections 2972 and 3034 of the Code, held, in substance, that the plaintiff in an action against a railroad company for personal injuries cannot recover, even though the company may have been negligent, if, after the negligence of the defendant began or was existing, the person injured could, by ordinary care, have avoided the consequences to himself of that negligence; also that, if the person injured could not, by the exercise of ordinary care, have avoided the injury, and the injury resulted from the defendant's negligence, he can recover, although to some extent negligent himself, but the amount of the recovery should be diminished in proportion to the amount of fault attributable to him; and that this latter rule is not a qualification of the former. The first rule prevents his recovery at all if, by ordinary care, he could have avoided the injury; the second allows him to recover, although negligent himself, if he could not, by the exercise of ordinary care, have avoided it. Taking into consideration the entire charge of the trial judge upon the law of contributory negligence, it was substantially in accord with the law as above stated, and covered substantially the defendant's requests to charge on this subject.

2. It appears from the record that the railroad company's track extended longitudinally through Bay street, one of the principal thoroughfares of the city of Brunswick, and that the trains of the company ran from one end of the street to the other. The locomotive and train which ran over and killed the plaintiff's son were at the upper end of the street, standing still, and blocked a crossing which was in general use by the people in that locality. In order for the train to run down the street, the locomotive had to run backwards, with the tender in front. The deceased started across the street a short distance beyond the crossing, and while he was crossing the track the train

suddenly started, and ran over him. The declaration alleged that the defendant was negligent in failing to have a flagman or some other person at the rear of the locomotive while it was being run backwards, so as to warn persons who were crossing or attempting to cross the track as the train was approaching. The court, in its charge to the jury, submitted to them whether, under all the circumstances disclosed by the evidence, the failure to do this was negligence. The defendant, in its motion for a new trial, alleged that this was error, because there was no statutory requirement or ordinance requiring the company to make any provision of this kind for warning persons crossing the track. As before remarked, the track at this point ran through a leading thoroughfare of the city; a large number of people doubtless crossed it every hour; and whether there was a statute or ordinance requiring it or not, we think the jury would have a right under the circumstances to say that the railroad company ought to have had some person stationed at the end of the train at that point to give warning. It was contended on the part of the railroad company that the crossing blocked by the train on that occasion was a private crossing. If the street was a public one, we do not see how there could be a private crossing upon it. Nor do we agree with counsel for the railroad company in his contention with regard to the right of the public to cross the street elsewhere than at certain points. It is true that in most cities streets are usually crossed at certain points, generally at the intersection of other streets, but there is no law which requires people to cross only at such places. If the street is a public one, people have a right to cross it at any place along its line, and the law will protect them from being run over, either by ordinary vehicles or railroad trains. The only difference in the duty of a railroad company towards persons crossing at the usual places of crossing and towards those crossing at other places in the street is in the greater degree of care required in the one case than in the other. On the other hand, there is a corresponding duty on the part of persons who cross the street elsewhere than at the usual crossings to exercise a greater degree of care for their own protection than would be required of them at such crossings. And of course no person would have a right to cross the track in front of a moving train when it would be dangerous to do so.

3. It is complained that the court erred in refusing to charge as follows: "If the declaration of the plaintiff sets out that the crossing at Cook's Mill was blockaded by the locomotive and flat cars, and that Richard B. Gibson walked south to a point about fifty feet, and started to cross said track near the back or rear of said locomotive at a point not a crossing, the plaintiff is bound

by such allegations. They are to be considered the truth of this case, as an admission that Richard B. Gibson did not undertake to cross at a public crossing." If we are correct in what we have said as to the rights of the public to cross the street at any place along its line, provided they do so with proper care and caution, there was no error in refusing to give this request in charge; and, whether this would have been a proper charge or not, the failure to give it would not, under the facts of the case, be sufficient to demand a new trial. Nor did the court err in refusing the other requests set out in the motion for a new trial. It would have been error against the plaintiff if the court had instructed the jury as requested, because these requests contain intimations from the court to the jury as to what would have been negligence on the part of the deceased and this question, as we have often held, is for the jury alone and not for the court.

4. The evidence authorized the finding of the jury, and, this being the second verdict in the plaintiff's favor, we will not overrule the discretion of the trial judge in refusing a new trial. Judgment affirmed.

(97 Ga. 563)

#### RAY v. HEMPHILL.

#### SAME v. HAAS.

(Supreme Court of Georgia. Dec. 2, 1895.)

#### MORTGAGE—POWER OF SALE—REVOCATION.

Although a mere recital in a power of sale, contained in a mortgage given to secure the payment of money, that such power is coupled with an interest, would not of itself make it such a power, yet where the mortgagor plainly and unequivocally stipulated in the mortgage itself that the power of sale should be irrevocable, and thus, upon a valuable consideration, made the power a part of the contract given as security for a debt, and conferred it for the purpose of effectuating that security, he was bound by the terms of this contract, and could not himself revoke the power of sale. This is true, irrespective of the question whether, in the absence of such a stipulation, the power would be irrevocable by the mortgagor while in life, or whether it would, by his death, be ipso facto revoked.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Actions by L. R. Ray against W. A. Hemphill and Jacob Haas. Judgments for defendants, and plaintiff brings error. Affirmed.

W. B. Hammond, Felder & Davis, and Lavender R. Ray, for plaintiff in error. Goodwin & Westmoreland, for defendants in error.

SIMMONS, C. J. The plaintiff in error executed to the defendants in error certain promissory notes, and a mortgage to secure the same, which mortgage contained a provision authorizing the mortgagee to sell the mortgaged property for the payment of the

debt if not paid when due, and a further provision that "the power and agency aforesaid is coupled with an interest, and is hereby made irrevocable, even by death." The notes became due, and were not paid, and the mortgagee, in pursuance of the power given by the mortgage, advertised the mortgaged property for sale; whereupon the mortgagor notified him that the power of sale was revoked and canceled. Subsequently the mortgagor filed a petition for an injunction against the sale, basing his petition on the ground that he had revoked the power of sale. The court refused the injunction, and to this ruling the petitioner excepted.

Generally an agency is revocable at the will of the principal, and it is ipso facto revoked by his death. To the rule that an agency is revoked by the death of the principal there is but one exception, and that exception exists where the power of the agent is coupled with an interest. By this is meant an interest in the thing itself; that is to say, in the subject on which the power is to be exercised, and not merely in that which is produced by the exercise of the power. *Wilkins v. McGehee*, 86 Ga. 766, 13 S. E. 85, and authorities there cited. The power is irrevocable in the lifetime of the principal where it is given for a valuable consideration, and forms a part of a contract made as security for a debt, and is conferred for the purpose of effectuating the security, even though not coupled with an interest in the thing itself; and this is said to be so although there is no express stipulation that the power shall be irrevocable. *Marshall, O. J., in Hunt v. Rousmanler*, 8 Wheat. 174; *Id.*, 1 Hare & W. Lead. Cas. \*578. It is undoubtedly so if there is such a stipulation. Our Code, it is true, in section 2183, which declares the rule to be as above stated, that generally an agency is revocable at the will of the principal, mentions but one exception to the rule,—that of a power coupled with an interest; but there is no reason to suppose that other instances were excluded, there being nothing in the language of the section to indicate that it was intended to be exhaustive on the subject. In the case of *Calloway v. Bank*, 54 Ga. 441, it was held that "a power in a mortgage to the mortgagee to sell the property mortgaged on the failure of the mortgagor to pay the debt at its maturity is a lawful power under the laws of this state, and is irrevocable." Some of the reasoning of *McCay, J.*, in that case was disapproved in the case of *Wilkins v. McGehee*, *supra*, in which it was held that such a power was revoked by death, but it was said that the decision itself was right. Judge *McCay* argued that the mortgagee had such an interest in the land itself as would render the power irrevocable. In *Wilkins v. McGehee* we disapproved of that view, for the reason that in this state a mortgage does not convey title, but is a mere security, and the interest of the mortgagee is therefore confined to the proceeds of the mortgaged prop-

erty; but we said: "Under the facts of that case the power of sale could very well be held irrevocable, because they show that the contract between *Maxwell* [the mortgagor] and the mortgagees was that, on default in the payment of the sum of money secured by the mortgage, the mortgagees were not to be delayed by the necessity of foreclosing in the courts, but either of them might sell all or any part of the lands to pay said indebtedness, after advertising, etc. *Maxwell* was not 'dead at the time of the sale'; and the power, being part of a contract for a consideration, might, for that reason, be held irrevocable in the lifetime of the mortgagor." Chief Justice *Marshall*, in the leading case of *Hunt v. Rousmanler*, *supra*, says: "Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it." Judge *Story*, in his work on Agency, says: "Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, there, unless there is an express stipulation that it shall be revocable, it is from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not." 2 *Story, Ag.* (8th Ed.) § 477. See, also, 1 *Am. & Eng. Enc. Law* (2d Ed.) "Agency," p. 1217 et seq. In the case of an ordinary agency, there is generally no reason why the principal should be precluded from revoking the agency. The agent is the servant of the principal, and the law compels no man to employ another against his will, or to continue to repose trust and confidence in another after he has seen fit to withdraw it. If the revocation is unreasonable, and constitutes a breach of contract, whereby the agent sustains injury, the law affords him redress in an action for damages. Code, § 2183. In this case, however, the relation of the parties was not merely that of principal and agent. The power in question concerned the disposition of property upon which the person on whom the power was conferred held a lien as security for a debt, and was a part of the contract creating the security, and was granted for the purpose of effectuating that security; and it was expressly stipulated, as a part of the consideration moving to the mortgagee, that the power should be irrevocable. Upon principle as well as authority it seems to us clear that, whether such a power is revoked by death or not, the grantor should not be permitted to revoke it himself. We hold, there-

fore, that the court below did not err in refusing the injunction prayed for. Judgment affirmed.

(97 Ga. 575)

MORRIS et al. v. MADDOX et al.

(Supreme Court of Georgia. Dec. 2, 1895.)

PARTNERSHIP—POWERS OF PARTNER—TRIAL—  
MISCONDUCT OF COUNSEL.

1. It being within the scope of the legitimate business of a mercantile partnership to raise money by making and negotiating promissory notes, a member thereof has the power to exchange a promissory note of the partnership for the promissory note of another of like amount, the proceeds of which are intended for use in carrying on the partnership business.

2. Where a case turned largely upon a material issue of fact concerning which the parties were seriously at variance, and there was present at the trial a witness who manifestly had full knowledge as to the truth of this issue, and who had been sworn at the instance of the plaintiff, but not examined, it was grossly improper for the plaintiff's counsel, in the concluding argument of the case, to state to the jury that it was unnecessary to examine this witness, because, if he had been examined, he would have sworn to certain things, the counsel at the same time undertaking to inform the jury what the testimony of the witness would have been, and it being apparent that such testimony, if true, would have been fatal to the defendant's case.

3. In the present case—it being one in which not only an issue of the nature above indicated, but other issues of considerable importance were closely contested—the misconduct of plaintiff's counsel was cause for a mistrial; and, although the judge rebuked the counsel, and instructed the jury to disregard his improper statements, this was not, in this instance, a sufficient correction of the injury done to the defendant, and consequently it was error to overrule the latter's motion for a new trial, the same having been made with reasonable promptness.

4. Other than as stated in the preceding note, there was no error requiring a reversal of the judgment below.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by J. J. & J. E. Maddox against E. S. Morris & Co. From a judgment for plaintiffs, defendants bring error. Reversed.

Mayson & Hill, for plaintiffs in error. C. D. Maddox and Glenn & Rountree, for defendants in error.

LUMPKIN, J. 1. It is well known that every mercantile partnership needs cash in the conduct of its business. Without money, such a concern could not transact business at all, and it is perfectly obvious that the necessity of borrowing must frequently arise. It follows that a member of such a partnership has, generally, the right to contract, in the partnership name, for a loan of money. It is usual, in such a case, to give a promissory note, and the partner conducting the transaction has the authority to sign the name of the firm to such note. Very often security is required, and in that case it would be perfectly legitimate and proper for

such partner to procure another to sign the note as surety. If the surety required an indemnity, the name of the partnership could, for the accomplishment of this purpose, be lawfully signed to the proper instrument by the partner who induced the surety to sign the note. These propositions seem clear and indisputable, and they lead to the conclusion that a member of a partnership has the power to exchange a promissory note of the partnership for the promissory note of another of like amount, the proceeds of which are intended for use in carrying on the partnership business. Each becomes an accommodation maker for the benefit of the other. The act of one is the consideration for the act of the other; and the net result, so far as the partnership is concerned, is that it obtains money for use in its business upon the paper of another person, and in return indemnifies that person against loss; or, what is equivalent to the same thing, extends to him an accommodation of the same kind it procured at his hands.

2. The misconduct of the plaintiffs' counsel, as outlined in the second headnote, was wholly inexcusable. This is apparent without discussion.

3. This being a closely contested case upon the facts, a mere rebuke of the counsel by the judge, and an instruction to the jury to disregard counsel's improper statements, was not, in this instance, a sufficient correction of the injury done to the defendants. The latter's counsel pursued the course which this court, in *Railroad Co. v. Johnson*, 90 Ga. 501, 16 S. E. 49, decided was the proper one under such circumstances, viz. he promptly objected to the remarks made by the plaintiffs' counsel, and moved that a mistrial be declared. See, also, *Robinson v. Stevens*, 93 Ga. 539, 21 S. E. 97, citing the *Johnson Case*, supra, and again holding that, under such circumstances, "the proper course was to move that the case be withdrawn from the jury, and a mistrial be declared; and, if the court refused to grant this request, the refusal would be subject-matter for review by this court." The case in hand affords an instance in which the motion for a mistrial ought to have been granted.

4. It is unnecessary to deal specifically with other questions presented in the record. Except as above indicated, there was no error requiring a new trial. Judgment reversed.

(97 Ga. 614)

CRAWFORD et al. v. BROOMHEAD et al.  
(Supreme Court of Georgia. Dec. 21, 1895.)

SALE OF WARD'S LAND—REINVESTMENT OF PROCEEDS.

Prior to the passage of the act of November 11, 1889, relating to sales of the estates of wards for reinvestment (Acts 1889, pp. 156, 157), the ordinary had jurisdiction and authority to grant to a guardian of a minor child an order authorizing the guardian to sell unproductive real estate belonging to the ward for

the purpose of reinvesting the proceeds of the sale in other and productive property. The act of December 21, 1827 (Cobb's Dig. pp. 325, 326), in so far as it authorized the sale of realty belonging to an orphan or orphans, "where it is fully and plainly made to appear that the same will be for the benefit of such orphan or orphans," was, until the passage of the act first above cited, still of force, the power of ordering such sales being in the ordinaries. Section 1828 of the Code deals only with the rules and restrictions under which such sales are to be conducted.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between George G. Crawford and others and J. S. Broomhead and others. From the judgment, Crawford and others bring error. Affirmed.

John C. Reed, for plaintiffs in error. Hall & Hammond, Ellis & Gray, and Rosser Harter, for defendants in error.

SIMMONS, C. J. The only question for our determination in this case is whether, prior to the act of November 11, 1889, relating to sales of the estates of wards for reinvestment, the ordinary had jurisdiction and authority to grant to the guardian of a minor child an order authorizing the guardian to sell unproductive real estate for the purpose of reinvesting the proceeds of the sale in other and productive property. Prior to the act of 1827 (Cobb's Dig. 325, 326), there were several acts on the subject of sales by executors, administrators, and guardians; and that act, after reciting in its preamble that by the prior acts referred to no power was given "to said courts [the inferior courts when sitting for ordinary purposes, now the courts of ordinary] to order the sale of any real estate belonging to orphans other than such as is acquired by them from their testator or intestate, by reason of which frequent and manifest injury is sustained by orphans and others holding real estate other than such as is acquired by descent," provides that said courts "shall be authorized to order a sale of any part or the whole of the real estate of any orphan or orphans . . . upon application of the . . . guardian or guardians, where it is fully and plainly [made to] appear that the same will be for the benefit of such orphan or orphans, . . . under the same rules and restrictions as are by law pointed out for the sale of real estate of testators or intestates." This act, construed with those of which it is amendatory, clearly gave to the courts of ordinary the power to order the sale of the real estate of orphans whenever it should be made to appear to the court that the sale would be for the benefit of the orphans; and it was so well understood prior to the Code that this power was vested in the ordinary that the codifiers did not incorporate therein the details of the prior legislation on the subject, but embraced so much of it as was deemed necessary in section 1828 of the Code, which declares that "all sales of any portion of the property of

the ward shall be made under the direction of the ordinary, and under the same rules and restrictions as are prescribed for sales by administrators of estates." This section, we think, should be construed in connection with the act of 1827, and, so construing it, the ordinary had power thereunder to order a sale of any portion of the property of the ward whenever it should be made to appear that the sale would be for the benefit of the ward.

It was contended that under this section the ordinary could not order a sale of the realty of the ward for reinvestment, it being provided therein that all sales of the property of the ward shall be made "under the same rules and restrictions as are prescribed for sales by administrators of estates," and the power of an administrator to sell realty being confined to sales for the purpose of paying debts and for distribution. We do not think the language quoted limited the purposes for which sales of the property of the ward could be made. This language appears for the first time in the act of 1827, and in that act it applied to the mode and manner of sale. It applies to the application for leave to sell, the advertisement, time of sale, etc. If it limited the power of the ordinary to the granting of an order of sale only where the sale was to be made for the purpose of paying debts and for distribution, it would virtually abrogate the acts upon which this section of the Code is predicated, and some other provisions of the Code. For instance, under section 1824 the ordinary may, in his discretion, allow the corpus of the estate of the ward to be used in whole or in part for his maintenance and education. How could this be done if the contention of the plaintiff in error is correct? According to that contention, the ordinary would have no power to authorize the guardian to sell unproductive realty of the ward for his maintenance and education, although the ward might be in a starving condition, and illiterate. In the case of *Prine v. Mapp*, 80 Ga. 137, 5 S. E. 66, this court held that, although it is the duty of a father to provide for the maintenance and education of his children until their majority, yet if he is unable to do so from his own means, but has in his hands, as their guardian, an estate belonging to them, the ordinary may lawfully grant an order to sell the property for that purpose. Other cases could be cited in which this court has upheld the power of the ordinary to authorize the sale of the property of a ward for other purposes than the payment of debts and distribution. We are confirmed in this opinion not only by the recognition of the power by this court in numerous instances, but by the uniform practice of the ordinaries in this respect up to the passage of the act of 1889. The writer, from an experience at the bar and on the bench of 89 years, has never known it to be questioned before. His experience has been that applications for the sale of the property of wards, prior to the passage of the act of 1889, were uniformly

made to the ordinary, and passed upon by him. By the act of 1889 the legislature, in its wisdom, took away from the ordinary the power to grant orders for the sale of the property of wards for this purpose, and conferred it upon the judges of the superior courts, being doubtless of the opinion that the latter would exercise better judgment and discretion than had been exercised by some of the ordinaries in regard to this matter. Whatever may have been the reason, it is clear that this power now rests exclusively in the judges of the superior courts; and it is also clear to our minds that prior to the act of 1889 the power was vested in the ordinaries. Judgment affirmed.

(97 Ga. 658)

**TUGGLE v. TUGGLE.**

(Supreme Court of Georgia. Jan. 20, 1896.)

**SEPARATION OF PARENTS—CUSTODY OF CHILD.**

Under the facts of this case, the trial judge abused his discretion in awarding the possession of the child in controversy to the mother, instead of the father. Looking solely to the interest and welfare of the child, it is manifest that, as between the two parents, the latter, and not the former, was entitled to its custody.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

Application of Mrs. Willie O. Tuggle for writ of habeas corpus to obtain custody of her child. From the decree granting her the custody, Paul L. Tuggle brings error. Reversed.

Bishop, Andrews & Hill and Rosser & Carter, for plaintiff in error. James & Bell, for defendant in error.

**SIMMONS, C. J.** Section 1794 of the Code declares that, "in cases of separation of the parents \* \* \* the court, upon writ of habeas corpus, may exercise a discretion as to the possession of the child, looking solely to his interest and welfare." This does not mean an arbitrary or unlimited discretion, but a "discretion guided and governed by rules of law." *Lindsey v. Lindsey*, 14 Ga. 657, 660; *Miller v. Wallace*, 76 Ga. 479 (2). Under the facts of the present case as they appear from the record, we are constrained to hold that the court below erred in awarding the custody of the child to the mother. It is undisputed that she abandoned both the child and the father, and went to a distant city where she resided for a considerable length of time, her traveling expenses being paid by another man upon her promise that she would live with him. Several witnesses testified that her general reputation was bad. She had no means of her own, was not in any employment by which she could support the child, and was dependent on her father and mother, who were in very moderate circumstances. On the other hand, it appeared that the father of the child was an industrious, well to do

man, who was earning a good salary, and owned some real estate; that he was foreman of the shops of the Western & Atlantic Railroad Company, and had been continuously for 12 years in the employment of the company. He had always provided well for the support and comfort of his wife and child, and according to the testimony of a number of witnesses, some of whom had lived in the same house with him, he was of good character and habits, and not addicted to the drink habit, though he occasionally took a drink, and on a few occasions had taken too much. When his wife left him, he placed the boy, who was then about nine years old, with the family of his brother, a clergyman in good circumstances, where he was well treated and cared for, and was being prepared for school; and he was there when the wife obtained possession of him surreptitiously. The wife testified that her husband had cursed in the presence of the child, but her parents testified that she sometimes used "bad language" herself when the child was present. The wife testified that on one occasion she had seen him make amorous demonstrations towards another woman, and that he sometimes drank to excess. Her parents also testified as to his drinking to excess. It will be seen, however, that while there is some evidence derogatory to the father, it appears that he was not only, generally speaking, a man of good habits, but was well able to provide for the child, and had always taken good care of him, and had him placed where he was receiving proper moral and educational training, when the mother obtained possession of him; while, on the other hand, the evidence is overwhelming and uncontradicted that the mother, both in view of her character and her want of means and ability to provide for the child, was an unfit person to be intrusted with his care and training. The boy, having passed the period of infancy, did not require the care and attendance of the mother to the extent which would be required in the case of a child of more tender years. Looking solely to the interest and welfare of the child, we think it is manifest that, as between the parents, his custody should be awarded to the father. Judgment reversed.

(97 Ga. 660)

**VAN PELT v. HURT et al.**

(Supreme Court of Georgia. Jan. 20, 1896.)

**ASSIGNMENT—CONSTRUCTION—MORTGAGE—ENFORCEMENT BY ASSIGNEE OF NOTE.**

1. A written assignment of "all the claims" of the assignor against a named debtor, arising upon certain loans made by the assignor to the debtor, operates to pass to the assignee all choses in action falling within this description, including promissory notes held by the assignor against the debtor at the time the assignment was made.

2. While such an assignment of a promissory note, or other evidence of indebtedness, secured by a deed to land executed under the provisions

of section 1909 et seq. of the Code, does not pass to the assignee a legal title to the land itself, such assignee has—and, as against the debtor, may, when necessary to the collection of such claim, assert—an equitable interest in the security effectuated by the deed; and in such case it is within the power of a court exercising equity jurisdiction, upon proper pleadings and evidence, to afford appropriate relief in the premises.

3. Taking into view all the allegations of the plaintiffs' petition in the present case, the same was not without equity, and there was no error in overruling the defendant's demurrer.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Joel Hurt and others against F. M. Van Pelt for the foreclosure of a deed as an equitable mortgage. From a decree for plaintiffs, defendant brings error. Affirmed.

John A. Wimpy, for plaintiff in error. Glenn, Slaton & Phillips, for defendants in error.

SIMMONS, C. J. The Home Building & Loan Association, in winding up its business, executed an assignment as follows: "Georgia, Fulton County. For value received, the Home Building & Loan Association hereby transfers to H. C. Stockdell, Joel Hurt, and A. L. Waldo all the claims of said Home Building and Loan Association against the following parties to wit [naming several persons, among whom was F. M. Van Pelt], said claims having arisen from said parties borrowing as members of said association. In witness whereof, the said Home Building & Loan Association has hereto set its hand and seal this 12th day of December, 1888. The Home Building & Loan Association [seal], by George Winship, President, by Joel Hurt, Sect. & Treasurer." It appears that Van Pelt had borrowed from the association a certain amount of money, for which he had given his promissory note secured by 15 shares of the stock of the association, and by a deed, under section 1909 of the Code, to certain realty in the city of Atlanta. It appears further that he failed and refused to pay his dues to the association as required by the by-laws, and failed also to pay the taxes due upon the property to the state, county and city, and the association had been compelled to redeem the property after it had been sold for taxes, and subsequently bought it in at another tax sale, and received a deed thereto made in pursuance of such sale. The parties to whom the assignment above set out was made filed their equitable petition to the superior court, wherein these facts were alleged, and prayed that the deed given by Van Pelt to the association as security be foreclosed as an equitable mortgage; that all sums expended by them for taxes, etc., be declared a lien on the premises; and that they be granted a decree for said sums, and that the property be sold therefor; for judgment against defendant, in any event, for the amount of the claim of the association, and the sums expended in paying taxes, etc.; and that, if it should be determined that they have not the title to the property, the property be sold, and they be paid their claims out of the proceeds of the sale. The petition was demurred to on various grounds, which were overruled, and the defendant excepted.

1. One of the grounds of demurrer was that the transfer above set out is void in that it does not describe what property or claim is transferred to the plaintiffs, or whether it is for money, personal property, or for land. There is no merit in this objection. The terms of the assignment are very broad. It is a transfer of "all the claims" of the association against the parties named, one of whom is Van Pelt; and the claims are further identified by the statement that they had "arisen from said parties borrowing as members of said association." No particular form of assignment is required. The description of the property assigned is sufficient when it can be readily ascertained what property is meant.

2. Another ground of demurrer was that the petition did not show that the association transferred to the plaintiffs by deed the title to the property which the association held from the defendant to secure the loan. The petition, it is true, does not allege that such a deed was made by the association to the plaintiffs; and, if the rights of the plaintiffs depended alone upon their having a legal title to the land from the association, the demurrer would have been good. An assignment of a promissory note, or other evidence of indebtedness, to secure which a deed to land has been given by the assignor, does not pass to the assignee the title to the land itself. The assignee acquires, however, an equitable interest in the security, which, when necessary to the collection of the debt, he may assert as against the debtor; and in such case a court of equity, upon proper pleadings and evidence, will afford appropriate relief. If the security had been a mortgage, instead of a deed conveying the legal title, the transfer of the debt secured by the mortgage would have carried with it the mortgage itself. See *Murray v. Jones*, 50 Ga. 119, and cases cited; *Colebrooke*, Collat. Sec. § 144. And so, where the security is a deed conveying the legal title, the transfer carries with it an equitable interest in the security, though not the legal title, and a court of equity will give effect to the transferee's rights in the premises. See *Henry v. McAllister*, 93 Ga. 671, 20 S. E. 66.

3. Taking into view all the allegations of the plaintiffs' petition in the present case, the same was not without equity, and there was no error in overruling the defendant's demurrer. Judgment affirmed.

(97 Ga. 702)

## ROBINSON v. DONAHOO et al.

(Supreme Court of Georgia. Feb. 7, 1898.)

## FRAUD—BURDEN OF PROOF—INSTRUCTIONS—MISCONDUCT OF JURY.

1. As a general rule, one who attacks an instrument signed by himself, alleging that it does not contain or express what he intended it should contain, and believed it did contain, and that his signature to it was procured by the fraud of the other party, carries the burden of proving that these allegations are true.

2. Where, in a given case, it was a closely-contested issue of fact as to whether or not on a particular occasion the plaintiff was able to read an instrument which he then signed, after having made an addition to it in his own handwriting, an omission to charge a rule of law applicable to persons confessedly blind is certainly no cause for a new trial.

3. Where, after a jury had been charged by the court, and sent out to make up their verdict, two or three of them, while separated from their fellows, "remained in conversation with somebody for about fifteen minutes," the legal presumption is that the losing party in the case was thereby injured; and, in the absence of any explanation of the matter, there should be a new trial.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. H. Lumpkin, Judge.

Ejectment by R. M. Robinson against Powell Donahoo and another. From a judgment for defendants, plaintiff brings error. Reversed.

W. J. Albert, for plaintiff in error. John S. Candler and Candler & Thomson, for defendants in error.

SIMMONS, C. J. Robinson sued Powell Donahoo and William Donahoo for certain land, claiming title thereto as an heir at law of his children, to whom the land had been devised by their grandfather. The defendants set up various defenses; among them, that Robinson had executed to them a relinquishment, as follows: "Chamblee, June 27, 1893. Received of M. B. Donahoo 14 and 69-100, in full of any and all claims against the estate of Abner Donahoo, dec'd; and in consideration of said sum I hereby relinquish, surrender, and renounce any claim to further administer on said estate, or to any interest therein, and disclaim and renounce any right to, or title or interest in, land lot number —, in the 15th district of Dekalb county, bequeathed by said Abner Donahoo to his wife for life, and at her death to my deceased wife for life, and in fee to the children born to me and my said wife,—my said wife and children having died before the first life tenant. Added for time \$15.00. R. M. Robinson." Robinson contended that when he signed this paper he was not fully acquainted with its contents; that he thought he was signing a receipt for his commissions as administrator, but did not know that the paper contained a relinquishment of his interest in the land. It appeared from the evidence at the trial that he was not an illiterate man, but that when he signed the pa-

per his lip or face was swollen, and that he had a poultice on his face; and, according to his own testimony, there was a part of the writing that he could not make out exactly, and he handed it to William Donahoo, one of the defendants, and requested him to read it to him. William Donahoo denies that he read it to him at all. Before Robinson signed the paper he added to it, in his own handwriting, the words: "Added for time \$15.00."

The trial judge charged, in substance, that one who attacks an instrument signed by himself, alleging that it does not express or contain what he intended it should contain and believed it did contain, and that his signature to it was procured by the fraud of the other party, carries the burden of proving that his allegations are true. This charge is assigned as error, and it is complained that the court erred in not charging that if the plaintiff, owing to the condition of his eyesight, or for any other reason, could not read the paper, the burden was upon the defendants to show that its execution was free from fraud. There are authorities which hold that, where the maker of an instrument is illiterate or blind, the burden of showing that it was read over to him, and that he understood it, is upon the person claiming rights under it; while others hold that, where such a person is shown to have signed the paper, the presumption is that it was read over to him; but, as far as we have been able to ascertain, the authorities are uniform in holding that where a person can read and write, and has signed his name to an instrument, he is presumed to know its contents, and if he attacks the instrument for fraud, and asserts that it does not contain the whole contract, or contains more than the contract, the burden is upon him to show it. See Lawson, Pres. Ev. p. 18; 1 Bigelow, Fraud (Ed. 1890) p. 376. And he must show clearly that he could not read it, before the burden will be shifted. Here the evidence is conflicting as to whether the defendant was able to read the instrument, or not, on the occasion in question. There is evidence strongly tending to show that he was able to do so, and a significant fact is that he made an addition to it in his own handwriting. In view of this evidence, it is certainly no cause for a new trial that the court failed to give in charge a rule of law applicable to persons confessedly blind or illiterate.

The motion for a new trial alleges misconduct on the part of jurors at various times after the case had been submitted to them. The alleged misconduct was explained by members of the jury, the sheriff, and others, except as to one occasion. It appears from the motion, and from the affidavit of W. W. Jossey, Jr., introduced in support of the motion, that after the jury had been charged by the court, and had been sent out to make up their verdict, they were taken to a certain hotel for the night, and about 11 o'clock that

night all of them, except two or three, went down the back steps of the hotel, and into the lot about 50 yards from the hotel, and that those who did not go remained in conversation with somebody for about 15 minutes; but who it was, the deponent did not know, and he could not hear what they said. The affidavit of this witness was not contradicted by any of the jury, or by the officer in charge of them, but was unexplained. So far as we know, or the trial judge knew, the person conversing with the jurors on the steps may have been one of the parties in whose favor the verdict was rendered, or some person talking to them in the interest of those parties, and it was incumbent on the latter to explain this conduct to the satisfaction of the trial judge. This they might have done by affidavits from all the jurors and the officer in charge of them. It is singular that, while all of the other alleged instances of misconduct are explained, no attempt is made to explain this particular one. The conduct of jurors on the trial of a case should be above suspicion, and, in order to maintain the purity of trial by jury, whenever such misconduct as this is alleged and proved a new trial follows as a matter of course. Upon this ground alone a new trial is awarded. Judgment reversed.

(97 Ga. 742)

LAWHORN v. MILLEN & S. RY. CO.

(Supreme Court of Georgia. Feb. 10, 1896.)

**INJURY TO SERVANT—KNOWLEDGE OF DEFECTIVE TRACK—ASSUMPTION OF RISK.**

1. Even if a train employé, who, by reason of his having full knowledge that the track of the railroad was in a dangerously defective condition, and had so remained for a considerable period, can be held to have thereby assumed all risks of injury necessarily incident to riding, while engaged in his work, upon a train, when being run in the usual manner and at the usual rate of speed, yet where, upon a given occasion, he was injured by a derailment of a car upon which he was riding in the due course of his employment, and, on the trial of an action against the railroad company for the injury thus sustained, proved affirmatively that the train, at the time of the injury, was being run at a dangerous rate of speed around a sharp curve, it was at least incumbent on the defendant to show that such rate of speed at the point in question did not exceed that at which the train had usually been run at this place.

2. In view of the law as above announced, and of the evidence introduced by the plaintiff, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Emanuel county; C. C. Smith, Judge.

Action by John Lawhorn against the Millen & Southern Railway Company. From a judgment of nonsuit, plaintiff brings error. Reversed.

H. D. D. Twiggs and Hines & Hale, for plaintiff in error. A. O. Wright and Williams & Smith, for defendant in error.

SIMMONS, C. J. The plaintiff sued for damages on account of personal injuries received by him while in the employment of the railroad company as a brakeman and train hand. The injuries were caused by the overturning of a freight car, on the top and at the brake of which he was standing, while the train was running around a sharp curve in the track. He alleged that the wreck was due largely to the defective condition of the roadbed and track, the same having been constructed of old scrap iron, upon old cross-ties, at the point of derailment, and to the fact that the train was running around the curve at a rapid and reckless rate of speed, considering the condition of the road at that place. From the evidence introduced by the plaintiff at the trial, it appeared that the roadbed and track were in the defective condition alleged in the declaration, and that on the occasion in question the train was heavily loaded, and in going around the curve the engineer put on full steam, and ran the train at a dangerous rate of speed. It appeared also that the plaintiff had been working on the road for several years, and knew of the defective condition of the roadbed and track at the place where the derailment occurred, and had on several occasions seen the train derailed at that place. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, on the ground that the plaintiff was previously aware of the dangerous condition of the road, and hence could not recover. The motion was sustained, and the plaintiff excepted.

We think the court erred in granting a nonsuit. Ordinarily a person who remains in the employment of a railroad company, as a brakeman or train hand, with knowledge that the track of the railroad is in a defective and dangerous condition, is to be regarded as having assumed all the risks of injury which are necessarily incident to that condition, when the train is being run in the usual manner, and at the usual rate of speed; but we do not think it follows, from the mere fact of his knowledge of such condition, that he is to be regarded as having assumed the risks incident to a more dangerous manner of running the train than usual. A person might be willing to remain in such employment, and assume the risks incident to running the train in a careful and prudent manner, and, if the train has been so run in the past, might reasonably conclude that it would continue to be run in the same way. It cannot fairly be said, however, that by remaining in such employment he assumes the risks incident to a sudden, dangerous, and unusual increase of speed of the train in passing, with heavily loaded cars, over a particularly defective, and, under such circumstances, dangerous, part of the track. At any rate, we think the question should have been submitted by the court to the jury. See Wood, Mast. & S. § 358. The plaintiff having shown that the train was running at a high and dangerous rate of speed, it was at

least incumbent on the defendant to show that such rate of speed at the point in question did not exceed that at which the train had usually been run at that place. If this should appear, we think that, under the facts of this case, the plaintiff would not be entitled to recover. Judgment reversed.

(97 Ga. 753)

**KENNEDY et al. v. HODGES.**

(Supreme Court of Georgia. Feb. 10, 1896.)

**REWARD TO PUBLIC OFFICER—VALIDITY.**

An agreement, between persons interested in a criminal prosecution, and a deputy sheriff of the county in which the prosecution is pending, for the payment to the latter of a pecuniary reward for furnishing sufficient evidence to convict the accused, is illegal, contrary to public policy, and void.

(Syllabus by the Court.)

Error from superior court, Tattnall county; E. H. Calloway, Judge.

Action by P. O. Hodges against D. M. Kennedy and others. Judgment for plaintiff. Defendants bring error. Reversed.

Lee & Giles, and Hines & Hale, for plaintiffs in error. Williams & Burkhalter, for defendant in error.

**SIMMONS.** C. J. Alfred Kennedy was murdered in the county of Tattnall, and Henry Futch, Sarah De Loach, and Mary Jane De Loach were charged with the crime, and were arrested and placed in jail. Certain relatives of Kennedy entered into a written contract with Hodges, the deputy sheriff of the county, as follows: "We, the undersigned, do contract as follows: P. O. Hodges agrees, in consideration of the sum of five hundred dollars to be paid for his services, to furnish sufficient evidence to convict the parties who murdered Alfred Kennedy, and to show up all parties connected with the said murder. In consideration of said services, we, the undersigned, do hereby agree, on our part, to pay said amount immediately after the trial and conviction of said murderers, and the bringing to light all parties connected with the same." Henry Futch and Sarah De Loach were convicted. Subsequently Hodges brought suit against the parties who had entered into this agreement with him, alleging that they had refused to pay the reward. A verdict was rendered in his favor, and the defendants made a motion for a new trial, which was overruled, and they excepted. One of the grounds of the motion was that the contract sued upon was void because contrary to public policy.

We think the court erred in not granting a new trial. A contract to pay a public officer for doing a duty which the law requires him to do without such payment, or to pay him a greater sum than that contemplated by law, is contrary to public policy and void; and still more so is any contract which is calculated to induce a dereliction or laxity in the

performance of his duty. See Greenh. Pub. Pol., pp. 306, 328, and cases cited. The plaintiff in the court below was an officer of the court in which the accused were to be tried. Among the duties appertaining to his office, in connection with the trial of criminal cases, were the summoning of witnesses, the selection of tales jurors, and the keeping of the jury in his charge, or under his supervision, during the trial, and until the rendition of the verdict. His interest in procuring a reward for the conviction of the accused would manifestly have a tendency to encourage dereliction of duty in these respects. Its tendency would be to render him less diligent in procuring the attendance of witnesses in behalf of the accused; to influence him to select as tales jurors persons having a bias or prejudice against the accused; to cause tampering with the jury while under his charge, etc. We think it is clear, therefore, that the contract in question was contrary to public policy, and void. Judgment reversed.

(97 Ga. 804)

**McLEAN v. CAMAK.**

(Supreme Court of Georgia. Feb. 29, 1896.)

**USURY—RETENTION OF COMMISSION—NOTICE TO LENDER.**

1. Although the maximum legal rate of interest was reserved upon a given loan, the mere fact that the lender's agent charged the borrower an additional sum as a commission for making the loan did not render the transaction usurious as to the lender, when he did not authorize such charge, had no knowledge of the same, and did not share in the commission.

2. In determining whether or not, as matter of fact, the lender had knowledge of the agreement between his agent and the borrower for the payment of such commission, the law of implied, as well as of express, notice may be invoked; but the agent's own knowledge of the fact that he did charge the commission, uncommunicated to his principal, is not imputable to the latter, the doctrine of constructive notice not being pertinent to the inquiry.

(Syllabus by the Court.)

Error from superior court, McDuffie county; E. H. Calloway, Judge.

Ejectment by Mary W. Camak against Martha A. McLean. From a judgment for plaintiff, defendant brings error. Affirmed.

Ira E. Farmer and P. B. Johnson, for plaintiff in error. John T. West, for defendant in error.

**LUMPKIN, J.** This was an action for land, in which the plaintiff below, Mrs. Camak, relied for a recovery upon a deed to herself from the defendant, Mrs. McLean. The latter set up as a defense that this deed was given to secure the payment of a promissory note, which was usurious, and that, therefore, the deed was void, because tainted with usury. The material facts, as shown by the evidence, are as follows: Mrs. Camak made a loan of money to Mrs. McLean, who thereupon executed and delivered the

note and deed in question. The transaction was not conducted by Mrs. Camak in person, but through Mr. Thomas E. Watson, her agent. The note bore interest at the rate of 8 per cent. per annum. The agent charged Mrs. McLean a commission for making the loan, which she paid to him out of the proceeds thereof. As to the scope and character of his agency, Mr. Watson testified: "I looked after her business in this county, and she requested me to make investments for her out of money collected from her father's estate. I am not sure whether I consulted Mrs. Camak about making this particular loan or not. \* \* \* Mrs. Camak did not receive any" of the commission charged for making the loan, "nor did I notify her that I charged a commission, and she had no notice of it, so far as I know. She did not pay me anything for making the loan, nor did she agree to pay anything. \* \* \* I had a good deal of money to collect for Mrs. Camak and her sister, Mrs. Du Bose, which was due them as heirs of Judge Wellborn, and I charged them for collections I made. I am not certain I had enough of Mrs. Camak's money to pay Mrs. McLean the full amount of loan at time it was made. If not, I soon collected it for her. I am not certain that I notified Mrs. Camak at the time that I had made this loan; but, if not, I informed her soon afterwards." In a letter introduced by the defense, addressed to Mrs. McLean, in regard to this loan, Mrs. Camak said: "Several years ago I asked Mr. Watson to make investments for me with the collections he made from my father's estate, and trusted him entirely to do so without any consultation with me. Consequently, I did not know he had made any business relations with you until some time afterward." And in a subsequent letter, she wrote: "You know you made the bargain with him, and it was a good while before I knew anything about it." The defendant introduced no evidence whatever tending to show that Mrs. Camak ever authorized her agent to receive commissions on loans negotiated in her behalf, or knew that it was his custom to charge commissions, or had ever shared in the same, or otherwise ratified the acts of her agent in thus transacting her business.

1. From the foregoing statement of facts it cannot be doubted that Mr. Watson was a general, and not a special, agent. As such, he had ample authority to bind the plaintiff by any act on his part which properly and legitimately appertained to a lawful transaction of the business intrusted to his care. It is proper to observe, however, that his authority as a general agent did not extend to making in her behalf contracts which the law expressly prohibited. Therefore, in the absence of some authority outside of and in addition to that conferred by the general agency, he had no power to make for her a contract tainted with usury. The transaction involved in this case was unquestiona-

bly of this character; so it becomes important to inquire whether the agent undertook to act under the general powers with which he was clothed in his capacity of general agent, or by virtue of even more comprehensive authority expressly conferred upon him by his principal. "The general rule is now well settled that commissions paid or agreed to be paid by the borrower to an agent of the lender for his services in procuring or advising the loan, and which, if added to the stipulated interest, would exceed the statutory limit, do not render the contract of the loan usurious, provided that such commissions are not in any manner shared in by the lender, and are not exorbitant or unreasonable in amount; or, if excessive, that they were exacted by the agent without the lender's knowledge or consent." 27 Am. & Eng. Enc. Law, p. 1004. In the present case it is to be observed that the note and deed are apparently perfectly valid, as they contain nothing to indicate that a higher rate of interest than 8 per cent. was charged. Only upon the theory that these two instruments do not set forth the real contract can the loan be attacked as usurious. The defendant contends that the contract actually entered into embraced the stipulation that the agent was to receive a commission, and that the whole of the principal sum which the agent purported to loan was not to be received by the borrower. If the agent was actually empowered or instructed to enter into such an arrangement, the contention of the defendant would unquestionably be sound. But if the lender in fact parted with the entire principal sum, and was not concerned in and received no benefit under the collateral agreement between the agent and the borrower whereby the former reserved to himself a commission, it would be a serious matter to declare inoperative and void the deed thus honestly and in good faith taken by the lender. If the lender had no knowledge of this collateral agreement, and received no part of the commission, but, when the agent, in effect, reported that he had made a loan of the entire principal sum at a legal rate, simply ratified this apparently legal contract, she would be both legally and equitably entitled to enforce the contract as written, for the borrower would be equally chargeable with the agent in concealing the true state of affairs, and placing the lender in this situation. It is a homely axiom that "it takes two to make a contract." Therefore, unless a borrower shows affirmatively that one who loaned him money at the highest legal rate assented to the exaction of a commission by the latter's agent, it cannot be said that the lender ever understood and agreed that the collateral agreement between his agent and the borrower should be considered and become a part of the contract of loan. The borrower has no right to assume that even a general agent has power to bind his principal by such an agreement; for, the same

being illegal, and prohibited by law, the borrower is put upon immediate notice that the agent is transcending his general powers and going beyond the legal scope of his agency. Only by showing that the agent was in fact authorized by his principal to reserve the commission can the borrower claim immunity because of an act by the agent which he is bound by law to know was illegal, and not binding upon the principal, unless previously authorized, or subsequently ratified, by the latter. It is not enough to show that the agent reserved a commission, instead of turning over the entire amount of the principal sum which he undertook to loan in behalf of his principal; for the lender, in the absence of information as to the true state of facts, would have the right to assume that his agent would prove faithful to his trust; and, though the agent be a general one, the lender would be under no duty of anticipating that he would make an illegal contract, and consequently, if the agent actually made such a contract without the knowledge or consent of his principal, the latter would not be bound by it. We do not mean to say the borrower must show that the lender expressly, in so many words, authorized his agent, before the transaction was consummated, to exact a commission. If the lender be shown to have had actual knowledge of the agent's intention to charge a commission, and, before accepting or ratifying the contract of loan, became aware of the fact that a commission had been reserved, the law would imply assent to the agent's acts from the principal's silent acquiescence. What we wish to be understood as holding is that, unless it be shown that the lender had knowledge of the illegal agreement between the borrower and the agent, the law will not imply any assent on the part of the lender thereto, but will treat him as authorizing and ratifying a loan on the terms communicated to him by the agent, and expressed in the instruments which the borrower has signed as setting forth the contract made by him with the agent. It certainly would seem that if, by executing and delivering these formal instruments, the borrower induced the lender to honestly part with his money in consideration of the undertakings on the part of the borrower therein set forth, the latter would be estopped from claiming that such was not the real contract assented to by the lender.

2. The court charged the jury in the present case. "If you find from the evidence that Mr. Watson was the agent of Mrs. Camak, and exacted a commission above eight per cent. for making the loan to Mrs. McLean, and Mrs. Camak had notice or knowledge of it, then the contract would be usurious; but, if Mrs. Camak did not have notice or knowledge of Watson's charging the commission, then, I charge you, it would not be usurious. In determining whether or not Mrs. Camak had notice of the fact that Mr. Watson charged commission for making this loan, the ju-

ry can look to all the facts and circumstances of the transaction." It is alleged that this charge was erroneous, because "it restricted the question of usury to actual notice to Mrs. Camak of the taking of a commission by her agent, and shut the jury off from considering any facts or circumstances whatever as sufficient to impute notice or knowledge to Mrs. Camak." The same question is also raised by an assignment of error upon the refusal of the court to give in charge the following written request: "If the agent of the lender exact a bonus or commission, and the lender, Mrs. Camak, had notice thereof, or if the facts were such as would impute notice to Mrs. Camak, then the contract would be usurious. As to what facts would impute notice, that is a question for the jury entirely. You are to decide this question, and find whether the facts in this case are such as would put a reasonable person on notice or inquiry, so as to impute notice." From the language in which this request was couched, and especially in view of the peculiar legal significance of some of the words employed, we understand that counsel attempted to invoke in the defendant's behalf the doctrine of constructive notice. This becomes the more apparent in view of the fact that counsel complains of the above-quoted charge on the ground that it restricted the jury to a consideration of "actual" notice, and in his written argument before this court insists that "notice to the agent is notice to the principal." If such was the purpose of the request, it was not very happily nor accurately worded. For instance, "as to what facts would impute notice" is not, as this request undertakes to lay down, "a question for the jury entirely," but, on the contrary, "constructive notice is a question of law," and a matter for determination by the court (18 Am. & Eng. Enc. Law, 972); that is to say, the law imputes notice upon a given state of facts; and it lies within the province of the jury simply to determine whether or not such facts exist, and not to say whether, as matter of law, they constitute constructive notice. But, even if this request correctly stated the law as to constructive notice, we think it was very properly refused, for the doctrine of constructive notice has no application whatever to the facts of this case. Otherwise it would be an entirely useless formality to inquire whether the plaintiff really had knowledge of the fact that her agent exacted a commission, for it is not disputed that he did, and under the doctrine of constructive notice his knowledge of the fact would be legal notice to her. We have already seen that the purpose of showing knowledge on the part of the principal in such a transaction is to prove that he at least tacitly assented to his agent's making a usurious loan. The principal is not chargeable with knowledge as to acts of his agent beyond the scope of the latter's authority, nor in any wise bound thereby; but the principal must

be shown to have either tacitly or expressly assented to or ratified such acts on the part of his agent, before they can be considered as having any binding effect. Of course, the principal cannot be said to have tacitly assented to anything as to which he knew nothing; and it follows that the doctrine of constructive notice has no application to a case where the sole inquiry is whether or not a principal actually had knowledge of, and ratified, acts of his agent outside of the general authority conferred upon him. If, however, counsel for the defendant intended to embody in his request the law as to implied notice, we still think the request was properly refused; for, although the question of implied notice was more or less involved in this case, it was sufficiently covered by the charge given, and there was no evidence upon which to predicate the request to charge. Certainly the plaintiff was not shown to have had knowledge of facts or circumstances which "would put a reasonable person on notice or inquiry" as to what occurred between Mr. Watson and Mrs. McLean with reference to the negotiation of this loan. The court expressly instructed the jury that "in determining whether or not Mrs. Camak had notice of the fact that Mr. Watson charged commission for making this loan the jury can look to all the facts and circumstances of the transaction"; and under the evidence submitted we think this instruction was certainly as favorable to the defendant as she had any right to expect, and it went quite as far as the court was warranted to go in charging upon this branch of the case. The court was right in restricting the jury to a consideration of actual notice. It was absolutely essential to the maintenance of the defense that the defendant should show the plaintiff had actual notice. Of course, this could be accomplished by proving either express or implied notice to Mrs. Camak. "Actual notice may be divided into express and implied. Express notice embraces not only what may fairly be called knowledge from the fact that it is derived from the highest evidence to be communicated by the human senses, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated. The implication of notice arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact." 16 Am. & Eng. Enc. Law, 790. In other words, it was incumbent upon the defendant to prove, either that the fact of the agent's exacting a commission was directly communicated to Mrs. Camak, or that she had actual knowledge of such other attending facts and circumstances as must of necessity have led her to a knowledge that such commission was exacted, if she had followed up the information she possessed, and endeavored to

ascertain the true state of affairs. The charge of the court left the jury entirely free to find that the plaintiff was chargeable either with express or with implied notice. We cannot say that their finding that she was chargeable with neither was erroneous under the facts presented for their consideration. The only circumstance which, in our opinion, could possibly count against the plaintiff, was that her agent testified, "She did not pay me anything for making the loan, nor did she agree to pay anything." This fact is capable of explanation, however, and is not inconsistent with the idea that it was not her purpose to require him to look to the borrower for compensation, or that she did not expect to pay him anything herself for his services in negotiating the loan. The evidence shows she placed her entire business in McDuffie county in his hands and gave him sole management thereof, intrusting him to make such investments in her behalf as he saw proper. She paid him for making collections for her, and it is not improbable she expected to pay him for his services in making investments for her as well. It appears he did not consult her about the advisability of making this particular loan, and she knew nothing of it until some time after it was made. It is certain she did not authorize him to make it only on condition that he would look to the borrower for payment for his services, and would charge her nothing. That he did not charge her anything, and that she never agreed to pay him for his services in this particular instance, is true; most probably for the reason that he considered himself sufficiently compensated by the commission he received from the borrower, and therefore never called upon Mrs. Camak for payment or rendered her a bill for his services. If the defendant chose to rely upon this naked circumstance, rather than bring out the whole truth by cross-examining the witness, we do not think she can now complain because the jury did not see proper to regard it as of sufficient importance to entitle her to a verdict. Judgment affirmed.

(98 Ga. 220)

**HOLT v. ANDERSON.**

(Supreme Court of Georgia. March 23, 1896.)

**ADMINISTRATORS—POSSESSION OF REALTY—WHEN NECESSARY—GIFT BY PARENT—PRESUMPTIONS—APPEAL—REVIEW.**

1. In order to entitle an administrator to maintain an action for the recovery of land of his intestate, held by an heir, and which has never been in the administrator's possession, the latter must show a necessity for him to have possession, either for the purpose of paying the debts, or making a proper distribution. Code, § 2486. Such a necessity is not shown merely by proving that the estate of the intestate is liable for the payment of funeral expenses, and not showing also that there was not a sufficiency of personal property for paying the same, or some good reason why the administrator should make a division of the land, or its proceeds, among the heirs.

2. It was error, on the trial of such an action, to charge the jury, without qualification, that if there was any debt of the intestate for funeral expenses, or anything else, no matter how small, then the administrator could recover, and to refuse to charge the law as announced in the preceding note.

3. The presumption of a gift may arise, under section 2604 of the Code, in favor of a child whose possession began during minority, if, at or before the time when the child went into possession, he had been manumitted by the parent. In case a parent and minor child reside together upon land, the possession during the child's minority is presumptively that of the parent; but this presumption may be overcome by clear and unequivocal proof showing that the parent had actually surrendered to the child the exclusive control of, and dominion over, the property.

4. The question whether or not the defendant below was entitled, under section 3189 of the Code, to hold the land under the alleged parol gift, on the ground that it was based upon a meritorious consideration, and that valuable improvements had been made upon the faith thereof, though referred to in the brief of counsel, is not, upon the present writ of error, open for consideration.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Ejectment by J. L. Anderson, administrator of one Navel, deceased, against Julia Holt. From a judgment for plaintiff, defendant brings error. Reversed.

A. Dasher and Estes & Jones, for plaintiff in error. R. V. Hardeman & Son, for defendant in error.

SIMMONS, C. J. It appears from the record that Michael Navel died in possession of a tract of land, leaving as his heirs his wife and his daughter Julia; and these two remained upon the premises until the death of the widow, on October 11, 1891. She left no debts, except burial expenses, which were paid by A. J. McKinney, her son by a former husband. Anderson was appointed administrator of Mrs. Navel, and McKinney called upon him for the repayment of the sum advanced by him for funeral expenses, whereupon the administrator brought ejectment against the defendant for an undivided half interest in the land. Under the charge of the court, the jury found for the plaintiff, and the defendant excepted.

1, 2. The Code declares (section 2486) that "the administrator may recover possession of any part of the estate from the heirs at law, or purchasers from them; but in order to recover lands, it is necessary for him to show upon the trial, either that the property sued for has been in his possession, and, without his consent, is now held by the defendant, or that it is necessary for him to have possession for the purpose of paying the debts or making a proper distribution. An order for sale or distribution, granted by the ordinary after notice to the defendant, shall be conclusive evidence of either fact." In this case it did not appear that the administrator had ever been in possession of the land, nor

did it appear that it was necessary for him to have possession for the purpose of paying debts, or making a proper distribution. It was not shown that any order for sale or distribution had been granted by the court of ordinary, and, for aught that appeared from the evidence, the decedent may have left a sufficiency of personal property to pay the claim for funeral expenses. Counsel for the defendant requested the court to charge the jury that it was incumbent upon the administrator, before he could recover land from an heir, to show upon the trial either that the property sued for had been in his possession, and, without his consent, was held by the defendant, or that it was necessary for him to have possession for the purpose of paying the debts, or making a proper distribution. The court refused to charge as requested, and instructed the jury as follows: "When it is shown that Mrs. Navel was the owner of this property, and if she died in possession of the property, and if there should be any debts of hers to be paid, for funeral expenses or anything else, no matter how small, when that is shown then the administrator is entitled to recover her half interest." This charge, and the refusal to charge as requested, are excepted to. We think the court erred in the charge here complained of, and in refusing to give in charge the instruction requested, which was substantially in the language of the section of the Code above quoted. Under that section, the administrator must show that "it is necessary for him to have possession" for one of the purposes mentioned, namely, for paying the debts, or making a proper distribution; and the mere existence of a small debt for funeral expenses does not, of itself, show such a necessity. If there is any money or other personal property left by the decedent, and it is sufficient to pay the debts, there is no necessity for the sale of the land for that purpose; and in such case, even if the land were in the possession of the administrator, he would not be authorized to sell for that purpose. Under the law of this state, the lands of an intestate go immediately to the heirs, and the personalty to the administrator for the payment of debts, if there be any; and he is not entitled to recover land from an heir, in order to sell it and apply the proceeds to the payment of debts, without showing that the personalty is insufficient for that purpose. In *Head v. Driver*, 79 Ga. 179, 3 S. E. 621, it was said by Bleckley, C. J., that "prior to the Code it was not absolutely settled whether or not an administrator could recover in ejectment against an heir at law without first obtaining an order of sale from the court of ordinary. *Carruthers v. Bailey*, 3 Ga. 111; *Jordan v. Pollock*, 14 Ga. 145; *Goodtitle v. Roe*, 20 Ga. 141. Under the Code it is the better practice, if not indispensable, in most cases, to obtain such order." The burden being upon the administrator to show this, and there being no order of the ordinary for the sale or distribution of the

land, and the evidence being wholly silent as to what personal property was left by the intestate, the error complained of is sufficient cause for a new trial.

3. The defendant inherited an undivided half interest in the land from her father, and claimed the other undivided half interest under a parol gift from her mother, which she alleged had been made to her more than seven years before the mother's death. She testified that during that period she had been in exclusive possession of the land, without payment of rent; and it was claimed that this, under section 2664 of the Code, created a conclusive presumption of a gift, and gave her a good title. During the period mentioned she was earning wages, paid the taxes on the land, and made improvements thereon. She was a minor, however, at the time the gift was claimed to have been made, and her mother continued to reside with her on the land; and seven years had not elapsed between the time of her arrival at majority and the time the suit was commenced. It was contended on the part of the plaintiff that the possession required to create a presumption of a gift from a parent to a child, under section 2664 of the Code, could not begin until the arrival of the child at majority, and the court instructed the jury in accordance with this view. In our opinion, the possession required to create a presumption of a gift, under this section of the Code, may begin during minority, if the child has been manumitted by the parent. Where a parent and child reside together on the land, the presumption is that the possession is that of the parent; but this presumption may be overcome by clear and unequivocal proof that the parent actually surrendered to the child the exclusive control of, and dominion over, the property.

4. Under the principle announced in section 3189 of the Code, a donee of land under a parol gift based upon a meritorious consideration, who, with the consent of the donor, enters into possession and makes valuable improvements upon the faith of the gift, acquires such a perfect equity as will enable him to successfully defend his possession against the donor or his heirs. *Floyd v. Floyd*, 97 Ga. —, 24 S. E. 451. This section of the Code is referred to in the brief of counsel for the plaintiff in error, but, so far as appears from the record, the question whether or not a good defense existed under this section was not considered in the court below. We therefore do not deal with the question upon the present writ of error. Judgment reversed.

(97 Ga. 560)

#### WESTERN & A. R. CO. v. BURKE.

(Supreme Court of Georgia. Dec. 2, 1895.)

COMPROMISE—RESCISSION—TENDER.

The evidence for the defendant company showing that the plaintiff had accepted and receipted for a given sum of money in full settlement of a claim for damages on account of

personal injuries received, and it appearing from the plaintiff's own testimony, when fairly construed in connection with the undisputed facts of the case, that at the time of the settlement the company owed him nothing for wages; that he had no lawful demand against it, of any kind, other than his above-indicated claim; and that the settlement was made for the purpose of satisfying this claim,—and it therefore being, in any just view of the evidence, indisputable that damages resulting from the personal injuries were the subject-matter to which the settlement related, he was not, under the principle laid down by this court in *Railway Co. v. Hayes*, 10 S. E. 350, 83 Ga. 558, entitled to recover, it not appearing that before bringing his action he had tendered to the defendant the money paid him, or had made any effort whatever to rescind the contract of settlement. This case differs from that of *Butler v. Railroad Co.*, 15 S. E. 668, 88 Ga. 594.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by E. L. Burke against the Western & Atlantic Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Payne & Tye, for plaintiff in error. Burton Smith, for defendant in error.

LUMPKIN, J. This was an action against the railroad company by Burke, an employé, for damages resulting from personal injuries, in which he obtained a verdict for \$715, "less one hundred and sixty-five dollars already paid." At the trial the defendant introduced a writing signed by Burke, whereby he acknowledged the receipt of \$165 in full settlement for the injuries inflicted upon him by the defendant. He sought to avoid the effect of this instrument by showing that he could neither read nor write, and that, in ignorance of the real contents of the paper, he signed it, supposing it to be a receipt for money paid him for "lost time." It appears from the plaintiff's own testimony, fairly construed in connection with the undisputed facts of the case, that at the time of this settlement the company owed him nothing for wages, and that he really had no demand against it, of any kind whatever, other than his claim for damages, in which, of course, his "lost time" would be an important element. It is indisputably clear that damages resulting from personal injuries were the subject-matter to which the settlement related. The verdict shows with absolute certainty that the jury so believed, or else they would not have deducted from what they regarded the proper amount of damages the "one hundred and sixty-five dollars already paid." Already paid on what? Why, on the claim for damages, of course; for, if it had been paid on any other just account or demand that the plaintiff may have had against the company, the jury would have allowed him to keep it, and would have made the company pay him the full amount due him on account of his injuries. If, in making this settlement, a fraud was practiced upon him, and he was

overreached, he might have cause to rescind, and still retain his right, upon rescission, to recover the full amount to which he was entitled. But under the principle laid down by this court in *Railway Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350, it would be essential that before commencing suit he should tender to the railroad company the sum he received, with a demand for the return of the receipt he had given. Nothing of this kind was done in the present case, nor does it appear that the plaintiff, before bringing his action, ever made any effort whatever to rescind the contract of settlement.

There is a very clear distinction between this case and that of *Butler v. Railroad Co.*, 88 Ga. 594, 15 S. E. 668. In the opinion therein, delivered by Chief Justice Bleckley, the doctrine which governs the present case, and which was recognized and applied in *Hayes' Case*, *supra*, is thus distinctly stated: "It is quite true that if the plaintiff had made any settlement or entered into any accord touching the injury complained of in his declaration, and now sought to open the same on the ground of fraud, he would have to tender back any money which had been paid to him in consequence or by way of execution of the settlement or accord." Page 598, 88 Ga., and page 668, 15 S. E. *Butler* contended that the money he received was for wages, and for nothing else, and that he was induced to believe the paper he signed was simply an ordinary pay roll acknowledging the receipt of money paid to him as wages actually due, independently of any claim for damages he might have against the company. Dealing with the case from his standpoint, this court very properly held that if the company entered into a settlement with him touching a matter unconnected with his claim for damages, and as to which they were in any event liable, but fraudulently procured him to sign a paper which purported to be a settlement of his claim for damages, no duty devolved upon him of tendering back the money he received, and which he was entitled to keep, as the fruits of the claim, which was really the subject-matter of the settlement. In the present case there is not a word in the plaintiff's evidence indicating that he held against the company any claim for wages owing to him for services already rendered, or by reason of any special contract as to his employment, whereby the company obligated itself to pay him his wages whether he worked or not. On the contrary, it appears that the company had paid him, prior to the settlement, all it owed him as wages for work actually performed; and certainly, in the absence of an express contract to that effect, the company was not bound, independently of its liability for inflicting personal injuries upon him, to pay him anything for "lost time." Therefore it cannot be seriously contended that the settlement had no reference to the plaintiff's claim for personal injuries inflicted upon him, but was in regard

to another and entirely distinct claim, which *Burke* held against the company, and which it, in any event, was bound to pay. Indeed, the verdict itself, as above shown, is conclusive against him on this very point. If the company did in fact perpetrate a fraud upon him, and he desires to set the settlement aside on that ground, he must in good faith attempt a rescission, by tendering back what he received under the settlement he now repudiates. The writing itself plainly shows to what contract the company gave its assent. The fact that the plaintiff was fraudulently induced to sign that contract may give him a right to set it aside. It can, in no event, afford him a basis for holding the company to a settlement which he was willing to make, but to which it did not in fact assent; and it certainly did not, if, as he insists, it fraudulently procured him to sign an altogether different contract. The minds of the parties never met, if the contention of the plaintiff be true. Courts have no power to make contracts for parties. To set aside a contract procured by fraud is as far as even a court of equity can go. We deem further comment unnecessary, for the reason that the opinion in the *Butler Case* so plainly shows the distinction between that case and the class of cases to which the present case belongs, we could not hope to more clearly state the points of difference. Judgment reversed.

(97 Ga. 755)

## BRANTLEY et al. v. WOOD et al.

(Supreme Court of Georgia. Feb. 10, 1896.)

## USURIOUS MORTGAGE—ENJOINING ENFORCEMENT.

The instrument involved in this case was a mortgage, and not a deed; and though, under the allegations of the petition, the mortgage was infected with usury, it was not thereby rendered absolutely void, and the exercise of the power of sale therein contained could not, upon that ground alone, be legally enjoined. The court therefore committed no error in requiring, as a condition precedent to the granting of an injunction, that the debtor should pay the principal and legal interest of the debt secured by such mortgage.

(Syllabus by the Court.)

Error from superior court, Johnson county; R. L. Gamble, Judge.

Action by T. J. Brantley & Bro. against J. S. Wood & Bro. and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

The following is the official report:

On January 15, 1892, T. J. Brantley & Bro., a firm composed of T. J. and J. F. Brantley, made to J. S. Wood & Bro. a mortgage on a large amount of realty and personalty, to secure the payment of a promissory note due October 15, 1892, as well as any further advances they might procure of Wood & Bro. before the maturity of said note, together with any interest, attorney's fees, and commissions arising therefrom. The mortgage

contained a waiver of homestead, and a power, at the option of the mortgagees, to take possession of the property, and sell all or any of it at public or private sale, upon 10 days' notice, and to pass good and sufficient titles to the same. On March 16, 1894, in renewal of the indebtedness secured by the mortgage, the mortgagors executed to A. F. Daley, as trustee, an instrument, in brief, as follows: "The parties of the first part are indebted to J. S. Wood & Brother, upon a promissory note of even date with this instrument, for \$3,350, due on October 15, 1894,—said note stipulating for the payment of all cost of collection, including ten per cent. attorney's fees, and containing a waiver of homestead, etc.; also, upon a cotton contract, or contract to ship cotton to Wood & Brother by maturity of said note, in the ratio of one bale to every \$10 in the amount of said note and contract, with liquidated damages agreed upon at \$1.50 per bale for failure so to ship. For the purpose of securing the payment of said indebtedness, with accruing interest, whether represented as above, or by any renewal thereof, at the option of said party of the second part, and the performance of said cotton contract and the covenants hereinafter set out, the parties of the first part do grant, bargain, sell, alien, remise, release, convey, and confirm unto the party of the second part and his successors in trust [certain land and personalty, describing the same]; and for better description of the property they refer to the mortgage before mentioned, which mortgage, and every part thereof, remains unpaid, and which is not intended to be canceled by this deed, but shall stand of full force and effect until fully paid off and discharged; the above-described note being for a renewal of the principal and interest in said mortgage, for the cost of drawing this paper, and for a small open account. The above-described property, together with all improvements, etc., and all right, title, interest, claim, and demand to the same, to have and to hold to said party of the second part and his successors in the trust forever, upon the following trusts, and not otherwise: (1) To permit the parties of the first part to use, occupy, and enjoy the property so long as the covenants herein set out are observed by them, until default is made in the payment of any of said indebtedness, whether of principal or interest, or in the performance of the cotton contract; and, upon full payment of said indebtedness and performance of said contract at any time before the sale hereinafter provided for, to release and reconvey the property. The parties of the first part shall pay all charges, cost, taxes, insurance, or other legal burdens by which, in any way, the above indebtedness may be defeated, or its collection impaired, or whether this may happen or not; and, if the parties of the first part shall fail to pay any of the charges, the trustee may put out said charges and insurance, and the same, after being paid, shall become a part of the

indebtedness hereby secured, and bear interest at 8 per cent., in the same manner as any other interest hereby secured; and when any of said charges become due, or are paid by the trustee, the whole of the indebtedness hereby secured shall then become due and payable, and the trustee may proceed, by any of the remedies allowable hereunder, for the full amount of said indebtedness, principal and interest, whether the same be otherwise due or not, and may likewise proceed as to the liquidated damages. (2) Upon default being made upon the principal or interest or damages due, or upon failure to observe the covenants herein set out, and upon the trustee giving ten days' notice to the parties of the first part, with such default continuing, to sell said property at public outcry at the courthouse door, after advertisement once a week for four weeks, and to convey the property in fee simple to the purchaser, who shall not be required to look to the application of the purchase money. This remedy is cumulative of all other remedies allowed by law for the enforcement of said indebtedness and its collection; and the trustee is empowered to use all legal remedies for that purpose, and to employ an attorney or attorneys at the cost and expense of the parties of the first part; and the expense of sale may include an auctioneer. (3) To pay all proper cost and charges incident to the sale, and to any proceeding under this deed, and all taxes, assessments, and insurance due on the property, including a reasonable attorney's fee, not exceeding ten per cent. of the amount due, for any legal services required by the trustee; also, to retain, as compensation for making the sale, or instituting legal proceedings, or collecting said debt, in case the same is required to be settled or compromised after maturity, ten per cent. of the amount of principal or interest due at the time of sale, or of settlement or compromise; also, to apply the net balance then remaining to the satisfaction of said indebtedness, whether due or not; and lastly, to pay any balance remaining to the parties of the first part. Upon the death, resignation, or disqualification of the trustee, J. S. Wood & Brother have power to appoint another trustee, who shall be invested with all the powers given to the trustee hereunder; the power to remove any trustee being irrevocably vested in Wood & Brother." Then follows a covenant that the parties of the first part are the true and lawful owners, etc., and a warranty of title as against all claims except the before-named mortgage in favor of Wood & Bro. Default having been made in the payment of the indebtedness, Daley, as trustee, advertised the property for sale on the first Tuesday in August, 1895; and Brantley & Bro. brought their petition for injunction, and for cancellation of the trust deed as void for usury. The material allegations of the petition were denied in the answer of the defendants, who also filed a demurrer on the grounds that petitioners had no

right to the relief prayed for, and that they had failed to pay or tender the principal and legal interest due. Upon the hearing the court ordered that upon payment by plaintiffs of the principal sum due, with lawful interest, to wit, \$2,613.76, within 80 days, the sale be enjoined; otherwise, that the injunction be refused, and that plaintiffs and their agents be enjoined, as prayed by defendants, from cutting and selling timber from the mortgaged premises. To this judgment plaintiffs excepted. The pleadings contain numerous allegations, but the substantial contentions of the plaintiffs are that the contract for liquidated damages for failure to ship cotton is a device to evade the usury laws, and renders the conveyance usurious per se; that this conveyance is void for usury, being a conveyance of title, and not a mere mortgage; and that if the same be construed as a mortgage the homestead waiver therein is void on account of said usury, and a sale thereunder would defeat plaintiffs' right to a homestead in the property.

Wm. Faircloth, Vernon B. Robinson, Evans & Evans, and Felder & Davis, for plaintiffs in error. A. F. Daley, for defendants in error.

**LUMPKIN, J.** The nature of the instrument involved in this case will appear from the abstract of its contents set forth in the official report. After a careful examination and consideration of all its provisions, we hold that this instrument was a mortgage, and not a deed; and therefore, even if it was infected with usury, it was not absolutely void, and an exercise of the power of sale contained in it could not, upon that ground alone, be lawfully enjoined. We do not now decide whether the plaintiffs were, or were not, entitled to an injunction, under the evidence submitted. But, assuming that they were, the court very properly required, as a condition precedent to the granting of this relief, that they should first pay the principal and interest legally due on the debt secured by the mortgage. This requirement rests upon the time-honored maxim that "he who seeks equity must do equity." Upon this point the case of *Whitley v. Barker*, 79 Ga. 790, 4 S. E. 387, is controlling; and there would be no difficulty in supporting the doctrine there laid down by citing additional decisions made by this and other courts to the same effect, if its correctness was a matter of serious question. Judgment affirmed.

(88 Ga. 468)

**NORTON v. PARAGON OIL-CAN CO.**

(Supreme Court of Georgia. May 19, 1896.)

**PARTNERSHIP DEBT—PAYMENT BY NOTE—ACCEPTANCE BY CREDITOR.**

1. Where a partnership composed of two persons was indebted upon an open account, and on the day the partnership was dissolved one of the partners, with the knowledge and consent

of the other, mailed his individual promissory note to the creditor for the purpose of settling the account, this, of itself, was not a payment of the account, unless the note was accepted as such by the creditor.

2. A mere statement by the creditor, in a letter acknowledging receipt of the note, to the effect that, if the same should be paid at or before its maturity, it would be accepted in payment of the account, and his retention of the note until after its maturity, he being ignorant of the dissolution of the partnership, would not extinguish the account. Nor would its extinguishment result from the fact that the creditor, before the maturity of the note, discounted or otherwise used it; the note having been dishonored, and the creditor having been compelled, after protest, to again take it up.

3. Under the law and the facts of this case, both the defendants were liable to the plaintiff; and, the verdict being against one only of them, the court did not err in granting the plaintiff a second new trial.

(Syllabus by the Court.)

Error from city court of Floyd county.

Action by the Paragon Oil-Can Company against Howell & Norton. Verdict against Howell. From an order granting a new trial, defendant Norton brings error. Affirmed.

Fouche & Fouche, for plaintiff in error.  
Rowell & Rowell, for defendant in error.

**LUMPKIN, J.** The Paragon Oil-Can Company brought suit upon an open account against Howell & Norton, a partnership, alleging in its declaration that Howell, one of the partners, "in furtherance of said partnership indebtedness," had given to plaintiff a promissory note, which had never been paid; that this note was taken from Howell before any dissolution of the partnership, or notice thereof to plaintiff, and was taken and accepted with the distinct understanding and agreement at the time between plaintiff and the defendants that it was not to be in any way a release of the partnership liability, "only so far as and until said note should be paid." Norton, by his plea, denied that there was any such understanding as to the note, and alleged that the same was accepted in full settlement of the partnership indebtedness to the plaintiff. There was a verdict against Howell alone, and, the plaintiff's motion for a new trial having been granted, Norton excepted.

It appears from the evidence that, on the day the partnership was dissolved, Howell mailed his individual promissory note to the oil-can company, and, in a letter accompanying the same, asked that it accept the note in settlement of its bill against the partnership, promising in the letter that the note would be promptly met at or before its maturity. In reply the oil-can company stated, in effect, that it would accept the note as a settlement of the account, if it was paid before due, or when it became due. Other correspondence ensued between the parties, from which it can be gathered that the oil-can company had no intention of relinquishing its demand against the partnership of Howell & Norton, or of ever accepting the

note above mentioned as cash. It also appears that the company, being ignorant of the fact that the partnership had dissolved, retained the note until after its maturity, had discounted or otherwise used it in bank before it became due, and upon its dishonor had been compelled to again take it up.

1. The general rule is that "bank checks and promissory notes are not payment until themselves paid." Code, § 2887. Whether or not the receipt of a promissory note amounts to the payment of a pre-existing indebtedness depends upon the intention of the parties. "A bill, acceptance, or note of the debtor or a third person is not an extinguishment of the original demand, unless there is an express agreement to receive it as payment." *Cotton-Gin Co. v. Black*, 71 Ga. 450, 456, citing *Weaver v. Nixon*, 69 Ga. 699. Of course, if it affirmatively appears that in accepting a promissory note there was no intention of taking it as a payment of a pre-existing account, it cannot be said that the account was paid. See, also, *Pritchard v. Smith*, 77 Ga. 463. In *Stone v. Chamberlain*, 20 Ga. 262, it appeared that a note given by one of the partners in settlement of a debt due by the firm was executed after dissolution, which fact was known to the plaintiff, and that all of this was done without the knowledge or consent of the other partner. The court, while recognizing the general rule as laid down in the present case, were of the opinion that under the circumstances there shown the partner last referred to was exonerated. In *Chamberlain v. Stone*, 24 Ga. 310, it was again held that where the holders of a promissory note executed by a partnership renewed it with one of the partners after a dissolution of the partnership, and extended the day of payment without the knowledge of the other partner, the latter was discharged. Some stress is laid upon the circumstance that the renewal was after dissolution, and that one of the partners was kept in ignorance of the transaction. See, also, *Louderback v. Lilly*, 75 Ga. 855. In the present case the note was given on the day of the dissolution, and apparently with the knowledge and consent of Norton. In *Mosley v. Floyd*, 31 Ga. 564,—the facts of which are somewhat complicated,—it seems that the note in question was really accepted as a payment, the intention to thus accept it being manifested by a receipt in which the note was treated as cash. In *Tyner v. Stoops*, 11 Ind. 22, it was held that an individual note of one partner, given to a firm creditor, and payable at maturity of the firm debt, was merely a promise by the maker to pay the debt of the partnership, and that the creditor was not barred from suing the partnership because of his laches in not collecting the note before the maker's insolvency. The decision was rested upon the doctrine that the mere taking of the promissory note from one of several joint debtors was not a discharge of the

debt, unless such was the express agreement.

2. Neither the retention of the note until after its maturity, nor discounting it or otherwise using it in bank, resulted in an extinguishment of the original account; it appearing that after the note was dishonored the oil-can company again took it up, and had it in their possession before bringing the present action. A note will not be a payment or a discharge of the original debt, though the holder discount it, if he afterwards has to pay it. 2 Pars. Notes & B. 155, 156. "If a note be taken by a creditor, who indorses the note, and gets it discounted at bank for the benefit of the drawer, and afterwards has to take it up again after protest, this is not such a parting with the note as makes it an extinguishment of the precedent debt." *Kean v. Dufresne*, 3 Serg. & R. 233. And see *Burden v. Halton*, 4 Bing. 454.

3. We think, under the undisputed facts of the present case, both of the defendants were liable to the plaintiff; and, as the verdict discharged one of them, the plaintiff was entitled to another trial, notwithstanding the fact that a previous new trial had been granted to it. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 380)

NATIONAL BANK OF ATHENS v. BURT.  
(Supreme Court of Georgia. April 27, 1896.)

ACTION ON NOTE—PLEADING PAYMENT—EVIDENCE—AUTHORITY OF AGENT.

1. The action being upon a promissory note, a plea alleging payment to an agent of the plaintiff "authorized to receive payment of said note" was not incomplete because it did not aver that the alleged agent had the note in his hands at the time it was paid.

2. The evidence offered in support of the defendant's plea was properly admitted.

3. There being evidence sufficient to warrant the jury in finding that the alleged agent had express authority from the plaintiff to collect the note sued upon, and also that the latter had ratified partial collections thereon made by the former, the court did not err in giving in charge to the jury section 2178 of the Code.

4. The record discloses no cause for granting a new trial in this case.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; Seaborn Reese, Judge.

Action by National Bank of Athens against M. F. Burt. Judgment for defendant, and plaintiff brings error. Affirmed.

H. McWhorter, for plaintiff in error. W. M. Howard and Anderson, Felder & Davis, for defendant in error.

LUMPKIN, J. Burt executed and delivered a promissory note to Reaves, payable to the order of the latter, at the office of the Reaves Warehouse Company. This note, before its maturity, was duly assigned to the

National Bank of Athens, which brought suit upon the same against Burt, as maker, and Reaves, as indorser. Burt's defense was that he had paid the note to the Reaves Warehouse Company, and that it, as the agent of the plaintiff, was "authorized to receive payment of said note." The plain meaning of this language is that the warehouse company had express authority from the bank to collect this identical note; and, this being so, it was not essential that the defendant's plea should allege that the note was actually in the hands of the agent at the time of its payment. We therefore hold that the plea was good without this allegation, and it follows, of course, that evidence in support of it was properly received.

Complaint is made that the court gave in charge to the jury section 2178 of the Code. There certainly was no error in so doing, it appearing from the record that the defendant introduced evidence strongly tending to show that the warehouse company had express authority from the bank to collect from Burt the note sued on, and also that the bank had ratified partial collections upon the note made by the warehouse company before it was finally settled. The case was one in which the question of agency, both express and implied, was directly involved, and therefore the provisions of the above-mentioned section of the Code, which deals with this subject, were strictly applicable.

The jury were warranted in finding that the plea of the defendant was sustained by the facts of the transaction, and we find no cause for disturbing the judgment of the court below, refusing to grant a new trial. Judgment affirmed.

(98 Ga. 393)

**BERRY v. BERRY.**

(Supreme Court of Georgia. May 4, 1896.)

**DIVORCE—ALIMONY—ACTION PENDING.**

Where an application for temporary alimony, based upon a suit for permanent alimony, was made by a wife against her husband, and allowed, and afterwards the husband brought an action for a divorce against her, and she thereupon made another application for temporary alimony, based upon the fact that the action for divorce was pending, it was her right, at the hearing of this second application, to dismiss the original suit for permanent alimony; and the effect of this was to do away with the first order granting temporary alimony, and to leave the second application therefor open for a hearing upon its merits.

(Syllabus by the Court.)

Error from superior court, Hancock county; John C. Hart, Judge.

Action by Wm. M. Berry against Julia F. Berry for divorce. From an order granting temporary alimony, plaintiff brings error. Affirmed.

Lewis & Moore, for plaintiff in error. Frank L. Little and Harrison & Peebles, for defendant in error.

**SIMMONS, C. J.** Pending her application for permanent alimony, Mrs. Berry applied for temporary alimony. Upon the hearing of her application for permanent alimony, the jury rendered a verdict against her, which was set aside upon a motion for a new trial. Her husband then filed a suit for divorce, and she thereupon made a new application for temporary alimony. The husband filed a plea to the effect that she had made former application, and had obtained a judgment of the court for temporary alimony, which was still of force; that her suit for permanent alimony was still pending; and that she, therefore, did not have a right to make a new application. She then dismissed, by permission of the court, her application for permanent alimony, over the objection of her husband. The court then heard the application for temporary alimony, and awarded it, and the husband excepted.

There was no error in allowing her to dismiss the petition for permanent alimony. Any suitor has a right to dismiss his action at any time unless the defendant, in his plea or answer, has pleaded set-off, or prayed for affirmative relief. Code, §§ 8447, 4190. No affirmative relief was sought against the wife in the proceeding instituted by her to obtain permanent alimony. She therefore had the right to dismiss it, and when it was dismissed the application for temporary alimony, which was simply an adjunct to that proceeding, went with it, and the judgment granting the temporary alimony ceased to be of force. And, as the law gave her the right to temporary alimony pending the suit for divorce, the judge did not err in granting her temporary alimony and counsel fees upon her new application. Judgment affirmed.

(98 Ga. 396)

**ATHENS LEATHER MANUF'G CO. v. MYERS et al.**

(Supreme Court of Georgia. May 4, 1896.)

**SETTING ASIDE DEFAULT—GROSS NEGLIGENCE.**

Where, on account of the gross negligence of the defendant or his counsel, no defense was made to an action, and, the same being in default, a judgment was duly rendered in the plaintiff's favor, it was not error to overrule the defendant's motion, though made during the term at which the judgment was entered, to set the same aside and reinstate the case.

(Syllabus by the Court.)

Error from city court of Athens; Howell Cobb, Judge.

Action by M. Myers & Co. against the Athens Leather Manufacturing Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

W. I. Heyward and John J. Strickland, for plaintiff in error. Shackelford & Shackelford and Thos. F. Green, for defendants in error.

**LUMPKIN, J.** This was an action by Myers & Co. against the Athens Leather Manufacturing Company in the city court of

Athens. At the trial term the case was in default, and a judgment was duly rendered in the plaintiffs' favor. During the same term a motion was made to set the judgment aside and reinstate the case.

It appears that the failure to make a defense at the proper time was due to the gross negligence either of the defendant company or its counsel, and therefore the court certainly did not err in refusing to reopen the case, even though the defendant's showing for a reinstatement contained allegations which, if found true, would have constituted a good defense to the plaintiffs' action. In any view of it, the question of setting aside the plaintiffs' judgment was a matter resting in the sound discretion of the trial judge, and we certainly could not, in the face of the fact that the defendant lost a hearing solely because of its own negligence or that of its counsel, hold that the trial judge abused his discretion in denying the defendant another opportunity to set up its defense. Judgment affirmed.

(98 Ga. 428)

**LEWIS et al. v. HOWELL.**

(Supreme Court of Georgia. May 11, 1896.)

**PAYMENT BY WIFE OF HUSBAND'S DEBT.**

Where a married woman borrowed money from a creditor of her husband, the loan being made on condition that she would "take up" a promissory note due to the creditor by the husband, who was at the time insolvent, and where she accordingly gave to the lender her own promissory note for an amount including the cash advanced to her and the amount of the husband's note, which was delivered to her, but no part of which was ever paid, and where she paid upon her own note a sum exceeding the principal and lawful interest of the loan to herself, it was her right to sue for and recover the excess of her own debt from the legal representatives of the estate of the deceased lender.

(Syllabus by the Court.)

Error from superior court, Milton county; George F. Gober, Judge.

Action by Nora Howell against Thomas L. Lewis and others, administrators. Judgment for plaintiff. Defendants bring error. Affirmed.

H. P. Bell and T. L. Lewis, for plaintiffs in error. Enoch Faw and B. F. Simpson, for defendant in error.

**SIMMONS, C. J.** The evidence in this case shows clearly that the note given by Mrs. Howell to Autrey was in part for a debt of her husband. The transaction was not a purchase by her of the husband's note. She obtained from Autrey \$350, and gave him her note for \$572; the difference between these two amounts being the amount due by her husband upon his note to Autrey, \$165, with interest thereon from the date of her note to the date of its maturity at 12½ per cent. per annum. Her husband was insolvent, and his note was worthless. The law positively forbids any assumption by a wife of the debts of

her husband (Code, §§ 1754, 1783, 5087); and if a creditor of the husband receives in payment of his debt money of the wife, knowing it to be hers, the wife can recover of the creditor the amount so paid. *Humphrey v. Copeland*, 54 Ga. 543; *Chappell v. Boyd*, 61 Ga. 662; *Maddox v. Oxford*, 70 Ga. 179. It appears in the present case that the wife paid upon her note a sum \$132 in excess of her own debt, the amount of the verdict in her favor. The evidence warranted the verdict, and the court did not err in refusing a new trial upon the grounds taken in the motion. Judgment affirmed.

(98 Ga. 458)

**ARMOUR et al. v. EAST ROME TOWN CO.**  
(Supreme Court of Georgia. May 19, 1896.)

**RULINGS ON EVIDENCE—RECORD ON APPEAL—NONSUIT—PLEDGE OF CORPORATE STOCK—DIVIDENDS.**

1. This court cannot determine whether or not it is cause for a new trial that the presiding judge refused to allow an attorney at law to testify as to matters, his knowledge of which was alleged to have been derived from his professional relations to the parties concerned, when it does not appear what facts the attorney was offered as a witness to prove.

2. Under the rules of law laid down in the case of *Guarantee Co. of North America v. East Rome Town Co.*, 98 Ga. 511, 23 S. E. 503, and in view of the evidence disclosed by the record, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Floyd county; T. W. Milner, Judge.

Action by Armour & Co. against East Rome Town Company. Judgment of nonsuit, and plaintiffs bring error. Reversed.

Reece & Denny and T. W. Alexander, for plaintiffs in error. Fouché & Fouché, for defendant in error.

**LUMPKIN, J.** It is unnecessary to elaborate the question of practice to which the first headnote relates. It speaks for itself. In the absence of information as to what facts were sought to be proved by the attorney at law who was offered as a witness, it is impossible for us to determine as to his competency, or to intelligently decide whether or not the ruling of the court holding him to be incompetent affords any cause for a new trial.

2. Upon its merits, this case is controlled by that of *Guarantee Co. of North America v. East Rome Town Co.*, 98 Ga. 511, 23 S. E. 503. For this reason, we will not attempt to discuss it in detail. The transactions involved are part and parcel of those which constituted the subject-matter of controversy in the case just cited. In all essential respects, the facts of both cases are substantially the same. We held in the former case that the verdict in favor of the East Rome Town Company was not supported by the evidence. For similar reasons, we hold now that it was error in the present case to grant a nonsuit. Judgment reversed.

(98 Ga. 477)

**LATHAM v. LATHAM et al.**

(Supreme Court of Georgia. May 23, 1896.)

**HUSBAND AND WIFE—INVESTMENT OF WIFE'S MONEY—RIGHTS OF PURCHASER.**

Where a husband invested his wife's money in land, taking a deed to the same in his own name, she had a perfect equity in the land, and was not estopped from setting up the same against one who, with full knowledge of the facts, took from the husband a conveyance of the property, although the conveyance was made for the purpose of indemnifying the grantee therein against loss by reason of his having become a surety for the husband and wife upon their joint promissory notes to another person, it not appearing that such conveyance was executed for the purpose stated with the wife's consent.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by Ora A. Latham and husband against R. D. Latham. Judgment for plaintiffs. Defendant brings error. Affirmed.

McBride & Craven, Edgar Latham, and Price Edwards, for plaintiff in error. W. S. Brown and E. S. Griffith, for defendants in error.

**LUMPKIN, J.** There is no longer any room for doubt in this state that the investment by a husband of his wife's money in land to which he takes title in his own name gives her a perfect equity in the property, and that she is not estopped from setting up this equity against a vendee of the husband, who took from the latter a conveyance of the property with full knowledge that it had been bought and paid for with the wife's money. The case at bar presents a somewhat different, though not very difficult, question. It appears that the plaintiff and her husband borrowed money from a third person, for which they executed their joint and several promissory note, a brother of the husband signing the same as surety. According to the facts as found by the jury, the husband, prior to the giving of this note, had used his wife's money in the purchase of certain land, taking the title thereto to himself. In order to indemnify his brother by reason of the latter's suretyship upon the above-mentioned note, the husband executed to him a deed to the land so purchased, the grantee accepting the deed with knowledge of the fact that the land therein described had been paid for with the wife's money. The case—it being a petition for the wife for the cancellation of this latter deed—was submitted to the jury upon special questions; and, although the petition distinctly alleges that the deed from the husband to his brother was made without plaintiff's consent, there was no finding by the jury as to this particular matter. The answer, however, joined no issue with her upon this question; the husband averring that he bought and paid for the land with his own money, and the brother alleging that he took the deed in good faith, and without any notice or knowledge

of the wife's equity. The case, therefore, stands as if the deed was taken without the wife's consent, and the naked question presented is: Can a husband, without his wife's consent, convey land thus belonging to her to a third person, even for the purpose of securing her own debt, or indemnifying one who stands surety for her, when such person has knowledge as to the true ownership of the land? We think not. If the legal title had been in the wife, it could not be pretended that any conveyance by the husband—no matter for what purpose executed—would pass the title out of her; and certainly he has no more authority to attempt to dispose of her perfect equity in the land, without her express consent, by a conveyance of the legal title held in his name to one fully informed as to the wife's equity. The act of the husband in conveying would be as nugatory in the one instance as in the other, so far as she was concerned. Judgment affirmed.

**ATKINSON, J.**, providentially absent, and not presiding.

(98 Ga. 405)

**McMILLAN v. ALLEN.**

(Supreme Court of Georgia. May 11, 1896.)

**ARBITRATION—DELIVERY AND NOTICE OF AWARD—COURTS—JURISDICTION TO RENDER JUDGMENT ON AWARD—SETTING ASIDE AWARD—INCOMPETENCY OF UMPIRE.**

1. Where a controversy not pending in any court is by the parties thereto referred to arbitration,—it being stipulated in the submission that the two arbitrators chosen by the respective parties should, in conjunction with an umpire to be selected by them, determine the matters submitted, and return their award to the superior court of a given county, of which court the award so returned should be made the judgment,—and where it appeared that the party against whom the award was rendered was not served with notice of its rendition, but it was nevertheless, at the first term, without exception thereto, made the judgment of such court, and thereafter the court set aside this judgment, reopening it for the purpose of hearing and determining the sufficiency of exceptions filed by the person dissatisfied with the award, inasmuch as that court did, this court, in dealing with such exceptions, will treat them as having been filed in due time; and, the party excepting having been fully heard upon the exceptions filed by her, the omission to give her notice of the rendition of the award was immaterial.

2. In case of such a submission, the agreement of the parties will control as to the court to which the award shall be returned; and if in fact the losing party do not reside in the county to the superior court of which it is, under the agreement, made returnable, such party will be held to admit a residence in such county, in so far as may be necessary to uphold, as between the parties themselves, the jurisdiction of such court to make such award its judgment.

3. Exceptions to an award, upon the ground that the umpire chosen under such a submission was incompetent "because his hearing was very bad and defective, and in all probability he did not hear the evidence so clearly and distinctly as to fully understand it," and upon the further ground that "said umpire was brought

to the place of arbitration as a witness for the [adverse party], which was unknown to the" exceptor or her counsel, are each without merit,—the former, because it does not present a matter issuable either in law or fact; the latter, because it does not allege either bias or unfairness in the person selected as an umpire.

4. An exception to an award upon the ground that it was delivered to the court by a person other than one of the arbitrators was without merit; it appearing that the return of the arbitrators was regular, and it not appearing that, in the physical act of transmission, anything occurred which would cast suspicion upon the paper actually received by the court.

5. The mere fact that an arbitration was held and the award rendered in one county does not prevent the award from being made the judgment of the court in another county, when the parties, in the submission, so agree.

6. In the present case the exception that the award was contrary to law and contrary to evidence is without merit.

(Syllabus by the Court.)

Error from superior court, White county; M. G. Boyd, Judge pro hac.

Exceptions filed by A. C. McMillan to an award against her in favor of A. B. Allen were dismissed, and exceptant brings error. Affirmed.

The following is the official report:

In White county an agreement was entered into between Mrs. A. C. McMillan and A. B. Allen for the submission to arbitration of a dispute between them as to the location of a land line in that county. This agreement recites that for the purpose of settling all disputes as to the true line, and to avoid lawsuits and expenses, it is mutually agreed to submit all the matters in question "to the arbitrament and award of M. T. Perkins, chosen by Adaline C. McMillan, and Green B. Holcombe, chosen by said Allen, and an umpire chosen by said arbitrators," and that the award, when made by said arbitrators, shall be returned to the next April term of White superior court, and then and there be made the judgment of said court. The two arbitrators named chose Fred. Dover as third person, and the three took an oath to "well and truly arbitrate the within matter submitted to us, and a true award make, according to the law and evidence submitted to us, without favor or affection to either party." They made an award in favor of Allen, and the same was at the April term, 1892, of White superior court, on motion of Allen's attorney, made the judgment of the court, and the proceedings ordered to be entered on the minutes. Exceptions to the award, in behalf of Mrs. McMillan, were filed, on the following grounds: (1, 2) The award is contrary to law and evidence; (3) Dover, chosen as umpire by the arbitrators, was incompetent to discharge his duties and do justice in the case, because his hearing was very bad and imperfect, and in all probability he did not hear the evidence so clearly and distinctly as to fully understand it; (4) said umpire was brought to the place of arbitration as a witness for Allen, which was unknown to Mrs. McMillan, her agent or attor-

ney, or to the other arbitrators; (5) the award was not returned to court by any of the arbitrators, but was given to Elbert Allen, who brought it to court; (6) the arbitration was had in Habersham county, and the award rendered in that county; (7) Mrs. McMillan being a resident of Habersham county, the award should have been returned to the superior court of that county; (8) the superior court of White county has no jurisdiction to make the award its judgment; (9) the arbitrators failed to serve Mrs. McMillan with a copy of the award. At the October term, 1893, on motion of counsel for Mrs. McMillan, a rule was granted that the attorney for Allen show cause why the judgment making the award the judgment of the court should not be set aside on the following grounds: (1) The trial was had and the award rendered in Habersham county; (2) Mrs. McMillan had no notice of the return of the award, and of its being made the judgment of the court, said court not being the proper court to which the award should have been returned; (3) the award having been rendered in Habersham county, where Mrs. McMillan resided, it should have been returned to Habersham superior court. For answer the respondent in the rule showed: (1) The parties agreed, in writing, at the time of the trial which resulted in the award, that it should be entered on the minutes of White superior court, and made its judgment; (2) no objection was made to the award at the first term at which it was made the judgment of the court; (3) the award was made, returned, and made the judgment of the court, according to law and agreement. On hearing the rule the court ordered that the judgment theretofore rendered be vacated, and that Mrs. McMillan be heard on her exceptions to the award. To this order Allen excepted *pendente lite*. On demurrer to the exceptions to the award, the court ruled that they were insufficient in law, and dismissed them. Thereupon counsel for Mrs. McMillan moved that the award and its entry on the minutes be vacated, and the motion was overruled. To both of these rulings she excepted. The grounds of the motion last mentioned are (1) that the award was not on the submission of any suit or controversy pending in court; (2) that it was not on a submission to three arbitrators; (3) that no copy of the award was served on Mrs. McMillan by either of the arbitrators or the umpire before the award was entered on the minutes; (4) that the award should not be entered on the minutes of White superior court, because the arbitration was had and the award made in Habersham county, where Mrs. McMillan resided at the time of the arbitration and award, and at the time of the filing and entry on the minutes.

W. T. Oran, H. H. Perry, and J. J. Bowden, for plaintiff in error. J. W. H. Underwood and H. H. Dean, for defendant in error.

ATKINSON, J. 1. The official report states the facts. The object designed to be accomplished by section 4242 of the Code, in requiring that copies of awards shall be furnished to each of the parties by the arbitrators, is to enable the parties, if for any reason dissatisfied with the award, to move promptly in the matter of attacking it and causing it to be set aside. In the present case, although it is alleged as one of the grounds of exception to the award that the losing party was not served with a copy by the board of arbitrators, yet inasmuch as exceptions were filed by her, and these exceptions were not in fact disallowed by the court upon the ground that they were not filed in time, the mere failure to serve her with a copy of the award did not in any manner prejudice her rights; and for this reason, where the court in fact considered her exceptions to the award upon their merits, the fact that she was not served with a copy of the award by the board of arbitrators is no good ground for setting aside the award, provided it were otherwise legal.

2. In the present case the submission itself, signed by each of the parties, provided that the award should be made returnable to the next term of White superior court, and should then be made the judgment of said court. We know of no reason why the parties, as between themselves, could not make such an agreement. If in fact the losing party did not reside in the county to which it was agreed the award should be made returnable, the agreement itself, that such a judgment might be entered in that county, would amount to an admission of a residence therein; at least, in so far as that fact might be necessary, as between the parties themselves, to uphold the jurisdiction of the court to make such award its judgment. We are not now dealing with the question as to whether such a judgment would be good as against a person not a party to the agreement; but where the parties themselves resolve any doubt as to the jurisdiction of a particular court over their persons, by an agreement, solemnly entered into, that such a court might exercise a particular jurisdiction over their persons with respect to an adjudication upon their property rights, we know of no reason why, if the court have general jurisdiction of the subject-matter, its judgment, as affecting the interests of the persons so submitting themselves to its jurisdiction, would not be a valid and binding judgment. Our Code, § 3460, provides that the question of jurisdiction, so far as the rights of the parties are concerned, may be waived, but not so as to prejudice third persons. The exceptions to the award, in so far as the same is assailed upon the ground that it was made returnable to a county other than that of the actual residence of the party complaining, were, in view of the admission implied from the agreement, without merit.

Those exceptions which attack the award of the arbitrators upon the ground of incom-

petency, and the suggestion of bias, upon the part of one of the arbitrators, were equally without merit. There is no suggestion that the physical infirmity from which it was alleged that the arbitrator attacked was a sufferer was not well known to the party complaining at the time of the hearing, nor does it appear that any objection was made to him upon that ground. But, without reference to this knowledge, it was not alleged that he was in fact so very deaf as to be unable to hear, nor is it alleged that he did not hear, the evidence. The most that was said of him was that there was a probability that he did not hear the evidence clearly and distinctly, so as to fully understand it. Having been chosen as an arbitrator, and having presided upon the trial, the presumption is contrary to the exception; and, where objection is made by which it is designed to overcome this presumption, it is the duty of the party making the exception to present squarely the issue of fact, as to whether or not the arbitrator in fact heard the testimony, and likewise the issue of law, as to whether or not he was in fact incompetent.

The other exception to the arbitrator, upon the ground that he was brought to the scene of the arbitration by the adverse party, and as his witness, even if well founded in fact, affords no sufficient reason for vacating the award. Our Code provides that an award which was the result of accident or mistake or fraud of some one or all of the arbitrators or parties, or is otherwise illegal, may be vacated and set aside. The fact that one is a witness in a cause, and has been brought to the scene of the trial by one of the parties, is consistent with perfect freedom from bias or partisanship, such as would tend to render illegal an award subsequently rendered by him when chosen as an arbitrator. In order to make this a ground of exception which will prevail against an award, it is essential that the facts relied upon to set aside the award by the impeachment of an arbitrator should show either affirmative fraud, misconduct, bias, prejudice, or partisanship, such as would render one disqualified to preside as judge or juror in the trial of the questions of law and fact at issue. Upon the trial of any civil case in any court in this state, a person is not necessarily disqualified as a juror because he may know some facts material to be proven by him as a witness for one of the parties to the controversy. Knowledge of a material fact favorable to one side is one thing. Bias and prejudice in favor of that party is entirely a different thing. We think, therefore, these exceptions were without merit.

Exception was taken to this award upon the further ground that it was delivered to the court by a person other than one of the arbitrators. We do not think this a meritorious exception. The persons chosen as arbitrators determined the cause in accordance with the articles of submission, reached their conclu-

sion, reduced it to writing, and signed the award. We know of no provision of law which requires that the arbitrators, or any one of them, shall, in person, deliver the award to the court. We know of no reason why, having fully completed all their duties in the arbitration of the controversy submitted to them, they may not make return of their actings and doings in the premises, and cause the mere physical act of transmission of their report to the court to be accomplished by the hand of a third person; and, where there is no suggestion that such third person did not in fact transmit and deliver to the court the identical award intrusted to him by the arbitrators, the fact that the award was delivered to the court by the hand of a third person affords no reason for vacating or setting it aside. The parties in the present case solemnly agreed in writing that the matter in controversy between them should be submitted to arbitration. There was no agreement in the submission as to the place at which the arbitration should be held. There was an agreement that the award of the arbitrators should be returned to, and made the judgment of, the superior court of a particular county. It was excepted that the arbitration was held and the award rendered in a county other than that to which it was made returnable by the agreement of the parties. Although both of the parties were present at the arbitration, no objection was made at the time to the place of the hearing; and we know of no reason why the award should be vacated and set aside because the arbitration was held in one county, and the award made returnable to the superior court of another county, where neither of the parties made objection.

Other than as above indicated, the exceptions of law filed to the award were without sufficient merit to justify further discussion. Upon looking through the record in the case, and upon a careful consideration of the evidence which was submitted in favor of the plaintiff in error along with her exceptions to the award rendered by the arbitrators, we think the court committed no error in sustaining a demurrer to the sufficiency of the exceptions, committed no error in overruling a motion to vacate the award, and committed no error in sustaining the award, and confirming it as the judgment of the court. Judgment affirmed.

(88 Ga. 402)

#### WEST et al. v. BERRY.

(Supreme Court of Georgia. May 11, 1896.)

#### MANDAMUS—EVIDENCE—CITIES—SERVICES OF MAYOR—COMPENSATION.

1. Where an application for a mandamus, involving disputed questions both of law and fact, was by consent of parties on its final trial before the judge without the intervention of a jury, it is not cause for reversal that he considered as evidence the answer of the respondent, though not sworn to, the bill of exceptions reciting that the evidence for the defendant

was "the answer filed by the defendant, a copy of which is in the record, and is referred to."

2. The mayor of a town, the charter of which forbids that he shall "be interested directly or indirectly in any contract, office, or appointment in said town," cannot lawfully charge the municipality fees for services rendered by him as an attorney at law in cases before the courts to which the municipal corporation is a party; and it is entirely immaterial whether the services are rendered under an express or an implied contract to pay for the same.

(Syllabus by the Court.)

Error from superior court, Habersham county; John J. Kimsey, Judge.

Application of B. P. West & Co. for mandamus against W. W. Berry, treasurer of the town of Clarksville. Plaintiffs bring error. Affirmed.

J. C. Edwards, for plaintiffs in error. C. H. Sutton, for defendant in error.

SIMMONS, C. J. 1. West & Co. applied for a mandamus against the treasurer of the town of Clarksville to compel him to pay an order of the town council for a certain sum of money, which the treasurer refused to pay. The case was, by consent of the parties, heard and determined by the judge without the intervention of a jury, upon the petition of West & Co. and the answer of the treasurer. The court refused a mandamus, and the plaintiffs excepted. It was argued here that, the answer of the treasurer not being sworn to, it could not be considered as evidence, and, there being no other evidence introduced on the part of the treasurer, there was nothing on which to predicate the judgment refusing a mandamus. The bill of exceptions recites that "the evidence for the defendant was as follows, to wit, the answer filed by the defendant, a copy of which is in the record, and is referred to." The parties having agreed that the judge should hear and determine the case without a jury, and that the answer of the defendant might be used as evidence, although not sworn to, it was too late, after the case came to this court, to object that the answer was not sworn to. That objection should have been made before the trial judge.

2. The petition for mandamus showed that the town council of Clarksville issued an order in favor of J. C. Edwards, which order was transferred to the plaintiffs, and that the town treasurer had refused to pay the order. The answer of the treasurer set up that J. C. Edwards was mayor of the town, and an attorney at law, and that the order was issued to him in payment for services rendered the town as an attorney at law during the time he was mayor; that under section 24 of the charter of the town the compensation or salary of the mayor is fixed at \$100 per annum, and he received this salary while acting as mayor; that under section 12 of the charter of the town "neither the mayor nor any member of council shall be interested directly or indirectly in any contract, office or appointment in said town"; and that by this section he was prohibited from making any contract

with the council of the town whereby he was to receive any fee or compensation for any legal services he might render the town during the time he was mayor, and the council could not legally issue him an order in payment of such services, even though no distinct contract existed between them at the time the services were rendered. Under this section of the charter (2 Acts 1890-91, p. 486), we think the court was right in refusing the mandamus. Under the charter the mayor cannot lawfully charge the municipality fees for services rendered by him as an attorney during his term of office as mayor, and it is entirely immaterial whether the services are rendered under an express or an implied contract to pay for the same. See, also, on this subject, *Dorsett v. Garrard*, 85 Ga. 740, 11 S. E. 768. The town council therefore could not legally issue an order to pay for such services. Judgment affirmed.

(38 Ga. 397)

**DERRICK v. SAMS et al.**

(Supreme Court of Georgia. May 4, 1896.)

**MORTGAGES—DESCRIPTION—PAROL EVIDENCE—FORECLOSURE PROCEEDINGS—DEFENSES—CAPACITY TO CONTRACT.**

1. Where land was described in a mortgage as parts of certain specified lots in a designated land district of a given county, "it being the land purchased by J. L. Henson from J. E. Derrick," the description, as a whole, was not so totally defective and uncertain as to render the mortgage inadmissible in evidence upon the trial of a rule for its foreclosure; and it was competent to identify by parol evidence the land covered by the mortgage.

2. That the land so covered had been set apart to the widow of the mortgagor as a year's support, over objections filed by the mortgagee, constituted no defense to the foreclosure of the mortgage. Upon a levy of the mortgage *fi. fa.* on the land in question, a very different question would arise.

3. In a mortgage foreclosure proceeding there was no error in refusing to strike so much of a plea filed by the administrator of the deceased mortgagor as alleged that the latter, at the time of executing the mortgage, "was very old and sick, and unable to sign his name, \* \* \* but made his mark; that he was heavily under the influence of opiates, and at the time was in a comatose state, \* \* \* and was wholly unable to make any sort of contract"; and also that the mortgagor was unable to read the contract, that it was never read over to nor understood by him, and that if the same had been read to him he could not have understood it.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. J. Kimsey, Judge.

Action by J. E. Derrick against A. B. Sams, administrator, and others. From a judgment for defendants, plaintiff brings error. Reversed.

R. E. A. Hamby and W. S. Paris, for plaintiff in error. W. T. Crane, for defendants in error.

SIMMONS, C. J. 1. Derrick sought to foreclose certain mortgages purporting to have been given by Sams, and the administrator

of Sams filed a plea in resistance to the proceeding. On the trial of the case the court, upon objection by counsel for the defendants, excluded the mortgages on the ground that the description therein of the land mortgaged was insufficient, and refused to receive parol evidence offered to further identify the land. The description of the land was: "Parts of lots of land Nos. 22 and 33, in the 5th land district of Rabun county, Ga.; it being the land purchased by J. L. Henson of J. E. Derrick." We do not think this description, as a whole, was so totally defective and uncertain as to render the mortgage inadmissible in evidence. It is not essential that the description should completely identify the land. A description should not, as a matter of law, be treated as insufficient, if it furnishes the means of identification. The description above quoted does this. It gives the state, county, and district in which the land is situated, and the numbers of the lots, and says that it is "the land purchased by J. L. Henson of J. E. Derrick." By the aid of the parol testimony offered by the plaintiff, the land could easily have been identified, and its boundaries ascertained, so that the judgment of foreclosure might fully describe it. The description being ambiguous without the aid of such testimony, the testimony offered was clearly admissible to explain the ambiguity. See *Shore v. Miller*, 80 Ga. 93, 4 S. E. 561, where the description was similar to the one in question here. See, also, *Jennings v. Bank*, 74 Ga. 787, 738, and cases cited; *Parler v. Johnson*, 81 Ga. 255, 7 S. E. 317; *Wiggins v. Gillette*, 93 Ga. 23, 19 S. E. 86; *Broach v. O'Neal*, 94 Ga. 475 (3), 20 S. E. 113.

2. One of the defenses set up by the administrator was that the land in question had been set apart by the court of ordinary as a 12-months support for the widow and children of the intestate, over objections filed by the mortgagee, and that the mortgagee was thereby concluded, and his right to foreclose the mortgages barred. This plea was demurred to, and the demurrer overruled. We think the demurrer should have been sustained. The fact that the plaintiff appeared in the court of ordinary, and objected to the setting apart of the land as a year's support, does not estop him from obtaining a judgment against the estate of the mortgagee, or against the land. He had a lien on the land, and was entitled to a judgment setting up that lien. If he should undertake to enforce the judgment by levying upon the land, he might then be met by the judgment of the ordinary setting apart the land as a year's support.

3. Another of the pleas filed by the administrator alleged that the intestate at the time of executing the mortgages "was very old and sick, and unable to sign his name, \* \* \* but made his mark; that he was heavily under the influence of opiates, and at the time was in a comatose state, \* \* \* and was wholly unable to make any sort of con-

tract"; also, that the mortgagor was unable to read the contract, that it was never read over to nor understood by him, and that if the same had been read to him he could not have understood it. We think it was clearly not error to refuse to strike this plea. If the allegations contained therein are true, no court would hold that the mortgages were valid contracts. Judgment reversed.

(98 Ga. 413)

**PRATER v. BENNETT.**

(Supreme Court of Georgia. May 11, 1896.)

**BILL FOR REFORMATION—WHEN MAINTAINABLE—MULTIFARIOUSNESS—PARTIES—DEMURRER.**

1. The plaintiff's declaration showing that she and a deceased person had been common owners of a described tract of land, and that, while the latter was in life, one of the defendants, by fraudulently causing a misdescription to be inserted in a deed to himself from the deceased, conveying a portion of the land, had acquired possession of, and color of title to, more land than he really bought, and in consequence was holding adversely to the plaintiff land of which she owned an undivided half, the action was maintainable for the purpose of having the above-mentioned deed reformed, and for other appropriate relief therewith connected; and the legal representative of the deceased cotenant of the plaintiff was a proper party defendant to the case.

2. Such a declaration was good, against a demurrer alleging that the plaintiff "set forth no facts which would show title in her in or to the property sued for, or any part thereof."

3. The action was not rendered multifarious because the declaration alleged, and sought to recover damages for, trespasses committed by the defendant first referred to, upon other lands owned in common by the plaintiff and the estate of the deceased, not covered by the deed above mentioned.

(Syllabus by the Court.)

Error from superior court, Hall county; John J. Kimsey, Judge.

Action by Harriet C. Bennett against Shelton L. Prater and another for the reformation of a deed. From a judgment for plaintiff, defendant Prater brings error. Affirmed.

The following is the official report:

The petition of Harriet C. Bennett against Shelton L. Prater and Mrs. A. C. Scales, as executrix of James A. Findley, was demurred to by Prater. The demurrer was overruled, and he excepted. The petition alleges that, while plaintiff and James A. Findley were common owners of about 60 acres of land described, Findley made a deed conveying to Prater 19 acres thereof, at \$7.50 per acre; that when Prater came to take a deed he fraudulently represented to the maker that he had measured the land, and that a piece of land on the end fronting 4 acres on the road would just make 20 acres (he at that time owning 1 acre on the road, included in said boundary), not giving the distance, in acres or otherwise, from the road back to the line, and Findley, relying on the honesty and integrity of Prater, made him a deed describing the land as Prater had said would convey to him the amount he had bought, when

in fact said deed, by its description, covers and contains 32.32 acres, while it was intended to convey and contain only 19 acres. The petition then sets forth a description of said 32.32 acres, and alleges that Prater has taken exclusive possession of the same, has it under fence, claims to own it in severalty, and has excluded and ousted plaintiff, and refuses to allow her to participate in the possession, or to account to her for any of the rents and profits of the same which he has received for the last four years. She is the owner of one undivided half of said land, and is entitled to a joint possession of the same, and to half the rents and profits thereof. Prater is entitled to one undivided half interest to the 19 acres he purchased from Findley, and the estate of Findley is entitled to one undivided half interest in the excess of said tract that Prater is claiming over and above the 19 acres he purchased from Findley. For each of the last four years, Prater has willfully, recklessly, and without authority, entered upon the other part of said tract of land, belonging to petitioner and the estate of Findley, and has cut and carried away therefrom large quantities of timber, of the value of \$100. The prayers are that the deed from Findley to Prater be reformed and corrected in its description so as to convey to him the amount of land intended; that plaintiff be decreed to own an undivided half interest in the land now claimed by Prater, except the one acre mentioned, and that it be settled as to whom the other half interest in the excess now claimed by him, over and above what he purchased, belongs; that he be required to pay her the worth of half of the rents and profits of said piece of land for the last four years, and such amount as may be shown to be equitably due her for the trespass and damage done by him to her other land; and for general relief. The grounds of demurrer are: (1) That plaintiff sets forth no facts which would show title in her to the property sued for, or any part of it. (2) That she sets out no cause of action. (3) That she shows no interest in the question of the mistake or fraud alleged in the conveyance from Findley to Prater, and no right to have the deed reformed. (4) The petition is multifarious, in joining with a suit to recover one piece of land an action to recover damages for trespass on another piece; and (5) in seeking to join in this action the executrix of Findley, his estate having no interest in any controversy shown in the petition between plaintiff and defendant.

Perry & Craig, for plaintiff in error. J. M. Towery and W. F. Findley, for defendant in error.

LUMPKIN, J. The petition of Harriet C. Bennett against Prater and the executrix of Findley was demurred to by Prater. The demurrer was overruled, and he excepted. The substance of the petition and of the demurrer appears in the official report.

1. The facts are somewhat complicated, but we are unable to perceive how the plaintiff could obtain the full relief to which she was entitled without a reformation of the deed which Findley, her deceased co-tenant, had made to Prater. It is true, she was not a party to the deed; but a direct injury resulted to her from the fraud practiced upon Findley by Prater, and she could not well rid herself of the consequences of this fraud until that deed was made to speak the truth. This could not be done without having Findley's legal representative before the court, and hence his executrix was a proper party to the proceeding.

2. As will have been observed, the petition distinctly alleges that the plaintiff and the deceased, Findley, had been common owners of a described tract of land, as to a part of which Prater had obtained possession and color of title by a fraud practiced upon Findley, under whom he claimed. The petition therefore contained enough upon the subject of ownership to withstand a demurrer alleging in general terms that the plaintiff had set forth "no facts which would show title in her in or to the property sued for, or any part thereof." The case does not fall under section 3401 of the Code, which declares that the plaintiff in a statutory action for the recovery of land shall annex an abstract of the title relied upon.

3. Nor was the petition multifarious because the plaintiff sought thereby to recover damages for trespasses committed by Prater upon other lands which had been owned in common by herself and Findley, but were not embraced in the deed to Prater above mentioned. Under our system of pleading, both equitable and legal rights may be asserted in the same proceeding. The superior court having jurisdiction of the entire controversy between the plaintiff and Prater, and having before it the representative of the only other person interested in the subject-matter of the dispute, it will be better for all concerned to have the various issues in controversy adjusted and disposed of by one trial. Judgment affirmed.

(98 Ga. 432)

#### AUTREY v. CAIN.

(Supreme Court of Georgia. May 11, 1896.)

##### NOTE—CONSIDERATION—CONSTRUCTION.

The consideration of the note sued upon being the plaintiff's interest, as an heir at law of her deceased father, in a tract of land constituting a part of his estate, the title to which was involved in a "lawsuit" when the note was executed,—it being stipulated that if the entire tract was held by the estate the note was to be collectible in full, but if only a part of the land was held by the estate the note should be "collectible only pro rata," and the litigation having so resulted that "the entire tract was held by the estate,"—the defendant, who was also an heir at law of the deceased, after receiving the plaintiff's full share of the proceeds of the entire tract realized at a sale thereof by the administrators, was bound to pay the whole amount of the note, although, by the terms of

the verdict rendered in the "lawsuit," the administrator was required to pay a stated sum to the opposite party, and did pay the same out of other assets of the estate, thus diminishing the distributive shares of both the plaintiff and the defendant in those assets.

(Syllabus by the Court.)

Error from superior court, Milton county; George F. Gober, Judge.

Action by M. A. Cain against T. A. Autrey. Judgment for plaintiff. Defendant brings error. Affirmed.

T. L. Lewis, for plaintiff in error. J. P. Brooke, for defendant in error.

LUMPKIN, J. This was an action by Mrs. Cain against her brother, T. A. Autrey, upon his promissory note, payable to herself, for the sum of \$50. The judge, who tried the case without a jury, rendered a judgment in her favor, and the defendant excepted.

It appeared at the trial that the plaintiff and the defendant were heirs at law of R. M. Autrey; each being entitled to an undivided one-seventh of his estate, which was solvent. Among other property, the deceased had claimed to be the owner of a tract of land known as the "Tribble Place," but there was some sort of a "lawsuit"—the nature of which the record before us does not disclose—between one Eva Webb and the administrators of R. M. Autrey concerning this tract of land. While this litigation was pending, Mrs. Cain sold her interest, as an heir at law of her father, in this particular land, to T. A. Autrey, taking for the same the note sued on. Attached to the note was an agreement, signed by her, in the following words: "The condition of the above note is such that all lands known as the 'Tribble Place' are held by the estate of R. M. Autrey, then this is collectible. If only a part is held by the said [estate], then it shall be collectible only pro rata." The "lawsuit" resulted in a verdict vesting the title to the Tribble place in the estate, upon the payment by the administrators of \$250 to Eva Webb, and the costs of the suit. The administrators paid these sums out of assets other than the Tribble place, sold the latter, and, with Mrs. Cain's consent, paid over to T. A. Autrey her full share of its proceeds, without deduction. The defendant contended that one-seventh of the money paid to enable the estate of his father to hold the Tribble place should be deducted from the note which he had given to his sister, the plaintiff, for her one-seventh interest in that land. The trial judge disagreed with him, and we agree with the judge. Mrs. Cain's contract with her brother was equivalent to a conveyance and warranty of a clear title to him, not to all of the Tribble land, but to her one-seventh of the same. She made good her covenant by discharging the incumbrance placed upon her seventh by the verdict in the Webb case. In paying off this incumbrance, the administrators used assets of the estate, one-seventh of which she other-

wise would have received; and therefore it is the same thing as if, with money taken from her own pocket, or raised from another source, she had paid off one-seventh of the judgment in favor of Webb. In short, the defendant got exactly what he bought, and ought to pay for it. If the Eva Webb judgment had been satisfied with a portion of the proceeds of the Tribble place, the case would be entirely different. In that event it would have been incumbent upon Mrs. Cain to relieve the fund derived from the sale of that land of one-seventh of the amount of that judgment, so as to allow her brother to receive her gross share in the proceeds of the land. As the matter worked out, she did precisely what she agreed to do, and the judge was correct in holding that she was entitled to collect the full amount of the note. Judgment affirmed.

(97 Ga. 457).

#### ROYAL v. McPHAIL.

(Supreme Court of Georgia. Oct. 23, 1895.)

**CERTIORARI—WHEN LIEN—SUFFICIENCY OF PETITION—MECHANICS' LIENS—LIABILITY OF OWNER—EXTENT—PARTIES—PLEADING—ADMISSIONS—WAIVER OF OBJECTIONS.**

1. The pleading act of 1893 is not applicable to petitions for certiorari, and therefore does not require the allegations of such petitions to be set forth in numbered paragraphs.

2. This being a case tried in the county court, in which there was no contested issue of fact, but which turned in that court upon the question whether or not, conceding as true all the evidence introduced by the plaintiff, he was entitled to recover the amount of the judgment rendered in his favor, that judgment was, according to the decisions of this court in *Greenwood v. Furniture Co.*, 13 S. E. 128, 86 Ga. 582, and in subsequent cases, reviewable by certiorari to the superior court.

3. Whether or not it was essential to the enforcement of a lien arising under section 1779 of the Code for the plaintiff to allege and prove that he had "taken no personal security," it was too late, after judgment in his favor, to raise on this ground any question as to the sufficiency of his declaration, or of the proof introduced in support of it; the defect, if any, being one curable by amendment.

4. Under the decision of this court in *Lombard v. Trustees*, 73 Ga. 322, followed in *Castleberry v. Johnston*, 17 S. E. 772, 92 Ga. 499, it was proper practice for one seeking to enforce against the owner of real estate a lien for labor and material arising under the above-cited section of the Code, to join in his action the owner of the realty, and the person who had contracted with the latter for the erection of the building thereon.

5. Where, in a plea to an action for the enforcement of such a lien, one of the defendants admitted that the plaintiff's claim of lien had been duly recorded, and on the trial the plaintiff offered in evidence the alleged lien itself, although it had apparently never been recorded, and, in point of fact, had not been, this defendant could not for this reason object to the introduction of the lien in evidence, nor contest the fact that it had been recorded, so long as the above-mentioned admission in his plea remained unaltered, and constituted a part of such plea.

6. Construing in pari materia the act of October 19, 1891 (Acts 1890-91, vol. 1, p. 233), and the act of December 18, 1893 (Acts 1893, p. 34),

no owner of real estate who contracts for the erection thereon of any building or other improvement of any kind specified in these acts, or for repairs upon the same, is, in any event, liable in the aggregate to material men, laborers, or others furnishing material, labor, or other thing, for any of the purposes above mentioned, for more than 25 per cent. of the contract price which such owner has agreed to pay his contractor for the building, improvement, or repairs in question; and in no event are such material men, laborers, or others entitled to enforce against such owner their liens for more than 25 per cent. of the original amounts respectively due them by such contractor upon their contracts with him.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Action between E. B. Royal and C. O. McPhail. From a judgment for the latter, the former brings error. Reversed.

J. B. Mitchell and Pate & Bright, for plaintiff in error. J. H. Martin, for defendant in error.

ATKINSON, J. The plaintiff sued the defendant in the county court upon an open account for work done for, and material furnished to, one O'Brien, a contractor who was to furnish material to build a storehouse for the defendant. The plaintiff was a mechanic and material man, and as such furnished certain material to be used in the construction of the house. Upon the trial of the case the plaintiff proved such facts as would satisfactorily establish the indebtedness of the defendant to him, together with the claim of lien set up by him. There was no contested question of fact, but the determination of the cause rested upon the legal sufficiency of the evidence submitted by the plaintiff to sustain his cause of action. A judgment was rendered in his favor, and to that judgment the defendant excepted, and sued out a writ of certiorari. Upon the return of the writ of certiorari, motion was made to dismiss it—First, upon the ground that the petition for certiorari had not been drawn in separate paragraphs, and consecutively numbered, as required by the pleading act of 1893; and, secondly, upon the further ground that, there being issues of fact involved in the trial of the case, appeal, and not certiorari, was the remedy. This motion was overruled, and upon the judgment overruling the motion to dismiss, the defendant in certiorari specially assigns error.

1. To the first proposition, it is not necessary to do more than to refer to the act. It is obvious from the language in which it is couched that it was not a part of the legislative design to extend its provisions to petitions for certiorari. While a petition for certiorari has been held to be, in a certain sense, a suit, it does not belong to that class of suits to which pleas can be filed, and hence the act in question has no application to such a proceeding.

2. In the present case the defendant in the court below (the plaintiff in certiorari) made

no issue upon a single question of fact submitted by the plaintiff. The only substantial issue involved was one of law,—as to whether, upon the facts, the truth of which was conceded, the plaintiff had established a right to recover, and to have a lien in his favor attach to the property of the defendant. This being true, nothing was involved, save only a question of law; and, that question being referable to the legal sufficiency of the state of facts admitted to be true, the judgment of the county court thereon, by the repeated adjudications of this court, was reviewable by certiorari. See *Greenwood v. Furniture Co.*, 86 Ga. 582, 13 S. E. 128.

3. The plaintiff sought in the court below to foreclose his lien alleged to have arisen under section 1979 of the Code. In the proceeding for its foreclosure there was no allegation that "he had taken no personal security" for the payment of his debt. The cause proceeded to trial in the absence of such an allegation, and it does not appear that any evidence was submitted upon that point. No distinct issue was presented by the defendant, alleging that the plaintiff had taken personal security for the payment of his debt; but after judgment in the court below the plaintiff objected to the judgment, and assigned as one of the reasons why it should be set aside that the plaintiff had not made the allegations in question, and had submitted no proof upon that point. Had the sufficiency of this declaration been called in question by demurrer, or had a motion for a nonsuit been made at the completion of the plaintiff's case, these questions might have arisen. But we think that after judgment the plaintiff cannot be heard for the first time to urge this as an objection to its rendition. If the proceeding to foreclose the lien was defective because of the absence of such an allegation, under the present state of our law, the defect was curable by amendment. If proof of this formal fact were necessary in the absence of a demurrer to the declaration, this evidence could have been submitted in reply to a motion for a nonsuit; and we think that, where the defendant waives the objection at a time and place when it could have probably been promptly met, he is too late, after judgment, to make this question.

4. In the present case the plaintiff sued both the contractor, and the owner of the property for whom the house was in process of erection, and upon which he claimed a lien. The declaration was demurred to upon the ground of a misjoinder of parties, and this demurrer was overruled. Under authority of the decision of this court in *Lombard v. Trustees*, 73 Ga. 322, which was followed in *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772, it was not improper pleading for one seeking to enforce against the owner of real estate a lien for labor and material, arising under section 1979 of the Code, to join in his action the owner of the realty, and the person who had contracted with the latter for

the erection of the building thereon, and hence there was no error in overruling this ground of the demurrer.

5. The plaintiff, in his declaration, alleged that the lien which he sought to set up had been duly recorded; and the defendant, in his plea, admitted this fact to be true. When the case came on to be tried, the plaintiff offered in evidence the original instrument in writing which was the evidence of his claim of lien. It appeared that the instrument had never been, in fact, recorded. The defendant objected to its introduction in evidence, upon the ground that it had not been recorded. The objection was overruled, and a sufficient reply to the assignment of error to this ruling is to be found in the fact that by his plea the defendant had admitted that the lien was duly recorded. He made no motion to correct his plea, or to expunge from it the admission in question. So long as this admission remained standing in his plea, he was estopped to deny its truth, and hence could not insist upon the objection, however well founded it might have been in fact. The court therefore committed no error in overruling this objection.

6. It was the purpose of this court to discuss at some length the act of October 19, 1891, and the act of December 18, 1893,—the two enactments constituting the basis of the plaintiff's claim of lien,—in order to settle as far as possible any doubt which might exist in the public mind as to the meaning of these acts construed together; but after the court had pronounced its judgment, announcing, as in the sixth headnote, *supra*, its conclusion reached in the present case, the general assembly, on December 16, 1895, passed another act upon the same subject (see Acts 1895, p. 27), which renders at this time any elaborate discussion of the two prior acts wholly unnecessary. Judgment reversed.

(98 Ga. 438)

#### KING v. NEEL.

(Supreme Court of Georgia. May 11, 1896.)

TROVER—VENUE OF CO-TENANT—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. While an action of trover will not, as a general rule, lie in favor of one of several tenants in common against a co-tenant, for the reason that the possession of one is the possession of all, yet such an action will lie against the vendee of a co-tenant who sold and delivered the entire property without the consent of the other common owners.

2. The ground of the motion for a new trial as to newly-discovered evidence, in the light of the counter showing, and in view of the evident want of diligence to obtain such evidence before the trial, is without merit. No cause for a reversal appears.

(Syllabus by the Court.)

Error from superior court, Bartow county; W. T. Turnbull, Judge.

Action by J. M. Neel, receiver, against B. J. King. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Harris, Jr., for plaintiff in error. Neel & Swain, for defendant in error.

**LUMPKIN, J.** Stripped of all complication, this case turned upon the question indicated in the first headnote, and that question has been clearly settled by at least two decisions rendered by this court not long after its organization, and which seem to be well supported. See *Hall v. Page*, 4 Ga. 428, and authorities cited; *Starnes v. Quin*, 6 Ga. 84. The decision of the court in both cases was pronounced by Judge Nisbett. In the former (page 435) he says: "As a general rule, it is not denied anywhere but that trover will not lie in favor of one tenant in common against his co-tenant. The reason is that the one tenant is as much entitled to the possession as the other. The possession of one is, in law, the possession of both. \* \* \* An exception to this rule is where there is a destruction or loss of the common property by one of the tenants. \* \* \* Another exception is found in the case of a sale of the whole property by one tenant. Tenants in common having equal right of possession, and an undivided property, one has no right to dispose of the property and transfer the possession, to the injury of the other. In this regard, they are unlike partners." In the latter case, Judge Nisbett says (page 87): "It is true, generally, that an action of trover does not lie in favor of one tenant in common against his co-tenant, because the possession of one is the possession of all; yet it will lie in case of the destruction or sale of the property."

The ground of the motion for a new trial relating to newly-discovered evidence was fully met by the counter showing. Besides, there was an evident want of diligence to obtain this evidence before the trial. The judgment below was manifestly right. Judgment affirmed.

(98 Ga. 459)

#### BERRY v. SHANNON.

(Supreme Court of Georgia. May 19, 1896.)

**SALE OF ANIMAL—BREACH OF WARRANTY—DAMAGES—EVIDENCE.**

1. Where an animal which could be of no use or value except for a particular purpose was bought upon a warranty by the seller that it was serviceable for that purpose, and at the time of the sale it was in fact either partially or totally worthless in that regard, the buyer, in an action against him for the price, was entitled to an abatement of the purchase money equal to the difference between the agreed price and the actual value, as reduced by the defective quality of the animal.

2. This is true whether, in disposing of the animal to a third person, the buyer lost anything or not. What he realized is of no consequence, except as to its evidentiary bearing upon the question of value.

3. The court erred in refusing to allow the defendant to introduce evidence to support his defense, and in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from city court, Floyd county; G. A. H. Harris, Judge.

Action by F. T. Shannon against I. J. Berry. Judgment for plaintiff. Defendant brings error. Reversed.

H. M. Wright and Wright & Hamilton, for plaintiff in error. C. A. Thornwell, for defendant in error.

**LUMPKIN, J.** Shannon brought an action against Berry upon two promissory notes for \$337.00 and \$338.00, respectively. The defense was that these notes were given for the price of a jackass, which the seller expressly warranted to be suitable for the principal purpose for which an animal of this character can be made serviceable. It appeared from the defendant's evidence that the animal was not suitable for this purpose, and therefore was worth considerably less than he would have been had he come up to the warranty, but that nevertheless he had sold the animal to a third person for the sum of \$650. At this stage of the proceedings, and without allowing the defendant to submit other evidence material to his defense, the court took the case in hand, and directed a verdict in favor of the plaintiff for \$650, holding that in any event the plaintiff was entitled to recover as much as the defendant had realized upon a sale of the animal. We have no doubt at all that this was error. The purchaser was entitled to have just such an animal as he contracted for, and the seller was bound to make good his warranty; and, upon the failure of the latter to do so, he must suffer an abatement of the price, because of the breach of his covenant. The question is really free from difficulty, and has practically been settled by the decision of this court in *Atkins v. Cobb*, 56 Ga. 36. The seventh headnote in that case reads as follows: "The abatement of the purchase money for goods sold with warranty of quality, express or implied, should be equal, at least, to the difference between the agreed price and actual value as reduced by defective quality. Purchasers are entitled to this abatement whether, in disposing of the goods, they lost anything or not. What they realized is of no consequence, except as it may tend to illustrate the question of value." And see the comments of Judge Bleckley on pages 90, 91. This decision is well supported by the authorities, a few of which we will notice. In 2 Sedg. Dam. 474, 475, we find the following: "It results from the general rule that it is erroneous, in an action on a note given for the price of a chattel, for the court to charge the jury that, although they should find the covenant to have been broken, if at the time of the sale the chattel, in its unsound state, was worth the price for which it was sold, the defendant had sustained no damage. Nor is the rule affected by proof that the purchaser afterwards sold the property for as much as, and more than, he paid for it. Where the property at the time of the sale had no market value, and it is impossible to get at its real value at that time if it had been as warrant-

ed, the price paid may be taken to represent that value. And it is sometimes said generally that the price at which the property was sold is evidence of its value at that time as if warranted. Where, in an action for damages for a breach of warranty, the consideration given for the warranted article consisted in another article which was exchanged for it, evidence of the value of the exchanged property will be allowed, as tending to show what the value of the other would have been if it had corresponded with the warranty. The price realized on a second sale is admissible as one mode of determining the value." The author cites in support of his text our case in 56 Ga. 86, and also *Hunt v. Van Dusen*, 42 Hun, 392, and *Brown v. Bigelow*, 10 Allen, 242, both precisely in point. In the case last cited it was held that: "The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value if it had been as warranted, is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty." And see 2 Benj. Sales (Corbin's Ed.) 1160, 1161; *Thornton v. Thompson*, 4 Grat. 121; *Brock v. Clark* (Vt.) 15 Atl. 175. The decision of this court in *Henry v. Railroad Co.*, 89 Ga. 815, 15 S. E. 757, does not conflict with the law as here laid down. That was an action of tort, in which the plaintiff's right to damages was predicated upon the negligence of the carrier. It had made no express covenant or warranty of any kind to deliver the plaintiff's meat in any given condition, but was simply under a statutory duty of taking the proper care of the meat, and delivering it to the plaintiff within a reasonable time. It was accordingly held that if the plaintiff, notwithstanding the damaged condition of a portion of the meat, by a sale of the same protected himself from actual loss, he could not recover from the railroad company because of its damaged condition. That case, therefore, stands upon an obviously different footing from that of the case at bar. Judgment reversed.

(98 Ga. 475)

## GRIFFITH et al. v. POSEY.

(Supreme Court of Georgia. May 23, 1896.)

## EXECUTION—LIEN—RECORDING.

The word "lien," in the phrase, "as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the defendant's property," occurring in the second section of the registry act of 1889 (Acts 1889, p. 107), applies only to liens acquired by contract, and consequently this act has no application to contests between ordinary common-law judgments. Therefore the older of two such judgments against the same defendant has priority over the younger, as to a fund arising from a sale of his property, although the execution issued upon the younger may have been duly entered up-

on the general execution docket, and the execution issued upon the older has never been entered upon that docket at all.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Jones, Judge.

Contest between G. D. & F. W. Griffith and D. H. Posey, judgment creditors, to determine priority of liens. From the judgment, G. D. & F. W. Griffith bring error. Affirmed.

E. S. Griffith, for plaintiffs in error. W. P. Robinson, for defendant in error.

LUMPKIN, J. The question upon which this case turns was practically settled in the case of *Donovan v. Simmons*, 96 Ga. 340, 22 S. E. 903. In that case this court defined the meaning of the word "lien" as used in the phrase, "who may have acquired a transfer or lien binding the same property," occurring in the first section of the registry act of 1889 (Acts 1889, p. 106), and held that it applied only to liens acquired by contract, and not to those obtained by judgment. The second section of that act provides for the keeping of a general execution docket, and declares that, "as against the interest of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the defendant's property, no money judgment obtained within the county of the defendant's residence, in any court of this state, \* \* \* shall have a lien upon the property of the defendant from the rendition thereof, unless the execution issuing therefrom shall be entered upon said docket within ten days from the time the judgment is rendered." The obvious purpose of this section is to protect those who may acquire titles or liens in ignorance of the fact that a judgment existed against the other contracting party, of which the person taking such title or lien had not, under the pre-existing laws, reasonable and ample means of becoming informed. The word "lien," where first used in that portion of the section above quoted, has the same meaning which was ascribed to this word as used in the first section of the act; that is, it means a "lien" acquired by contract. The reasoning of Judge Hart in the case of *Donovan v. Simmons*, supra, is applicable in the latter instance as fully as in the former. It follows that the act in question has no application to contests between ordinary common-law judgments, and consequently the older of two such judgments against the same defendant has priority over the younger, as to a fund arising from a sale of his property, although the execution issued upon the younger may have been duly entered upon the general execution docket, whereas the execution issued upon the older has never been so entered at all. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(38 Ga. 418)

**BUFFINGTON et al. v. THOMPSON et al.**  
(Supreme Court of Georgia. May 11, 1896.)

**DEED—DELIVERY AND ACCEPTANCE—PLEADING—PARTITION.**

1. A plea, filed by one named as a grantee in a deed, alleging that the same had been "executed" by a deceased person, does not necessarily aver that the deed had been signed, sealed, and delivered to such grantee; and where it appears from other allegations in the plea that the word "executed" was used not in its strict, technical sense, but in the sense of the word "signed," the plea should not, in any event, be treated as a conclusive admission by the defendant that the deed in question had been actually delivered to and accepted by him, nor as rendering him liable to comply with conditions inserted therein for the benefit of other persons.

2. In so far as the case made by the plaintiffs' petition rested upon the validity of the deed in question, they had no right to any relief, for the reason that the deed, never having been delivered, nor accepted by the grantee, was ineffectual and void.

3. As the plaintiffs, in the amendment to their petition, claimed an interest in the land in controversy, and prayed for its sale, the defendants' answer, in the nature of a cross action praying for a partition by sale, was germane; and upon the facts in evidence the right result was reached, and the motion in arrest of judgment was properly overruled.

(Syllabus by the Court.)

Error from superior court, Hall county; John J. Kimsey, Judge.

Action by Drusilla Buffington and others against Raymond A. Thompson and others to enforce a trust. From a judgment for defendants, plaintiffs bring error. Affirmed.

The following is the official report:

James M. Thompson died leaving a widow and seven children. An eighth child, Jane Dunagan, had died, before his death, leaving four children. He left among his papers a deed which he had executed on January 5, 1890, but had never delivered. This deed is from James M. Thompson to his son Raymond A. Thompson, and by it the grantor, in consideration of love and affection, "gives, grants, and conveys" to the grantee, his heirs and assigns, 100 acres of land described, "upon the following conditions, to wit: When the said Raymond A. Thompson shall pay to the heirs of his sister Jane Dunagan, children four in number [naming them], fifty dollars to each child as named in this deed, the same being left to them by James M. Thompson, their grandfather, in the hands of Raymond A. Thompson, to pay to each heir at the death of James M. Thompson." In closing, the deed states: "The said James M. Thompson and his wife, Sarah Ann Thompson, has the control of the farm and house as long as she remains a widow after the death of James M. Thompson. If his wife, Sarah, shall marry another man, she forfeits everything that I have given her, and she gets nothing." To the January term, 1894, of the superior court, the children of Jane Dunagan brought their petition, alleging that by this deed the grantor made the sums of \$50 each payable to them

a charge on the land thereby conveyed, creating a trust in the land in the hands of R. A. Thompson for their benefit to the extent of said sums; that the same were due, but that R. A. Thompson had refused to pay them, or to have anything to do with the land. They prayed that he be required to pay them \$50 each, with interest from the death of the grantor; that said sums be declared a lien and charge upon the land, and, in the event R. A. Thompson refused to accept the land and pay said charges, and be held not liable to said sums personally, that a commissioner be appointed to sell the land subject to the rights of the widow, and pay plaintiffs said amounts out of the proceeds, and the balance to the administratrix of J. M. Thompson. By amendment they alleged that R. A. Thompson has accepted the deed; that, if it should appear that he has not, they pray that he be required either to accept or not accept it; and that plaintiffs are entitled to one-eighth of the estate of J. M. Thompson, and have received nothing, while each of the other distributees received during his lifetime, in land and other property, advancements more than \$200, and plaintiffs are entitled to be made even out of this land, the remaining property of their grandfather, before the other heirs of R. A. Thompson receive anything. And they pray, in the event the land be sold, that they be paid \$200 with interest from the death of J. M. Thompson, in preference to the claim of the other heirs. To this petition pleas were filed by R. A. Thompson, and by the widow of J. M. Thompson, who was his administratrix. At the trial, January, 1895, R. A. Thompson withdrew (by permission of the court, and over objection of plaintiffs) his original plea, which was a plea in abatement, and filed a plea denying the material allegations of the petition, and setting up that if any deed to him to the land described was ever attempted to be executed by J. M. Thompson, the grantor failed in his purpose; that, if any such deed was executed as alleged, it was only a deed upon a condition precedent; that it required acceptance by defendant, and a performance of certain conditions precedent, before any estate vested in him or in the widow; that he has never accepted the deed, and now refuses to accept it or to perform its conditions, or to pay any sums to plaintiffs; that they have no right to have any sum declared a lien on the land, and to have it sold to satisfy the same; that the deed is null and void; that plaintiffs are entitled to the proceeds of only an undivided one-eighth interest in the land, while defendant owns the other seven-eighths, by purchase from the other heirs at law, in common with plaintiffs. He prays that the land be sold by commissioners, for the purpose of division (as it cannot be divided in kind), and that the proceeds be divided in the proportions before indicated. To this plea the plaintiffs demurred on the ground that the relief prayed was not germane to the case brought

by them, or to the subject-matter thereof. The demurrer was overruled. When plaintiffs offered the deed in evidence, they offered the testimony of the subscribing witnesses thereto. From this testimony it appears that neither R. A. Thompson, nor any one representing him, was present when the deed was executed. J. M. Thompson kept it. It was handed back to him with other deeds executed at the same time. About the time he executed it he divided up some land among his other children, but gave none to the plaintiffs, so far as the witnesses knew. The land conveyed by this deed was worth about \$800. The grantor stated to the witnesses that the deed only required R. A. Thompson to pay the money when he got possession of the land; that he was to have the land after the death of the grantor, and the death or marriage of the widow, provided he then paid plaintiffs \$50 each, but was not to pay until he got possession. The court ruled out the deed, presumably for want of proof of delivery. Plaintiffs insisted that it should be admitted, because it had been recognized by defendant's pleas, and requested a charge to the jury that it was necessary for them to introduce the deed and prove its execution, if it appeared that R. A. Thompson had admitted in his pleas the existence and execution of such a deed; and after the withdrawal of the plea in abatement, as before mentioned, they offered the plea in evidence, though it does not come to the supreme court as a part of the evidence. R. A. Thompson testified that the deed offered in evidence was never delivered to him, and he never accepted it, or agreed to accept it; that he made no contract with his father about this land or the deed, and knew nothing about it; that his father never gave him anything, and left no money in his hands, or anything else; and that the land could not fairly be divided by metes and bounds, on account of improvements and other circumstances, but would be worth more sold as an entirety. He introduced deeds to himself from the other six living children of J. M. Thompson, dated in January, 1895, conveying their interests in the land in question, for "one dollar and other good and valuable considerations," without warranty of title. The court charged the jury that if they believed from the evidence that plaintiffs owned one-eighth, and R. A. Thompson seven-eighths, of the premises in dispute, and that the land could not be divided equitably in kind, and such division in kind would depreciate its value, they should find a verdict that the property be sold, and the proceeds be divided one-eighth to plaintiffs, and seven-eighths to defendant. Such verdict was returned, and decree was entered accordingly, appointing commissioners for sale, etc. Plaintiffs moved in arrest of judgment on the grounds that the same was contrary to law and evidence, and that, under the case as brought, no such judgment could be legally rendered. To the overruling of this motion,

and to the other rulings before noted, they excepted.

Perry & Craig, for plaintiffs in error. H. H. Dean and J. B. Estes, for defendants in error.

SIMMONS, C. J. 1, 2. The facts, so far as material to an understanding of the case, are set out in the reporter's statement. It appears that, when the grandchildren of Thompson filed their suit against R. A. Thompson, he filed what is called in the record a "plea in abatement." Subsequently, by permission of the court, he withdrew this plea, and filed others. One of the questions at issue on the trial of the case appears to have been whether the deed from the elder Thompson had ever been delivered to R. A. Thompson, his son. The plaintiffs put in evidence the plea in abatement, for the purpose of showing an admission therein by R. A. Thompson that the deed had been executed. The subscribing witnesses to the deed were called, and testified that the grantor signed it in their presence, and that they signed it in his presence, but that neither the grantee, nor any one representing him, was present when the deed was signed, and that the grantor kept the deed in his possession. Upon this state of facts, the court ruled out the deed, on the ground that no delivery and acceptance on the part of the grantee had been shown, and to this ruling the plaintiffs excepted. It was claimed before us by counsel for the plaintiffs in error that the plea in abatement was changed after it had been filed and withdrawn; that the original plea stated that the grantor had "executed" the deed in question, instead of that he had "attempted to execute" it, as appears in the copy contained in the record sent to this court; and an application was made to us to order the clerk of the superior court to send a certified copy of the original plea, in lieu of the one which he had sent. It is doubtful whether the plea is rightly before this court at all, and more doubtful whether this court can take cognizance of the alleged alteration; but, be this as it may, the plaintiffs in error, in the view we take of the case, would have no right to reverse the judgment, even if they accomplished all they set out to do by suggesting a diminution of the record. Treating the plea as stating that the grantor "executed" the deed, and construing this language in the light of the whole plea, we do not think it amounted to an admission that the grantor delivered the deed to the grantee, and that the latter accepted it. Technically, the word "executed," when used with reference to a conveyance, comprehends, not only signing and sealing; but delivery. *And. Law Dict. "Execute"; 7 Am. & Eng. Enc. Law, p. 117, note.* In a popular sense, however, it means signing and sealing. *Id.* And it is in this sense that we think the admission in this plea was made, because it avers in the latter part

thereof that the deed had never been accepted by the grantee; and, if it had never been accepted, it could not have been delivered, for acceptance is a part of the delivery of a deed. See *Beardsley v. Hillson*, 94 Ga. 50, 53, 20 S. E. 272. We think, therefore, that the plea should not be treated as a conclusive admission by the defendant that the deed had been actually delivered to and accepted by him, nor as rendering him liable to comply with conditions inserted therein for the benefit of other persons. There being no evidence of delivery and acceptance, the court properly ruled out the deed; and, in so far as the case made by the plaintiffs' petition rested upon the validity of the deed, they had no right to relief.

3. By an amendment to their petition, the plaintiffs prayed that, if it should appear that R. A. Thompson had not accepted the deed, he be required either to accept or reject it. They alleged that they were entitled to one-eighth of the estate of J. M. Thompson, but had received nothing, while each of the other distributees received during his lifetime more than \$200; that they (the plaintiffs) were entitled to be made even out of this land, the remaining property of their grandfather, before the other heirs should receive anything. And they prayed that in the event the land should be sold they be paid \$200, with interest from the death of J. M. Thompson, in preference to the claim of the other heirs. R. A. Thompson answered, and admitted that the plaintiffs were entitled to a one-eighth undivided interest in the land, but alleged that by deeds from the other heirs he then owned seven-eighths undivided interest therein; and he prayed that the land be sold, because it could not be divided in kind, and that the proceeds be divided in the proportion indicated. The plaintiffs demurred to this part of the answer on the ground that the relief prayed was not germane to the case brought by them. The demurrer was overruled, and the plaintiffs excepted. The plaintiffs, in the amendment to their petition, having claimed an interest in the land, and prayed for its sale, we think the defendant's answer, in the nature of a cross action, praying for a partition by sale, was germane. Upon the facts in evidence, the verdict was right, and the motion in arrest of judgment was properly overruled. Judgment affirmed.

(98 Ga. 490)

BOON v. MAYOR, ETC., OF JACKSON.  
(Supreme Court of Georgia. May 23, 1896.)

ACTION AGAINST CITY—DECLARATION—AMENDMENT.

1. A municipality incorporated under "the name and style of 'The Town of Jackson,'" "with power in and by said corporate name to contract and be contracted with, sue and be sued, plead and be impleaded," cannot be properly sued under the name of "The Mayor and Council of the Town of Jackson"; and accordingly a declaration describing the defendant in

the words last quoted, though it may have been designed as an action against this municipality, was rightly dismissed on demurrer.

2. Where an amendment to a declaration was offered and rejected, it cannot be brought to this court as a part of the record of the case. In assigning error upon a refusal to allow such amendment, a copy of the same should be set forth, or its substance stated, in the bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Butts county; J. L. Hardeman, Judge.

Action by J. F. Boon against the mayor and council of the town of Jackson. Dismissed, and plaintiff brings error. Affirmed.

Y. A. Wright add Hall & Boynton, for plaintiff in error. W. W. Anderson and R. L. Berner, for defendant in error.

LUMPKIN, J. An action for damages brought by Boon against "The Mayor and Council of the Town of Jackson" resulted in a verdict in his favor, which was afterwards set aside by this court. 93 Ga. 662, 20 S. E. 46. At the next trial the case took an entirely new turn. A motion was then made to dismiss the action on the ground that it was brought as above stated, when it should have been brought against "The Town of Jackson," that being the corporate name of the municipality intended to be sued. We find, upon looking at the charter, that in point of fact the words last quoted embrace the correct designation under which this town was incorporated. This being so, was the declaration bad because brought against "The Mayor and Council of the Town of Jackson"? We do not like "to stick in the bark," or enforce mere technical rules in the administration of the law; and, were we permitted to decide the question now presented entirely unembarrassed by any previous adjudications of this court, we would be gravely inclined to hold that this declaration, if not good upon its face, could be made so by amendment. In certain cases, however, closely resembling the present, this court, by its rulings, has, we think, decided the principle which we are now undertaking to follow. These decisions were made with reference to that provision of our present constitution which declares that "all suits by or against a county, shall be in the name thereof." In *Bennett v. Walker*, 64 Ga. 326, it was held that in an action for land brought by the county commissioners, who sued officially in their own names, there could be no recovery in behalf of the county. Following this case, it was again held, in *Arnett v. Commissioners of Decatur Co.*, 75 Ga. 782, that an action against the board of county commissioners of that county (naming them) was not a good action against the county, and could not be amended by making the county a party. Both of these cases were adhered to in *Hunnicutt v. Stone*, 85 Ga. 435, 11 S. E. 663. If actions against the county commissioners, who were the official representatives of the county, and

who were sued in that capacity, could not be held as actions against the county, it seems to follow inevitably that an action against "The Mayor and Council of the Town of Jackson" cannot be maintained as a valid suit against the municipality itself, the corporate name of which is "The Town of Jackson," and the charter of which expressly provides that it shall have "power in and by said corporate name to \* \* \* sue and be sued, plead and be impleaded."

2. But even if the declaration could have been amended so as to make it an action against "The Town of Jackson," the plaintiff in error has not properly brought to this court for review an alleged refusal of the trial court to allow just such an amendment. The bill of exceptions states that the court erred "in refusing to allow the amendment offered by the plaintiff to his writ before the said case was dismissed." It does not inform us what this amendment contained, but undertakes to bring it to this court by specifying as a part of the record to be sent up "the application to amend the writ by plaintiff, and the order refusing said amendment." The rejected amendment was no part of the record, and, in assigning error upon a refusal to allow it to be made, a copy of the same should have been set forth, or at least its substance stated, in the bill of exceptions, or attached thereto as an exhibit properly authenticated. We cite two cases precisely in point upon this question of practice: *Sibley v. Association*, 87 Ga. 738, 13 S. E. 838, and *Barnett v. Railway Co.*, 87 Ga. 767, 13 S. E. 804. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 465)

**HARRIS et al. v. AMOSKEAG LUMBER CO.**

(Supreme Court of Georgia. Oct. 28, 1895.)

TRIAL—OBJECTIONS TO EVIDENCE—LETTERS—CONTRADICTION BY PAROL—CONTRACT BY CORRESPONDENCE—IMPLIED CONTRACT.

1. While all of the record admitted in evidence at the instance of the defendant may not have been pertinent, yet, as much of it was both material and relevant, the court did not err in overruling a general objection to its admissibility.

2. Where letters in evidence, plain and unambiguous in their terms, clearly and distinctly indicated a purpose on the part of the writer (the defendant's general manager) to make a contract with the plaintiffs, who were the persons addressed, it was error to allow the former to testify, "It was not my purpose to trade with them [plaintiffs], by writing these letters." This error, in view of the entire record, is cause for a new trial.

3. A complete and binding contract may be made by means of an epistolary correspondence, but this result is not accomplished until there has been a definite offer by one of the parties to the correspondence, and an unequivocal acceptance of it by the other, without condition or variance of any kind. The parties must "mutually assent to the same thing, in the same sense."

4. Although, in the present case, the correspondence between the plaintiffs and the defendant did not, of itself, amount to a fully completed and binding contract, it, in point of fact, the parties so treated and regarded it, and if, in consequence, the plaintiffs relinquished to the defendant their claim to certain timber, and the latter cut and used the same, it is bound to pay to the plaintiffs the price thereof as stated in the letters, unless it shows affirmatively that they did not really own the timber, but that the paramount title thereto was in another, or others, claiming adversely to the plaintiffs.

5. The charges excepted to, in which the court stated to the jury the respective contentions of the parties, are not erroneous. Some of the other charges complained of are not entirely free from criticism, but they contain nothing which would require the granting of a new trial, and there would be no reversal of the judgment below but for the error first above indicated.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by Harris & Mitchell against the Amoskeag Lumber Company. From a judgment for defendant, plaintiffs bring error. Reversed.

J. E. Wooten and Steed & Wimberly, for plaintiffs in error. E. A. Smith, for defendant in error.

LUMPKIN, J. This was an action by Harris & Mitchell against the Amoskeag Lumber Company for the price of the timber on certain lots of land, which plaintiffs claimed they had sold to the defendant, and which the latter had cut and used. The declaration alleged that the contract of sale was in writing, evidenced by a correspondence which had taken place between the plaintiffs and the defendant. It is unnecessary to set out in full the letters constituting this correspondence. It is sufficient to say that those written by the defendant's general manager unmistakably indicated a purpose on the part of the writer to purchase for the company he represented the timber in question. Indeed, the correspondence, as a whole, amounted to almost a complete contract. It did not, however, quite accomplish this result; for the reason that it never reached such a point as to show that the parties had distinctly, definitely, and finally agreed upon precisely the same thing, although it is manifest from the evidence as a whole that both parties treated this correspondence as a complete and binding contract between them, and that the defendant acted upon it, by taking and using the timber in pursuance of its terms. During the progress of the trial the latter offered in evidence the record of an action brought against the plaintiffs by one McAnthur, which had resulted in a verdict in the latter's favor. This action involved the liability of the plaintiffs to McAnthur for some or all of the timber which is the subject-matter of the present suit. Some portions of this record do not appear to have been relevant evidence in this case, but, at the same time, other portions of the same were both relevant and material. The court admitted in evidence the entire record, over a

general objection to its admissibility. There was a verdict for the defendant, and the plaintiffs excepted to the overruling of their motion for a new trial. Omitting minor points presented by this motion, we will briefly discuss the more important questions it brings before us for review.

1. The first of these relates to the action of the court in admitting in evidence the record above mentioned. The rule is well settled that if a mass of testimony—such, for instance, as a voluminous record, composed of numerous separate documents, some of which are admissible, and some inadmissible—is offered in evidence as a whole, it will not be error to reject it as a whole; for in such case it is clearly the duty of the party tendering such testimony to point out, and offer separately, the relevant and material parts, to the benefit of which he is entitled. The correctness of this rule was recognized in the case of *Herdon v. Black* (decided at the March term, 1895) 22 S. E. 924. On the other hand, where evidence partly competent and partly incompetent is offered as a whole, and a mere general objection to its admissibility is made, admitting all of such evidence affords no legal cause of complaint to the objecting party. This must necessarily be true, for the reason that the effect of a general objection to the evidence as a whole is to assert that none of it is admissible; and if this is not so, because a portion of it is pertinent and material, such general objection must fail, because obviously lacking in merit and in truth. If counsel honestly believes none of the evidence so offered is admissible, it is manifestly proper that by general objection he insist that the whole of it be excluded. If, however, his real reason for objecting to the evidence is that he thinks it contains some irrelevant matter, the proper course for him to pursue is to point out to the court such matter as he thinks inadmissible, and thus ask the court to pass upon the merits of his real objection. It is an elementary rule of practice that, to entitle a party to the benefit of any right upon which he insists, he must state his claim thereto clearly and intelligibly, in order that the court may understandingly and advisedly pass thereon. Counsel may, in utter good faith, object to a voluminous mass of evidence, upon the idea that it contains no matter which is competent, but in every instance he does so at his peril; for if the view he entertains be, in point of fact, erroneous, there can be no merit in his objection. The fact that the party offering such evidence is not, on his part, entitled, as matter of strict right, to thus smuggle in portions which would be clearly inadmissible if offered separately, cannot relieve the objecting party of his plain duty of stating to the court the precise ground or grounds of objection upon which he relies. However irrelevant and objectionable evidence may be, and no matter how obvious it may be that the party offering the same has no right to have it admitted, the rule of law

is unbending that the opposite party must not only object to its introduction, but must also distinctly state the ground or grounds upon which he insists it should be excluded. A mere general objection to it will not suffice; and even if he objects to it specifically, upon grounds devoid of merit, he will be held to have suffered no injury if the court correctly rules against him as to the objections he actually prefers, and this is so though the evidence in question would not for a moment have withstood the test of other grounds of objection not brought to the attention of the court. This court will certainly not reverse the action of a trial judge, either in admitting or in rejecting evidence offered as a whole, some of which is competent, and other portions of which are incompetent, when the complaining party has utterly failed to meet the requirements imposed upon him by law as to the manner in which he shall state and insist upon his rights in the premises. In a word, it is the duty of counsel, and not of the presiding judge, to properly manage and conduct cases intrusted to their care. If they fail in their attempts so to do, it certainly is not incumbent upon the trial judge to take them in hand, and guide their exertions in the right direction. On the contrary, it would be highly improper, it occurs to us, for the judge to thus become a partisan in a case, rather than a presiding magistrate. In practice, the judge will generally exercise a wise discretion as to evidence offered in "bulk." If it, in the main, appears to be pertinent and competent, he will doubtless admit it, unless the objecting party undertakes to point out wherein the evidence is irrelevant and objectionable; while, on the other hand, if, as a whole, the evidence is of doubtful materiality, the court will not feel bound to admit it simply because some parts of the same, if offered separately, would be entirely unobjectionable. At all events, in no instance can either party be hurt if he but observes the plain duty which the law points out to him for his guidance in the matter.

2. The character of the correspondence which the plaintiffs insisted constituted the contract between themselves and the defendant has already been indicated. It would be impossible to read the letters written by the defendant's general manager without reaching the conclusion that he certainly intended to purchase from the plaintiffs the timber in question. It was therefore manifestly error to allow him to testify, "It was not my purpose to trade with them [the plaintiffs], by writing these letters." This testimony was clearly inadmissible, for at least two good reasons: (1) It contradicted the terms of the writings, which, being plain and unambiguous, constituted the best evidence as to the intention of the writer; and (2) it related to a secret and undisclosed intention on the part of the writer. Evidence as to a party's knowledge or ignorance upon any given subject is often competent, and may frequently be

shown by his own testimony, "but his undisclosed intent is not usually competent." Abb. Tr. Ev. 269, note 11, citing Nevius v. Dunlap, 33 N. Y. 676, 678; Dillon v. Anderson, 43 N. Y. 231. We make the following extract from the opinion of Folger, J., in the latter case: "The defendant, being a witness in his own behalf, was asked by his counsel, 'Did you intend to make an individual contract?' which question was overruled by the court. It called for his purpose, mentally formed, but undisclosed to the plaintiff. It sought to annul, by an intention not expressed, words and acts relied upon by the plaintiff, by which he was influenced, and which, of themselves, were prima facie evidence of an agreement. An agreement is said to be the meeting of minds of the parties. But minds cannot meet when one keeps to itself what it means to do. Nor can one party know that the other does not assent to a contract, the terms of which have been discussed and settled between them, unless dissent is made known. Here was the oral bargaining going before the written contract. Here was the written contract signed and delivered without qualification of the act of delivery,—without the expression of the intention called for by the question that the act of delivery was not to be taken as meaning all it seemed to mean." Applying the principle thus announced to the facts of the present case, the purpose or intent which inspired the defendant's general manager to write the letters in question was entirely immaterial. The plaintiffs had an undoubted right to place upon the language employed in these letters its usual, natural, and ordinary interpretation, and to treat the writer as meaning what the language he adopted unquestionably purported to express. His letters would certainly seem to warrant the conclusion that he seriously contemplated effecting a "trade" with the plaintiffs, not that he was writing in a spirit of pure idleness, innocent of design or purpose.

3, 4. In Robinson v. Weller, 81 Ga. 704, 8 S. E. 447, this court decided that while a contract of sale could be made by correspondence through the mails, or by telegraph, in order to render the same binding the offer of the seller must be accepted by the purchaser unequivocally, unconditionally, and without variance. In other words, there must be a mutual assent of the parties. "They must assent to the same thing, in the same sense." See, also, Stix v. Roulston, 88 Ga. 748, 15 S. E. 826, citing 1 Pars. Cont. 475. The above-quoted extract from the New York case is also pertinent in this connection. We do not think that the correspondence between Harris & Mitchell and the lumber company, tested by any recognized legal rules of construction, ever amounted to a fully completed and binding contract. Nevertheless, the evidence shows unmistakably that the parties so treated it; and this amounts to the same thing, in

law, as if this result had been successfully accomplished by the letters themselves. Upon the strength of the correspondence, the defendants cut and used the timber; and they ought to pay for it at the price mentioned in the letters (there being no disagreement as to price), unless they are able to sustain their defense that the timber did not really belong to the plaintiffs, but to another or others, having the paramount title to the same, and to whom, consequently, the lumber company would ultimately be liable to account for the timber at its market value. This defense, if proved, ought to prevail. It seems the only meritorious ground upon which the defendant can stand.

5. We grant a new trial in this case because of the error pointed out in the second head-note. But for this, we find nothing in the record which would require a reversal of the judgment. Judgment reversed.

(98 Ga. 456)

# DORSEY v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of Georgia. May 19, 1896.)

## FIDELITY INSURANCE POLICY—CONSTRUCTION—DEFAULT OF EMPLOYE—WHAT CONSTITUTES.

Where a fidelity insurance company, by its bond, covenants with a receiver engaged in operating a railroad that, during the continuance in force of such bond, certain specified employees of the receiver shall "faithfully and honestly discharge their duties in their several capacities, and shall also faithfully and truly account for all moneys and property and other things which may come into their possession in their respective employments, whenever there-to required by the employer, or a duly-authorized officer in that behalf, and, at the termination of their said employments, shall surrender and deliver up to the employer, or a duly-authorized representative, all moneys, books, vouchers, papers, tickets, and all other property belonging to the employer, or for which the employer shall be liable to another, or other party or parties, which shall then be, or which ought to be, in the hands, possession, or custody of the employees, or either of them; and the company hereby indemnifies the employer against all loss which the employer shall sustain by reason of the default of any or either of the employees in the premises, not exceeding in the whole the sum or sums as hereinafter provided,"—*held*, that the insurance company was not liable to the insured in damages for a loss resulting from a wrongful delivery of freight by one of these employees, in consequence of which the receiver was compelled to pay the value of such freight to its true owner, the wrongful delivery having occurred before the bond was executed. This is so notwithstanding that the employee, at the termination of his employment, though liable so to do, failed and refused to pay the receiver the damages which the latter had sustained because of such wrongful delivery.

(Syllabus by the Court.)

Error from city court, Floyd county; G. A. H. Harris, Judge.

Action by R. T. Dorsey, receiver, against the Fidelity & Casualty Company of New York. From a judgment for defendant, plaintiff brings error. Affirmed.

J. W. Ewing and C. A. Thornwell, for plaintiff in error. Reece & Denny, for defendant in error.

**LUMPKIN, J.** The nature of the question controlling this case so distinctly appears from the syllabus, but little need be added to what is there said. It seems to us absolutely free from doubt that, under the contract between the insurance company and the receiver, it was never contemplated that the company should be in any manner responsible or liable for any breach of duty or misfeasance on the part of any employé of the receiver which occurred before the bond was executed. The company simply undertook to guaranty the faithful and honest discharge of duty by the employés named in the bond, from and after its date. The contract, as to its operation, related exclusively to the future, and not to the past. We do not see that it makes a particle of difference that one of these employés, in consequence of a past act of negligence, had become liable to the receiver, and was still liable, at the termination of his employment, to respond in damages to his master. This was a matter with reference to which the insurance company did not covenant with the receiver, and there is no more reason for holding the company responsible for such damages than there would be in making the surety on a promissory note liable for pre-existing indebtedness of his principal, which the surety had never in any manner contracted to pay or be responsible for. Judgment affirmed.

(98 Ga. 320)

**MARTIN et al. v. TRUSTEES OF MERCER UNIVERSITY.**

(Supreme Court of Georgia. April 13, 1896.)

**WILLS.—CONSTRUCTION.—DESCRIPTION OF DEVISES.**

Where, by a will, specific legacies in cash were bequeathed to certain named persons, designated as nephews and nieces of the testator's first wife, to other named persons, designated as nephews of the testator, and to one other named person, designated as the son of a named nephew of the testator, and the will further provided, "I give and bequeath to each of my immediate nephews and nieces one thousand dollars (\$1,000.00) apiece; this meaning only the children of my brothers and sisters, and not including such nephews or nieces as are specially provide for in this will," the will also containing a residuary clause disposing of all the balance of the testator's estate not bequeathed or devised in the preceding items, *held*, that the gifts embraced in the words above quoted were to the testator's immediate nephews and nieces, as a class; that such gifts inured only to the benefit of persons who were his immediate nephews and nieces living at the time of his death, and therefore falling within this class; and that the children or grandchildren of nephews or nieces of the testator who died before his death took nothing under the will, either in their own right, or in that of their deceased parents or grandparents; and this is true whether such deceased nephews and nieces were or were not in life when the will was executed. Atkinson, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the trustees of the Mercer University against E. W. Martin and others, executors of A. J. Cheney, deceased, for an injunction. From a decree for plaintiffs, defendants bring error. Affirmed.

Edmund W. Martin, Marshall J. Clarke, and J. M. Terrell, for plaintiffs in error. Harde-man, Davis & Turner and W. B. Willingham, for defendants in error.

**SIMMONS, C. J.** In November, 1894, A. J. Cheney made his will, and in 1895 he died. The sixth item of the will is as follows: "I give and bequeath to each of my immediate nephews and nieces one thousand dollars (\$1,000.00) apiece; this meaning only the children of my brothers and sisters, and not including such nephews or nieces as are specially provided for in this will." The seventh item gives specific sums to several named nephews and nieces of the testator's first wife. The eighth item gives specific sums to six named persons, three of whom are described as nephews of the testator. The ninth item gives a specific sum to a son of one of these nephews. The thirteenth item is as follows: "I give, bequeath, and devise the residue of my estate, after deducting the amounts hereinbefore and hereinafter mentioned, to Mercer University, to educate poor young men who are unable to educate themselves, be the said residue much or little at the time of my death. The amount so bequeathed or devised shall be turned over to the proper authorities of said university, to be invested in bonds as soon as practicable; and the interest only used for the said purpose." This controversy arose upon the proper construction of the sixth item above quoted. The trustees of Mercer University filed their equitable petition, in which they alleged that 13 of the nephews and nieces of the testator were dead at the time of his death, and that the executors of the will contended that the shares which would have gone to these 13 nephews and nieces, had they been in life at the testator's death, went to their children and grandchildren, and that, so construing this item of the will, they intended to pay to these children and grandchildren accordingly. The trustees contended that, inasmuch as these 13 nephews and nieces were dead at the time of the testator's death, their children and grandchildren did not take under this item of the will; and they prayed for an injunction against the executors, restraining them from paying to the children and grandchildren referred to the amounts specified in this item. On the hearing of the petition for injunction, the court below decided that the children of the nephews and nieces mentioned in this item did not take under the will, and he enjoined the executors from paying over the money to them.

In the opinion of a majority of this court, the court below was right in the construction placed upon this item of the will. The bequest to the nephews and nieces mentioned in this item is clearly to a class, and is not made to them as individuals. In this respect it is different from other items above referred to, in which bequests are made to nephews and nieces, the bequests made in those items being made to them as individuals. In the construction of wills, it is the duty of courts to look to the whole will, and thus ascertain the intention of the testator. The evident intention of this testator, which we gather from the whole will, was that the bequests made in the sixth item should take effect immediately upon his death, and that the persons described who should be living at the time of his death should be the only objects of his bounty. It seems clear to us that he did not intend that others not described therein should take under this item. If he had so intended, he certainly would not have used the language he did,—“to each of my immediate nephews and nieces, one thousand dollars apiece.” Doubtless fearing that there might be some uncertainty as to whom he meant by his “immediate nephews and nieces,” he adds, “This meaning only the children of my brothers and sisters”; and to this he adds the following: “Not including such nephews and nieces as are specially provided for in this will.” If he had intended that the children of the nephews and nieces referred to in this item should inherit in case the parents were not living at the time of his death, it would have been an easy matter to have said so, and he doubtless would have done so if he had so intended. It is a familiar rule that a gift to a class, to take effect immediately on the testator's death, includes only those who are living at that time. 2 Bigelow, Jarm. Wills (6th Ed.) top pp. 167, 1010; 2 Redf. Wills, 9, 10, and authorities there cited. In the case of Walker v. Williamson, 25 Ga. 549, the testator ordered an equal division of his property among his children, share and share alike. Philip Walker, one of the children included in the will, died before the death of the testator; and some of his heirs at law filed a bill claiming that he was a legatee, and that they were entitled to a portion of his legacy. McDonald, J., in discussing this point says: “Nothing could pass to Philip Walker, for he is not named, and at the death of the testator he was dead. He was not a child. Under that item of the will, then, there was no lapse into the estate of the testator of any interest in the negroes by reason of the death of Philip Walker in the lifetime of testator.” It was further held in that case that grandchildren cannot take under a bequest to children, unless there be something in the will to indicate and effectuate such intention. It was also held that, under a bequest to the testator's children, nothing would pass to a son who died in the testator's lifetime. In the

case of Springer v. Congleton, 30 Ga. 976, it was held that a legacy to “be divided between my two sisters' children, Elizabeth Jones and Martha Lilly, to wit” (naming the children), goes only to those who were children of the two sisters at the death of the testator; and one of the named children dying before the testator is to be considered as stricken from the enumeration. Judge Stephens, who delivered the opinion of the court, said: “This is a gift to a class, ‘sister's children,’ and to individuals also, ‘Naomi,’ etc., the two ideas being supposed by the testator to be so perfectly coincident and harmonious that the one is really used as a description of the other. But we think the class was the leading idea. The blood seems to have been the motive, and we think the intention was that the gift should go to all who were children of those two sisters, and to none who were not children; that is to say, to all who answered the description, and to none who did not answer it, at the death of the testator,—that being the time at which the will speaks.” In the case of Davie v. Wynn, 80 Ga. 673, 6 S. E. 183, the bequest was to the son for life, and at his death to his children, share and share alike, but, if he died leaving no children, then the same, at his death, to go, share and share alike, to his nephews and nieces, the children of his deceased brother, John L., and of his deceased brother-in-law, John Wilkinson. Two of the testator's nieces, children of John Wilkinson, died in the testator's lifetime, leaving issue; and it was held that the devise was to a class, and the nieces who died before the testator were not included therein. This case was referred to and approved in the case of Tolbert v. Burns, 82 Ga. 213, 8 S. E. 79, where it was again held that, one of a class having died before the making of the will, her daughter took no share in the devise.

But it was contended that, although this may be true, the language of this item of the will takes it out of this rule, because it declares that each of the testator's nephews and nieces shall have \$1,000 apiece, and thus individualizes them, and therefore section 2462 of the Code is applicable, that section declaring: “If a legatee dies before the testator, or is dead when the will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportions as if inherited directly from their deceased ancestor.” We do not think the language, “each a thousand dollars apiece,” would change the rule which we have stated. The words “each” and “apiece,” in this item, mean the same thing. They mean simply that each nephew and niece shall have \$1,000. Instead of giving to the class an aggregate sum, the testator divided it himself, by this language. Hawkins, in his work on Wills (page 68), after stating the rule above laid down,—that a de-

vise or bequest to the children of the testator means, prima facie, the children in existence at the testator's death,—adds: "The rule is the same whether the gift be of an aggregate fund to the class, as 1,000 pounds to the children of A., or of a certain sum to each member of the class, as to the children of A. 100 pounds each." He says also that this rule extends to gifts to grandchildren, issue, brothers, nephews, cousins. Schouler, in his work on Wills (section 529), after laying down the general rule above announced, remarks, "Nor is this presumption to be varied, whether an aggregate sum, like \$5,000, be given to the class, as \$5,000 to the children or grandchildren or brothers, etc., of A., or a certain sum to each member of the class, as to the children or grandchildren or brothers, etc., of A., \$1,000 each." In the case of *Robinson v. McDermid*, 87 N. C. 455, the will contained these provisions: "My bank stock, my county bonds, I leave to my following heirs: Bank stock \$5,000,—\$3,000 of it I leave to my mother, \* \* \* \$800 to my nephew [naming him], \$200 to each of my sister, Mrs. Ann V. Huske's, children." One of Mrs. Huske's children, Clay, died before the testatrix. Smith, C. J., said: "We concur in the opinion that all the children of Ann V. Huske living at the time of the death of the testatrix, as well the two youngest born after the making of the will as those born before, and none others, take the legacy given 'to each of my sister, Mrs. Ann V. Huske's, children,' excluding Clay, who died during the lifetime of the testatrix." And he adds: "But this is not a case of lapse. The deceased child, not being in esse at the death, is not embraced in the words of the bequest to the others as a class." In the case of *Mann v. Thompson*, 1 Kay, 638, it was held that when distinct sums of money are given to every individual of the class, but no time is limited for distribution, the persons who answer the description at the death of the testator are alone entitled to take; and the construction is the same if the gift be of a certain sum to each of the children of A. and B. who should attain twenty-one, but, in case any of them should die under that age, his share to go to his surviving brothers and sisters, although A. had no children at the date of the will, or at the death of the testator, but had children born after the testator's death. Many other cases could be cited in which it has been held that a bequest was to a class, although made to the legatees "share and share alike," "equally," "each and every," or "each and all."

This brings us to the discussion of the section of the Code above quoted (2462). This section is not a rule for the construction of wills. It simply declares who shall take when the legatee is ascertained. It was enacted by the legislature to prevent a legacy from lapsing when the legatee is ascertained. If what we have already said in this opinion is sound, no person of a class can be a legatee unless he is living at the time of the testator's

death. The gift, as we have shown, was to take effect immediately upon the testator's death. Property must at all times have an owner, and where the bequest is in terms immediate, and so intended to be by the testator, and the description of persons to take is general, then none that do not fall within the description at the time of the testator's death can take. Thirteen of these nephews and nieces being dead at the time of the testator's death, and the gift being immediate upon his death, they did not fall within the description of legatees, and not being named in the will as legatees, nor described in such manner as to individualize them, and show plainly what particular persons the testator meant, they could not be legatees under the will; and of course, if they were not legatees, this section of the Code cannot apply to them, and their children or grandchildren cannot take anything under it. The uniform decisions of this court since the passage of the act of 1836, of which this section of the Code is a codification, are in accord with this view. This act being in existence when the case of *Walker v. Williamson*, supra, was decided, the court must have held that it did not apply in that case. It was also in existence when *Springer v. Congleton*, supra, was decided. In referring to that case, Blandford, J., in the case of *Davie v. Wynn*, supra, says, "It may be fairly inferred that the counsel who argued that case did not overlook this statute, and that the court considered it, and that it was considered inapplicable to a case of this kind." It appears from the report of *Springer v. Congleton* that Judge Blandford was of counsel for the plaintiff in error. This statute was likewise considered in the case of *Tolbert v. Burns*, supra, and was there treated as inapplicable. But it was contended that this case is controlled by that of *Downing v. Bain*, 24 Ga. 372. In our opinion, that case has no bearing at all upon the point now being considered. The statement of facts contained therein does not show that section 2462 was involved in the decision. All the legatees were in life at the death of the testator, and the question was whether a certain class of legatees took per capita or per stirpes. The gift was to a class, as in the present case, but the testator did not give an aggregate sum to the class. Four thousand dollars was given to each one of the class. The court properly held that the intention of the testator was to give to each one of them a particular amount, and not to each family that amount. In the present case, as we have seen, the judge below held that those living at the time of the testator's death took each \$1,000, which we think was proper and right. If any of the class to whom the bequest was made in *Downing v. Bain* had died before the testator, a very different question would have been presented. The only other thing decided by the court, bearing upon this question, was that one of the class of children of the testator's two nieces, Janet Bain and Sophia McBride, was

born after the death of the testator; but it appears in the report of the case that this child was born within nine months after the testator's death, and it was properly ruled that he also took as a legatee under the will, because he was in esse at the time of the testator's death. The case of *Cheney v. Selman*, 71 Ga. 384, is also relied on by counsel for the plaintiff in error. The difference between that case and this was fully explained by *Blanford, J.*, in *Davie v. Wynn*, supra.

Looking to the whole will, especially the sixth item, we are of the opinion that the bequest made therein was to a class; that none of that class took under that item of the will, except those who were living at the time of the testator's death; that those not living at that time could not be legatees, and therefore section 2462 of the Code does not apply; that the words "each" and "apiece" do not so individualize or identify the persons of that class as to change the general rule that only those living at the time of the death of the testator could take; and that in this class of cases such has been the uniform construction of this court. Judgment affirmed.

**ATKINSON, J.** (dissenting). The bequest embraced in the words quoted was to the persons described as legatees severally and as individuals, and not to them collectively and as a class; and the legacies bestowed being absolute and without remainder or limitation over, if one of such legatees so indicated died leaving issue in life at the testator's death, such issue were entitled to take the legacy of their deceased ancestor; and this is true, even though the ancestor died before the testator, or indeed was dead at the time of the execution of the will. Code, § 2462.

(96 Ga. 484)

#### HARRIS v. JOHNSON.

(Supreme Court of Georgia. May 11, 1896.)

**MASTER AND SERVANT—DISSOLUTION OF RELATION BY DEATH OF MASTER—IMPLIED CONTRACT FOR SERVICES—ACTION BY INFANT—MANUMISSION.**

1. A mother, who was a widow, having agreed in parol with another to take her minor son, about 10 years old, and board, clothe, and send him to school till he was of age, have his services to that time, and then give him a horse, saddle, bridle, and suit of clothes, and this contract having been faithfully carried out by the person who had made the same with the mother, until his death, which occurred some five years after the contract was made, the services of the child during this period not being of greater value than what was done for and received by him, the estate of the deceased was not liable to the child or the mother in any amount.

2. Where, after the death of such person, his widow and his son agreed with the mother of the child to carry out the contract of the deceased, but in point of fact the child worked until his majority for the son of the deceased, who promised the child to pay him for his services, and where, upon the child's becoming of age, his employer not only repudiated the

original agreement of his father as to the horse, saddle, bridle, and suit of clothes, but also refused to pay the child the value of his services, the latter could maintain in his own right an action for the same against his employer upon a quantum meruit, it appearing that the plaintiff had been practically manumitted by his mother; that she had relinquished any right to claim compensation for his services, and consented for him to receive the same.

3. The evidence fully warranted a finding that the real facts of this case were as above summarized. The charges requested were not adjusted to the issues involved, and the charge complained of, if not strictly correct, was not harmful to the defendant. The verdict appears to have done substantial justice, and, being the second one in the plaintiff's favor, this court will not set it aside.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by J. L. Johnson against W. W. Harris to recover compensation for services rendered. From a judgment for plaintiff, defendant brings error. Affirmed.

McCutchen & Shumate, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

**SIMMONS, C. J.** The father of Johnson, the defendant in error, died, leaving a widow and five young children, one of whom was the defendant in error. The mother, being unable to support them, entered into an agreement with William Harris, Sr., the father of the plaintiff in error, to the effect that he was to take the defendant in error, and board and clothe him and send him to school, and receive all his services, until he should reach the age of 21 years; and, when he should arrive at that age, Harris was to give him a horse, saddle, bridle, and a suit of clothes. He was then 10 years of age. He remained with Harris until the latter's death, which occurred when the boy was about 15 years old. A new arrangement was then made by the mother and the boy with the widow of Harris and his son, the plaintiff in error, whereby they agreed to carry out the original agreement. The boy remained with them until he was 21 years old. The evidence is conflicting as to who was his employer during this latter period, but we think a preponderance of the evidence shows that he worked for the son instead of the mother. There is evidence, also, that the son agreed with the boy that if he would stay with him, and work for him, he would pay him for his work on his arrival at majority. When he arrived at majority, he demanded payment from Harris for his services, and, this demand being refused, brought his action against Harris, upon a quantum meruit, for the value of his services for six years. On the first trial of the case the jury rendered a verdict for the plaintiff, and on motion for a new trial by the defendant the court set aside the verdict. On the next trial the jury again rendered a verdict for the plaintiff, and the court refused to set it aside upon the motion of the defendant, whereupon the latter excepted.

It was insisted that the defendant was not liable, because the contract, if any was made, was between the defendant's father and the mother of the plaintiff, and the right of action was in the mother and not in the son, and that if there was any liability at all the estate of the defendant's father was liable, and not the defendant himself. When a father dies leaving a widow and minor children, the mother is entitled to the custody and control of the children, and to their services during their minority; but she can release her right to the services of a child, and, if she does, of course she cannot recover therefor, but the right of action would be in the child. We think, therefore, that, when the mother made the agreement above mentioned with the elder Harris, it was a virtual relinquishment by her of the custody and control of the child, and of her right to receive compensation for his labor. If the elder Harris had lived until the child became of age, and had then refused to carry out his agreement with the mother, we think the child could have brought an action against him to recover for the value of his services; but inasmuch as the evidence shows that he carried out his contract, and that the services rendered up to the time of his death were not worth more than what was done for and received by the child, the latter was not entitled to recover anything from the estate of his deceased employer. When the elder Harris died, the agreement between him and the mother in behalf of the child died with him. The relation of master and servant is dissolved by the death of the employer. Wood, Mast & Serv. p. 62, § 44; 1 Am. & Eng. Enc. Law (1st Ed.) p. 639a.

2. The mother of the child, and the widow and the son of the employer, seemed to recognize this rule, and after the death of the employer, made a new agreement, whereby they were to carry out as individuals the original agreement. Under this new agreement the plaintiff remained on the farm, and, it seems, fully performed his duty. Mrs. Harris, the widow of the employer, and her son, the defendant, also remained on the farm, but the son cultivated and managed it, and used its proceeds for his own benefit; and the evidence shows that the plaintiff worked for him from the time the new contract was entered into until the plaintiff arrived at majority. Under this state of facts, we have no hesitation in holding that, upon the refusal of the defendant to carry out the agreement, the plaintiff could recover against him upon a quantum meruit. The evidence shows that the plaintiff's mother had virtually manumitted him, and he was therefore entitled to sue in his own right for his services. As before remarked, the evidence is conflicting as to whether the plaintiff was working for the defendant's mother or not; but, according to the weight of the evidence, he gave his whole time and services to the defendant.

3. The evidence warranted the jury in find-

ing for the plaintiff. The request of the defendant's counsel to the court to charge as set out in the record was not adjusted to the points in issue between the parties, and was therefore properly refused. The charges complained of in the motion for a new trial, if not exactly accurate, were not harmful to the defendant. The verdict appears to have done substantial justice to the parties, and, the trial judge being satisfied therewith, we will not interfere with his discretion in refusing a second new trial. Judgment affirmed.

(98 Ga. 463)

#### CRUTCHFIELD v. DAILEY.

(Supreme Court of Georgia. May 19, 1896.)

INSURANCE—RESCISSION OF CONTRACT—ACTION ON PREMIUM NOTE—ADMISSIBILITY OF POLICY—EXECUTION.

1. No consideration is essential to the rescission of a simple executory contract (that is, one which has not been acted upon), other than a mutual agreement of the parties that it shall no longer bind either of them. The consideration on the part of each is the other's renunciation.

2. Hence, if a written application for a life insurance policy, and a promissory note for the first premium thereon, were delivered to an agent of the insurance company, and by him forwarded to the company, but before the latter had acted upon the application it was mutually agreed between the applicant and the agent that the note should be recalled and returned to the applicant, and that "the affair will stop just where it is at; there will be nothing more of it,"—this of itself would be sufficient to constitute a lawful rescission; and it was error to charge, in effect, that a rescission could not be had under these circumstances, unless based upon a valuable consideration.

3. In the trial of an action upon such note, a policy of insurance alleged to have been issued in pursuance of the application above mentioned was not admissible in evidence, without proof of its execution; and it was not sufficient for this purpose merely to prove by a subagent of the company that he had received such a policy from another subagent, or from the company's general agent, the witness being unable to remember from which of these persons it came into his hands.

(Syllabus by the Court.)

Error from superior court, Walker county; W. T. Turnbull, Judge.

Action by O. C. Dailey against F. A. Crutchfield on a premium note. From a judgment for plaintiff, defendant brings error. Reversed.

Copeland & Jackson and R. M. W. Glenn, for plaintiff in error. Lumpkin & Shattuck, for defendant in error.

SIMMONS, C. J. 1, 2. Crutchfield applied to Dailey, the agent of a life insurance company, for a policy of life insurance, and at the same time gave his note for the premium thereon. The morning after the application was made, he met Dailey, and told him that he wished the application to stop where it was; that he did not want it to go any further. Dailey replied that he had sent the application on to Atlanta, and would write and get the note returned, and give it back

to him; that "the affair will stop just where it is at; there will be nothing more of it." He did not receive the policy, and heard nothing more about the matter until just before suit was brought upon the note. To the suit he filed a special plea setting up these facts. On the trial of the case the court charged the jury that, unless there was a valuable consideration for the rescission, he could not rescind. Under the evidence for the plaintiff, this charge was erroneous. The contract between Crutchfield and Dailey was executory, and not under seal. While it is true he had given his note for the premium on the policy of insurance, his application had not been accepted by the company. The company might have rejected it. It would not be bound until it had accepted the application and issued the policy. So the contract was not fully executed by Crutchfield giving the note. It was still executory. Under this state of facts, the parties who made the contract could, by mutual consent, rescind it. It was not necessary for Crutchfield to pay Dailey any consideration for his consent to rescind. The agreement by each party to release the other from the obligation of the contract was a sufficient consideration, and the agreement did release the insurance company from the performance of that part of the contract which the company would have been required to fulfill. "While a valid executed contract cannot be discharged by a simple agreement, but only by performance, by release under seal, or by an accord and satisfaction, one that is executory (that is, one that has not been acted upon) may be discharged by an agreement of the parties that it shall no longer bind either of them. The consideration on the part of each is the other's renunciation." 21 Am. & Eng. Enc. Law, "Rescission," 68, and cases cited; Biah. Cont. §§ 68, 813 et seq.; McCree-ry v. Day, 53 Hun, 630, 6 N. Y. Supp. 49, affirmed 119 N. Y. 1, 23 N. E. 198; Morrill v. Calchour, 82 Ill. 626; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Lynch v. Henry, 75 Wis. 631, 44 N. W. 837.

3. At the trial the plaintiff sought to introduce in evidence the policy of insurance which he claimed was issued on the application of the defendant, and the defendant objected to it on the ground that there was no proof of its execution. A subagent of the company was introduced, who testified that he received this policy from another subagent, or from the company's general agent; he did not remember which. Upon this testimony the court admitted the policy in evidence. We do not think this was sufficient proof of the execution of the policy. The receipt of such a paper by one subagent from another would not prove its execution. Nor would the receipt by the subagent of the paper from a general agent be sufficient, in our opinion, to prove its execution. We think, therefore, that the court erred in admitting it in evidence. Judgment reversed.

(98 Ga. 472)

## WINKLES v. GUENTHER et al.

(Supreme Court of Georgia. May 19, 1896.)

## ALTERATION OF INSTRUMENTS—PROVINOS OF COURT AND JURY—BURDEN OF PROOF.

1. Where a change, in a material part, made by erasure and interlineation, appears in a written contract, it is not such an "alteration" as is referred to in section 2852 of the Code, if made before execution, but is such an alteration, if made afterwards, without the consent of the other contracting party.

2. The materiality of an alteration is a question of law for the court. When the genuineness of the instrument is denied under oath, the time when, and the intention with which, a change was made in it, are questions for the jury.

3. Where suit was brought upon a promissory note which showed on its face that the amount originally written therein had been changed to a larger amount, and the defendant filed a sworn plea of non est factum, and also a plea alleging that, without his consent, the note had been "raised" in amount after he had signed it, by one claiming a benefit under it, with an intention to defraud the maker, the burden of proof was on the plaintiff to explain when, and for what purpose, the change was made.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. Janes, Judge.

Action by Guenther & Co. against S. J. Winkles. From a judgment for plaintiffs, defendant brings error. Reversed.

Irwin & Bunn, for plaintiff in error.  
Blance & Fielder, for defendants in error.

LUMPKIN, J. An action upon a promissory note for \$128.50 was brought by Guenther & Co. against Winkles. He filed a plea of non est factum, and also a plea alleging that, without his knowledge or consent, the note, after he had signed it, had, with intent to defraud him, been altered by the owner, or some one having an interest in it, by changing the word "four" to the word "six"; thus making it a note for \$128.50, instead of \$124.50, as it was when signed. The evidence showed that the note, as originally written, was for the latter amount, but was decidedly conflicting as to when the erasure and interlineation had been made. There was a verdict for the plaintiffs for the lesser amount, and the defendant assigns error upon the overruling of his motion for a new trial.

1. It is obvious that, if the change in question was made before the note was executed, there was no alteration at all; for in that event the note remained exactly as it was when signed, and accurately expressed the contract intended to be made. If the change was made after signing, then there was such an alteration as is contemplated by section 2852 of the Code; and in that event it would become important to ascertain by whom, and with what intent, the terms of the note as originally written were changed.

2, 3. The materiality of an alteration in a contract is always a question of law, for the court. The alteration in the present case, though apparently trivial, was material in a

legal sense, because its effect, if unchallenged, would be to make Winkles liable for a larger amount than he had contracted to pay. In the opinion by Judge Lumpkin in *Tedlie v. Dill*, 2 Ga. 131, he states that the materiality of the alteration is always a question for the court, and then remarks: "But whether the alteration was made before or after the execution of the instrument, in the more recent cases, has been decided by the court. Formerly it was referred to the jury." Be this as it may, the law is now well settled that, when the genuineness of the instrument is denied under oath, the time when, and the intention with which, a change in it was made, are questions of fact for the jury. In the case just cited, Judge Lumpkin also remarked that some of the authorities maintained that if an instrument was altered in a material part, and the party claiming under it failed to explain it, the contract was absolutely void, and there could be no recovery upon it, but that, on the other hand, it had been held that the law will not presume that an alteration apparent upon the face of the paper was made after its execution. It is, however, not a case for presumption where a plea of non est factum has been filed, and the alteration distinctly attacked as having been made after execution. In that event the plaintiff is put on proof. In *Bank v. Erwin*, 31 Ga. 371, it was held that in such a case the law presumes nothing, but leaves the whole question to be passed upon by the jury. And see *Wheat v. Arnold*, 36 Ga. 479, which was an action on a promissory note, the defense to which was that the note had been altered and changed after the defendant had signed and delivered the same, in certain specified and material parts. The remarks of Judge McCay in *Thrasher v. Anderson*, 45 Ga. 544, are in perfect accord with what we now rule, for he says, "The rule is well settled in this state that alterations are, prima facie, presumed to have been made before execution, unless the paper be denied on oath." And again, in *Thompson v. Gowen*, 79 Ga. 70, 3 S. E. 910, it was decided that a bond altered in a material part, and declared upon as altered, was admissible in evidence without explaining the alteration, "unless there is a sworn plea of non est factum, or some plea denying on oath that the alteration was made with the consent or by authority of the makers of the instrument." Indeed, section 3835 of the Code settles the whole question. It declares, "If the paper appears to have been materially altered, unless it is the cause of action, and no plea of non est factum is filed, the party offering it in evidence must explain the alteration, unless the paper comes from the custody of the opposite party." Although the verdict in the present case was apparently just, we are constrained to grant a new trial because the court submitted to the jury the question of the materiality of the alleged alteration in the note, and also charged them that the burden of proof was on the defend-

ant to show that the alteration was material, and that it was made by the owner of the note, or some one interested in it, with the intent to defraud the defendant. These instructions were erroneous, and necessitate another hearing. If the law had been correctly presented to the jury, this court would not have disturbed the verdict rendered. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 479)

STEWART et al. v. GOLDEN et al.

(Supreme Court of Georgia. May 23, 1896.)

JUDGMENT—COLLATERAL ATTACK—RES JUDICATA—LIMITATIONS.

Where letters of administration were granted upon the estate of a deceased nonresident of this state, and the administrator, under an order of the court which granted the letters, sold land as the property of the estate, and thereafter, upon the petition of other persons claiming to own the land, and against whom the alleged title acquired by the administrator's sale was being asserted (to which petition the administrator and his vendees were parties, and with which they were duly served), a judgment was rendered by the court of ordinary, from which the letters issued, declaring that these letters were void ab initio for want of jurisdiction in that court to grant them, this judgment—the same not having been excepted to nor reversed—was binding upon all the parties thereto, though the petition was filed more than three years after the letters of administration were granted; there having been, so far as appears, no defense to the same by demurrer, plea, or otherwise.

2. Applying the above to the facts in the present record, the plaintiffs' evidence failed to make out a case entitling them to a recovery of the premises in dispute, and there was no error in directing a verdict for the defendants.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. C. Smith, Judge.

Ejectment by W. J. Stewart and others, administrators, and others, against R. F. Golden, administrator, and others. From a judgment for defendants, plaintiffs bring error. Affirmed.

Sidney Holderness and Merrell & Cole, for plaintiffs in error. King & Mundy, Price Edwards, and W. P. Robinson, for defendants in error.

SIMMONS, C. J. The plaintiffs in error brought an action of ejectment for land against the defendants in error, who were in possession. Upon the trial they introduced in evidence a grant from the state to Amos Williams; a deed from Williams to one Harris; a deed from Underwood, administrator of Harris, to Long and Richards; and a deed from Richards to Stewart and Long. One of the defenses relied on by the defendants was that the deed from Underwood, as administrator of Harris, to Long and Richards, was illegal and void, because the administration on the estate of Harris in Meriwether county was illegal, in that Harris did

not live there at the time of his death, had no property there at the time of his death, and had no bona fide cause of action against anybody residing there, and because the judgment granting the letters of administration had since been legally set aside. It appears from the record that Underwood was appointed administrator of Harris by the court of ordinary of Meriwether county in April, 1861; that in 1874 he applied for and obtained an order from the same court authorizing him, as administrator, to sell the land belonging to the estate of the intestate; and that under this order he sold the land in dispute to the predecessors in title of the plaintiffs. In 1890, after the present action was begun, the defendants applied to the court of ordinary to set aside the judgment of that court appointing Underwood administrator on the estate of Harris, on the ground that the court had no jurisdiction, for the reasons set out in the above-stated defense. A rule nisi was issued by the ordinary, calling on the plaintiffs to show cause why the judgment appointing Underwood administrator should not be set aside; and this rule, and a copy of the petition, were properly served upon the plaintiffs, and at a succeeding term of the court of ordinary the judgment appointing Underwood as administrator was set aside, and declared void ab initio, on the ground that the court had no jurisdiction, for the reasons above stated. This order was introduced in evidence at the trial. The court instructed the jury to find for the defendants, which they did; and the plaintiffs made a motion for a new trial, which was overruled, and they excepted.

It was insisted in the argument here that the last judgment of the court of ordinary was void for two reasons: (1) That the defendants had no right to move to set aside the judgment, because they were not parties thereto, and there was no privity between them and the deceased, or the administrator, or any one claiming under them; and (2) because the application was not made within three years after the judgment which it was sought to set aside had been rendered. The validity of the deed from Underwood, as administrator, under which the plaintiffs were seeking to recover, being dependent on the validity of the judgment appointing him administrator, the defendants were vitally interested in setting it aside. Why, then, were they not entitled to have it set aside in the same court that rendered it? If the facts pleaded by them were true, there could be no question that the judgment was void; and "a void judgment is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." Code, § 8594. "A judgment that is void may be attacked in any court, and by anybody." Code, § 3828. We do not see, therefore, why the defendant did not have a right to go into the court that rendered the judgment, and have it set aside.

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But it was argued that under section 2914a of the Code, which declares that "all proceedings of every kind in any court of this state to set aside judgments or decrees of the courts must be made within three years from the rendering of said judgments or decrees," the proceeding in the court of ordinary to set aside the judgment in question was too late, and the judgment setting the same aside was therefore void. This section of the Code does not deprive a court of jurisdiction to set aside judgments, but is simply a statute of limitations. This being so, the plaintiffs, having been duly served with notice of the proceeding, ought to have appeared in that court and objected, if they desired to avail themselves of the fact that the proceeding was not instituted in time. Having failed to do this, and the judgment rendered therein not being excepted to or reversed, it was binding upon them. The ordinary had jurisdiction of the subject-matter and the parties, and a judgment unrevoked would bind all the parties who were before him, although the period of limitation prescribed by this section of the Code had passed. If a person sues another upon a promissory note which is barred upon its face, and the defendant is served with notice and fails to appear and plead, and the court renders judgment against him, he cannot afterwards insist that the judgment is void because the action was barred. When he is in court he must make his defense. If he does not, he cannot afterwards insist that the judgment is void.

The judgment appointing Underwood administrator having been set aside as void, the deed made by him as administrator was also void. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void." *Freem. Judgm.* § 117.

The plaintiffs' right to recover depending upon the deed in question, they failed to make out a case entitling them to recover, and there was no error in directing a verdict for the defendants. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

#### MOORE v. BARKSDALE et al.

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

#### VENDOR AND PURCHASER—FALSE REPRESENTATIONS—STATEMENT OF OPINION—INJUNCTION.

1. A statement, by a vendor of lots to a purchaser, that pipes would be laid to the property connecting with a system of waterworks, is not a representation of a fact which will authorize a rescission of the sale on the ground of false representations.

2. A sale of property under a trust deed will not be enjoined because the trustee has adver-

used to sell all of the property, consisting of several lots, while the law authorizes the sale of only so much as is necessary to satisfy the debt secured, the presumption being that in making the sale the law will be followed.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by Charles E. Moore against T. F. Barksdale, trustee, and others. Decree dismissed on demurrer, and complainant appeals. Affirmed.

B. Lacy Hoge, for appellant. Hardaway & Payne, for appellees.

KEITH, P. Charles E. Moore filed his bill in the hustings court for the city of Roanoke, in which he avers that he purchased from one W. F. Wheatley, of the city of Baltimore, four lots, described in the deed of conveyance as lots 13, 14, 15, and 16, in block 34, as shown on the map of the "River View Land & Manufacturing Company"; that he made the cash payment required by his contract of purchase, assumed certain other payments, and executed his negotiable notes for the deferred payments, securing the same by deed of trust upon the property, in which T. F. Barksdale was the trustee; that, since making the purchase, he had erected on one of the lots a dwelling house at a cost of nearly \$2,000; that all of the original purchase price of the lots had been paid except about \$1,400; that at the time he made the purchase he was induced to believe that pipes would be laid which would bring these lots into connection with a water supply from the Roanoke Gas & Water Company, but that this had never been done; that the trustee, Barksdale, had advertised the lots for sale by public auction, and proposed to sell the whole of the property, whereas, he should be permitted to sell only so much as would be sufficient to pay the unpaid purchase money. The prayer of the bill was that the sale might be enjoined. The injunction was awarded, and upon the hearing the defendants Barksdale and William F. Wheatley demurred to the bill, the demurrer was sustained, and the bill dismissed. To this decree an appeal was allowed to this court.

The first error assigned is that the representation that pipes would be laid connecting the property with the Roanoke Gas & Water Company was a material inducement to the appellant in making the purchase. It is well settled that a false representation of a material fact, constituting an inducement to the contract on which the purchaser relies, is ground for the rescission of a contract of sale in a court of equity. See *Grim v. Byrd*, 32 Grat. 293; *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845. The representation here, however, is not of a fact, but, at the most, of an existing opinion, which does not constitute a ground for the relief asked for. *Watkins v. Improvement Co.*, 92 Va. 1, 22 S. E. 554.

The next error alleged is that, while the demurrer to the bill admits that the land was sold according to the map of the "River View Land & Manufacturing Company," it appears that no such map has ever been recorded. The bill does not aver that there was any representation as to the recordination of the map; so that, even if it were material, there is no averment that there was a false representation made with respect to it. The representation, however, whether true or false, is wholly immaterial, and in no way affects the title to the property in question.

The next error assigned is that the bill should not have been dismissed because the trustee had advertised the sale of the entire premises when a sale of a part only would be sufficient to satisfy the debt. It was proper to advertise the whole subject for sale, though it would be improper for the trustee to sell more than shall appear to be necessary, but the court cannot assume that the trustee would be guilty of a breach of duty, and, as the law forbids a trustee to sell more than is necessary to raise a fund sufficient to discharge the debt secured, the presumption is, till the contrary appears, that the trustee will confine himself within the limits prescribed by the law.

None of the assignments of error are well taken, and the decree complained of is right, and must be affirmed.

(93 Va. 518)

#### HUDSON v. WAUGH.

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

##### DEED—CANCELLATION FOR MISTAKE—DELAY.

Cancellation of a deed on the ground of mutual mistake as to the amount of incumbrance assumed by the purchaser will not be decreed where the purchaser, though discovering the mistake shortly after the transaction, continued to make payments on the incumbrance, and failed to seek relief against the vendor, till the rents of the property fell from \$72 per month to \$43 per month.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Suit by J. B. Waugh against John P. Hudson for cancellation of deed. Decree for complainant. Defendant appeals. Reversed.

A. A. Plegan and B. Lacy Hoge, for appellant. Moomaw & Woods, for appellee.

KEITH, P. J. B. Waugh exhibited his bill in the hustings court for the city of Roanoke, from which it appears that on the 27th day of April, 1891, he bought of one John P. Hudson four parcels of land lying in the city of Roanoke, with improvements thereon, for which he was to pay \$300 in cash on each lot, making \$1,200, \$2,804 payable, with interest, one and two years from date, for which he executed his notes, and assumed the payment of a lien of \$2,793, which was due from his vendor to the Old Dominion

Building & Loan Association, making the purchase price of the lots \$8,800. The lien for \$2,796 arose in this way: Hudson had taken certain shares of stock in the association, and had borrowed money from it; and, to secure its repayment, he had executed deeds of trust which stipulate that he should pay to the association installments amounting to \$51 each month, "until such time as the shares of stock shall be fully paid up, or for the period of 84 months, if said stock does not become fully paid up before the expiration of that time." The purchase was made by Waugh, through F. W. Craig and C. E. Moore, the agents of the vendor, J. P. Hudson; and the bill charges that these agents represented that \$2,796 was the entire amount due by Hudson to the Old Dominion Building & Loan Association, and that, when that sum was paid in monthly installments of \$51 each, the lots would be free from all incumbrance. It further appears that the notes for \$2,804, executed by Waugh, were discounted by him, and paid before maturity; so that the only part of the purchase price of the lots which now remains unpaid is the sum due the building association. About the month of June, 1892, Waugh discovered, as he avers, that, by the deeds of trust from Hudson to the building association, the lots were bound for about the sum of \$4,181, instead of the sum of \$2,796, which he had assumed; and he now claims that he was induced to enter into the contract for the purchase of the lots upon the assurance of the agents of his vendor that he would only be liable for the sum of \$2,796; that he was misled and deceived by their statements, and, while unwilling to believe that they were made with the intent to defraud him, yet the consequence to him is the same; and that a court of equity will grant relief under the circumstances of the case, although the situation may have resulted from a mutual mistake, rather than an intentional fraud. The bill avers that Hudson is insolvent, and that, if the complainant should be required to pay to the building and loan association a sum greater than that contemplated in his contract, his right of action against Hudson upon his covenant of warranty, and against incumbrances contained in the deed from Hudson to Waugh, would be a wholly inadequate protection. He therefore prays that Hudson be made a party defendant to the bill, and that the deeds of conveyance from Hudson to Waugh may be canceled, and the parties be restored to their original positions. To this bill, Hudson filed an answer, which admits the purchase of the lots and the assumption by the complainant of the sum of \$2,796 to the building and loan association, and admits also that the sum stated in the bill as due to the building association at the time of the sale is very nearly the correct amount, including loan, interest, and dues on stock, and claims that the difference between the sum

assumed by appellee and the sum claimed by him as actually due to the building association, amounting to \$1,288, is made up of \$400, interest accruing upon the \$2,796, and that the balance of \$800 would be applied to the payment of the stock in the Old Dominion Building & Loan Association, which was transferred to the complainant. The answer avers that the real agreement between the complainant and respondent was that the houses and lots should be conveyed to the complainant, and the interest in the association should be transferred to him, and the complainant should pay the principal of the money borrowed from the building and loan association, and the interest, demands, and dues upon the same; and that, if there was any mistake made in the drawing of the deed, it was in the failure to state plainly that part of the monthly payments were for interest, part for demands, and dues upon the stock, and part to be paid upon the principal of the loans which were made. The answer denies insolvency, and prays that the complainant's bill may be dismissed.

Upon the issues thus made, proofs were taken, from which it appears that the consideration for the purchase of the lots was as stated in the bill. It further appears that Waugh did not content himself with the representations as to the condition of the title and the amount of the outstanding incumbrances upon the property he was about to purchase that were made to him by Craig and Moore, the agents of the vendor, but that he declined to complete the negotiations until the title was reported upon by Mr. Pendleton, who corroborated the representation made by Craig, fixing the outstanding incumbrances at \$2,796. It appears that the deeds by which the sums to the building association were secured were of record; that they disclosed the whole nature and character of the transaction between Hudson and the building association, and, if examined by Waugh, would have informed him fully as to the extent of the liability resting upon the property. There is evidence which is strongly persuasive that he did actually see and inspect these deeds. Not to have done so, and to have relied wholly upon the representations of his vendor and his agents, furnishes an unusual example of negligence and credulity. It was about a year after the transaction that the appellee admits that he became aware of the existence of an incumbrance upon the property greater than that which he had assumed, but, even after he was fully informed with respect to it, he continued to make the monthly payments as they fell due. It appears that, at the time of the transaction, these four houses were renting for the aggregate sum of \$72 per month, and that after the lapse of a short time the rent fell off to \$64 per month, then to \$60 per month, and continued to decline until the rents only amounted to \$43 per month.

The controversy between the appellant and the appellee turns upon the time within which the shares of the building and loan association shall mature. The sum of \$2,796, assumed by the appellee, is predicated upon the maturity of the shares of the association in about 55 months. If they should mature within that time, then the obligation of the vendee would be precisely as fixed by his contract. Those shares may, perhaps, mature in a less period than 55 months, and in that event the incumbrance upon the property would be satisfied by the payment of a less sum than was contemplated by the appellee in his contract; or a greater length of time than 55 months may be required, in which event a sum greater than \$2,796 would be necessary to satisfy the demands of the building and loan association; but in no event could its demands extend beyond the payment of 84 monthly installments, that being the limit of the obligation imposed by the deeds of trust for the benefit of the building association. Whether the shares shall mature within a longer or shorter period depends upon the profits of the business conducted by the association. The evidence does not satisfactorily show at what period the shares in question may be expected to mature. While, therefore, there is a limit which the liability to the building association cannot exceed, it is not certain that there will be any responsibility imposed upon the appellee in excess of the amount assumed by him, or, if any, just how much it will be.

These are the material facts to be considered in determining this controversy. Do they entitle the appellee to a rescission of his contract for the purchase of the lots? The equities of the parties could be more easily adjusted if any part of the purchase money were yet due to the vendor. He would, of course, be restrained from enforcing his lien for the unpaid purchase money until the amount of the outstanding incumbrance had been ascertained; but here the vendor has been paid in full, and the building association occupies a position which is superior to that of the appellee. No protection, therefore, can be afforded the appellee in derogation of the rights of the association. The facts proved do not establish a fraud; nor, indeed, is fraud distinctly alleged. There is, as we have seen, evidence that the whole transaction was disclosed to the appellee by his examination of the deeds under which the building association makes claim. This, however, he denies; and it is unnecessary to pass upon this issue of fact. It is certain that, in June or July succeeding the transaction, the appellee became fully aware of all the facts as they are now exhibited in the record. It became his duty then to demand of his vendor some satisfactory indemnity against the claims of the building association, and, if arrangements to his satisfaction were not made, he should at once have de-

manded a rescission of the contract, accompanied by an offer upon his part of restitution to his vendor of all the benefits which he had received under it, so that both parties might be restored to their original position with as little loss as possible to either. Instead of doing this, he continued for some months, with full knowledge of the facts, to pay the monthly installments to the building association as they became due; and in the meantime the rents were reduced from \$72 to \$64, to \$60, and finally to \$43 per month.

"A party who intends to repudiate a contract on the ground of fraud should do so as soon as he discovers the fraud; for if, after the discovery of the fraud, he treats the contract as a subsisting contract, or if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit." 2 Add. Cont. p. 776; *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845. This duty is, perhaps, more imperative in the case of a mutual mistake. In *Simmons v. Palmer* (decided at the present term) 25 S. E. 6, it is said: "The application for relief in such cases, upon the ground of mistake, must be made with due diligence, and what constitutes due diligence is to be determined by reference to the facts attending the particular case in judgment. The diligence required should be proportioned to the injurious consequences likely to result from delay."

It is difficult to resist the impression that the decline in the value of the property, as shown by the constantly diminishing rents, constituted the motive for demanding a rescission of this contract. Had the rents derived continued to be sufficient, and more than sufficient, to meet the monthly accruing installments, it is probable that this controversy would never have arisen. It was only when the rents had fallen to \$43 per month (\$8 per month less than the demand of the building association for the same period) that the appellee determined to repudiate the contract, and instituted proceedings for its rescission. He had no right thus to delay and throw upon the appellant the burden resulting from a depreciation of the property. Had he acted promptly, and disaffirmed the contract as soon as he discovered the fraud or mistake of which he claims to have been a victim, it may be that the appellant could have averted, or, at least, have diminished, the loss attending its repudiation. As was said by Earl, J., in *Thomas v. Bartow*, 48 N. Y. 193: "In ordinary cases of tort and breach of contract, it is a fair and just rule which requires the injured party to use ordinary diligence to make his damages as small as he can, and confines his recovery to so much damages

only as he could not by good faith and ordinary diligence have averted. Much more where a party comes into equity, seeking relief on the ground of mistake, should he show that he has used due diligence and good faith to avert the consequence of the mistake; and it would be a poor administration of equity that would give him relief after, by his delay and omission of duty, he had caused irreparable mischief to the other party." Under the circumstances of this case, we do not think that the appellee is entitled to the relief afforded him by the decree appealed from, which must be reversed; and this court will enter such decree as the hustings court of the city of Roanoke should have entered.

(93 Va. 467)

### HESS v. GALE et al.

(Supreme Court of Appeals of Virginia. July 30, 1896.)

#### INSANE WIFE—PROCEEDING TO RELEASE DOWER—PARTIES.

The wife must be made a party to a proceeding under Code, § 2625, providing, if a husband of an insane wife wish to sell real estate, and have her right of dower released, he may petition the court, and if it appears to it to be proper, an order may be made for execution of such release, but the court shall make such order as in its opinion may be proper to secure to her the same interest in the purchase money and the income thereof that she would have had in the real estate and income thereof, if it had not been sold.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Suit by Mary Hess, by her next friend, against Joseph A. Gale and others. A demurrer to a bill was sustained, and the bill dismissed. Complainant appeals. Reversed.

A. A. Phlegar and B. Lacy Hoge, for appellant. Scott & Staples, for appellee.

KEITH, P. Frederick Hess filed a petition in the hustings court for the city of Roanoke, under section 2625, Code Va., in which he averred that he was the owner of certain real estate, which he had contracted to sell to one T. J. Teaford; that his wife, Mary Hess, was of unsound mind, and had been declared insane, and was therefore incompetent to unite in a conveyance of said property; and he prayed that a commissioner of the court might inquire and report forthwith the status of the property, whether petitioner's wife had a contingent right of dower in the same, and, if so, the value thereof, and what sum should be set apart out of the proceeds of the sale in lieu of such contingent right of dower, and that a special commissioner might be appointed to convey said contingent right. Thereupon the hustings court referred the matter to a commissioner, who reported that the wife had a contingent right of dower, and that its value was \$106, which should be set apart for the use of Mary Hess, the insane wife. This report

was confirmed, and a commissioner was appointed to execute a deed conveying and relinquishing the right of dower in the property. Subsequently Frederick Hess died, and Mary Hess, by her next friend, Kate Hess, filed her bill in the hustings court of the city of Roanoke claiming dower in the property. In the bill reference is made to the proceedings upon the petition just referred to, which, it is claimed, were illegal, null, and void, and in no way binding upon the complainant; that the commissioner had no authority or right to convey the contingent right of dower, because complainant had no notice or opportunity to be heard before the hustings court. To this bill J. A. Gale, to whom the property had been conveyed, and who is the present owner thereof, is made a party defendant. He demurred to the bill, and a decree was entered sustaining the demurrer and dismissing the bill, and to that decree an appeal was allowed by one of the judges of this court.

The question presented for our decision is whether the proceedings under section 2625 of the Code, for the transfer of the contingent right of dower of an insane wife, should be *ex parte* or *inter partes*. The section to be construed is in the following words: "If the husband of an insane wife wish to sell real estate, and to have her right of dower therein released to the purchaser, he may petition for that purpose the circuit court of the county or corporation court of the corporation, in which such estate or some part thereof is; and if it appear to the court to be proper, an order may be made for the execution of such a release by a commissioner to be appointed by the court for the purpose, which release shall be effectual to pass her said right of dower to the purchaser. But the court shall make such order as in its opinion may be proper to secure to her the same interest in the purchase money, and the income thereof, that she would have had in the real estate and income thereof, if it had not been sold; or, at the discretion of the court, to secure to her out of the purchase money such sum in gross as, in the court's opinion, may be sufficient to compensate her for right of dower."

Much of the very able oral argument and brief submitted by counsel for the appellees was devoted to a discussion of the true character of the right of a wife in the real estate of her husband during his lifetime, commonly known as the *inchoate* or *contingent* right of dower. We shall not undertake to follow the argument adduced or the authorities cited upon this subject. It is recognized in the statute under which the appellees claim as a "right" in the wife which must pass from her to the purchaser in order to give him a full and complete title. The court is directed to make such order as may be proper to secure to her the same interest in the purchase money and the income thereof that she would have had in the real es-

tate and income thereof if it had not been sold. The court is by the statute required to take from the insane wife a right, and the procedure is prescribed by which that right shall pass to and vest in another. This, under our system of government, is a judicial function, and one which can be exercised only by the courts acting in their judicial capacity. Conceding, for the sake of the argument, that the legislature might arbitrarily destroy the inchoate right of dower, and that it might defeat that right without giving the wife the opportunity to be heard, in a proceeding so repugnant to natural justice and to our whole system of jurisprudence, the purpose or intent to do so should be declared in explicit and unmistakable terms. Where jurisdiction is conferred upon a court to pass upon the right of the citizen, even with respect to those matters over which the legislature may exercise plenary and irresponsible power, if such subjects there be, the presumption would be, in the absence of clear and unequivocal language, that it was the intention of the law that the courts should proceed in their accustomed mode in the discharge of the duty imposed upon them. In *Underwood v. McVeigh*, 23 Grat., at page 418, it is said: "It lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect, in any other court, or elsewhere, when it has been pronounced *ex parte*, and without opportunity of defense. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence." In *Bloom v. Burdick*, 1 Hill, 130-140, it is said: "It is a cardinal principle in the administration of justice that no man can be condemned or divested of his right until he has had the opportunity of being heard; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject-matter was not within its cognizance."

That Mary Hess had an interest to be considered by the hustings court upon the petition presented by her husband is undoubted. That under the statute which we are considering the court recognized that she had an interest is obvious. That, having this interest in court, she was entitled to be heard, is established by the authorities just cited, if authority be needed in support of a proposition that has its foundation in the immutable principles of natural justice. That the decree or order of the court, which undertook, in her absence, to dispose of this interest and transfer it to another, is void,

follows as a necessary conclusion. We are of opinion that the decree of the hustings court sustaining the demurrer and dismissing the bill was erroneous, and must be reversed.

(93 Va. 455)

#### HOCKMAN v. HOCKMAN et al.

(Supreme Court of Appeals of Virginia. July 30, 1896.)

##### JUDGMENT AND DEED—PRIORITY OF LIEN.

Under Code, § 3567, providing that every judgment for money (which by section 8567 includes a decree for money) shall be a lien at or after the date of the judgment, or, if it was rendered in court, at or after the commencement of the term at which it was rendered, the lien of a decree for money, confessed or rendered in vacation, becomes a lien from the first moment of the day on which it was confessed or rendered, and takes precedence of a deed admitted to record later in the day (which by section 2465 takes effect from such time), though the clerk indorses the decree as filed still later in the day.

Appeal from circuit court, Roanoke county; Henry E. Blair, Judge.

Suit by Ella Hockman, by, etc., against Noah Hockman and others. From the decree, Ella Hockman appeals. Reversed.

A. B. Pugh and Scott & Staples, for appellant. G. W. & L. O. Hansbrough and R. H. Logan, for appellees.

RIELY, J. There were but two questions raised or discussed in this case,—the priority of lien between the decree and the deed of trust, and the validity of the latter. The question of priority will be first considered.

It is provided by section 3567 of the Code that "every judgment for money rendered in this state, heretofore or hereafter, against any person, shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled, at or after the date of such judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered." A decree for money, by express enactment, is embraced by the word "judgment," and consequently the statute fixing the lien of a judgment applies equally to decrees. Section 3567 of the Code. At common law all judgments were, by legal fiction, it is said, supposed to be entered on the first day of the term of the court at which they were recovered. This rule has always prevailed in this state whenever the action in which the judgment was rendered was in such condition that it might have been then tried, if it had happened to occupy the first place on the docket; and, the law not regarding fractions of a day, the lien of a judgment began, by relation, at the first moment of the first day of the term. *Society v. Stanard*, 4 Munf. 539; *Coutts v. Walker*, 2 Leigh, 268; *Skipwith v. Cunningham*, 8 Leigh, 271; *Horsley v. Garth*, 2 Grat. 474; *Withers v. Carter*, 4 Grat. 407; *Jones v. Myrick*, 8 Grat. 179; *Brockenbrough v. Brockenbrough*, 31 Grat.

580; *Yates v. Robertson*, 80 Va. 475; and *Janney v. Stephen*, 2 Pat. & H. 11. It being established by the decisions of this court that under the statute, as well as by the rule of the common law, a judgment or decree recovered or rendered during the term of a court in an action or cause that was ready for trial on the first day of the term becomes a lien on the real estate of the debtor as of the first day of the term, and that the lien thereof begins with the day itself, the language of the statute furnishes no ground for fixing a different or other time of the day for the commencement of the lien of a judgment or decree confessed or rendered in vacation. It discloses no intention on the part of the legislature to abrogate the principle of unity of the common law in respect to the day as a point of time. Its provisions give no warrant for drawing any distinction in this respect between judgments and decrees pronounced in term by the courts, and judgments and decrees confessed or rendered in vacation—certainly none to the prejudice of the latter. The one class becomes a lien from “the commencement of the term,” the day on which the term began; the other, from “the date of the judgment,” the day on which it was confessed or rendered. In respect to the time of the day when the lien of each begins, there is no distinction. Both begin with the first moment of the day on which the judgment or decree becomes a lien. There is no substantial ground for the claim that the lien of a decree rendered in vacation should begin at a fractional part of the day. It is a sound policy that rejects fractions of the day in fixing the lien of judgments and decrees. It gives to the public a plain and simple rule for their guidance, diminishes the opportunity for fraud, removes ground for controversy, and tends to prevent litigation. Wherever the legislature has seen fit to depart from the common-law principle of the unity of the day, its purpose to do so has been plainly declared. It has seen proper to create a priority between executions where two or more come to the hands of the officer on the same day; and, to this end, it requires him to indorse on each execution not only the year, month, and day he receives the same, but also the time of day. Code, §§ 3589, 3890. It has also prescribed that a deed of trust or mortgage shall be void as to subsequent purchasers for valuable consideration and without notice, and creditors, except from the time that it is duly admitted to record, and that, where two or more deeds of trust or mortgages embracing the same property are admitted to record on the same day, that which was first admitted to record shall have priority. Code, §§ 2465, 2469. Other instances from the Code will readily suggest themselves. But the statute law of the state contains no similar provision in regard to the lien of judgments and decrees. It nowhere prescribes that the clerk shall indorse on the

record the time of day when a judgment or decree is confessed, or when a decree made in vacation is returned to his office to be recorded. And, there being no statute requiring it to be done, such indorsement would be without force or effect. The law does not sanction what it does not enjoin.

The decree in favor of the appellant against Noah Hockman was made by the judge in vacation on November 9, 1892, was returned by him on that day to the clerk's office to be recorded, and was entered on the lien docket on November 18, 1892. The deed from Hockman to L. C. Hansbrough, trustee, to secure creditors, bears date on November 8, 1892, but was not admitted to record until the next day at 8:30 a. m. It went to record on the same day that the decree was made and returned to the clerk's office. The deed, by the express terms of the statute (section 2465 of the Code), took effect, as against the appellant, only from the time it was admitted to record; at 8:30 a. m. on November 9, 1892, while under the statute and the established rule of law, notwithstanding the indorsement of the clerk that it was filed on November 9, 1892, at 12 m., the decree became a lien on the real estate of the defendant at the first moment of that day. It therefore has priority over the deed of trust. This being our conclusion, it becomes unnecessary to consider the question of the validity of the deed of trust, which was assailed in the bill on the ground that it was fraudulent. The circuit court having held that the deed of trust took precedence over the decree, and was a valid conveyance, its decree, for the reasons herein stated, must be reversed.

(93 Va. 479)

#### MADDOCK'S ADM'X v. SKINKER et al.

(Supreme Court of Appeals of Virginia. July 30, 1896.)

#### APPEAL—AMOUNT INVOLVED—REPORT OF COMMISSIONERS—FIRM PROPERTY—INDIVIDUAL CLAIM.

1. Where an administrator of a deceased member of a firm controverted a certain claim wholly as a liability of the firm, but the court established it against the firm, and decreed that a debtor of the firm, who was a party to the suit, should pay such claim, and pay half the residue of his indebtedness to the administrator, the amount in controversy, for purpose of appeal by the administrator, is the whole amount of the claim against the firm, for which the estate of intestate would be liable if it was not paid otherwise.

2. A report of a commissioner, made pursuant to the decree of the court, which did not direct return of the evidence, will, in the absence of error apparent on its face, be taken as prima facie correct, unless steps are taken to place before the court the evidence on which it is based.

3. Property of a partnership is not subject to a judgment of an individual creditor till payment therefrom of the firm debts, and adjustment of the accounts of the partners as between themselves.

Appeal from hustings court of Roanoke; William Gordon Robertson, Judge.

Suit between Frank Maddock's adminis-

tratrix and J. H. Skinker and others. From a decree the administratrix appeals. Reversed.

Griffin & Glasgow, for appellant. Scott & Staples, for appellees.

RIELY, J. A motion was made by the appellees to dismiss the appeal on the ground that the matter in controversy is merely pecuniary, and, exclusive of costs, is less in value or amount than \$500. The matter in controversy, however, is the entire amount of the judgment claimed by J. M. Gambill & Co., which, inclusive of principal and interest, amounted at the date of the decree to \$951.79. The appellant controverted it wholly as a liability of the late firm of Maddock & Evans, but the court established it against the partnership for the full amount. It appearing that certain attorneys, who were parties to the suit, were indebted to the firm of Maddock & Evans, for moneys collected, in the sum of \$2,196.93, the court decreed that they pay to Gambill & Co. the amount of their debt; and, dividing the residue of the indebtedness into two equal parts, it decreed that they pay one of these parts which amounted to the sum of \$622.57, to Jean W. Maddock, the appellant, as administratrix of Frank Maddock, deceased. It was, therefore, contended by the appellees that the only amount in controversy is the difference between \$622.57 and one-half of \$2,196.93, the amount due from the attorneys, to wit, the sum of \$476.90. But this is not correct. The court, by its confirmation of the report of the commissioner, established the entire amount of the judgment claimed by Gambill & Co., and thereby fixed the liability for it upon the individual estate of the appellant's intestate, as well as upon the late firm of Maddock & Evans, of which he was a member. No part of the judgment has been paid, and if it should happen that it be not paid by the attorneys, the estate of Frank Maddock, deceased, would remain liable for the whole \$951.79; and it is this amount which constitutes the matter in controversy upon the appeal.

The first assignment of error is the bare statement that it was error for the court to confirm the settlement of the partnership accounts, because the same was without sufficient evidence to sustain it. Neither in the petition for the appeal nor in the oral argument did counsel indicate in what respect the evidence was insufficient to sustain the settlement made by the commissioner. It is in accordance with the evidence, and this assignment of error need not be further considered.

The appellant excepted to the report of the commissioner because he allowed the claim of Gambill & Co. as a subsisting judgment against Maddock & Evans without any proof (it was alleged) that there was such a judgment against the firm, and because the evi-

dence showed that, if any debt was due, it was the personal debt of Evans, and not a debt of the firm. The court overruled the exception, confirmed the report, and decreed, as we have seen, the payment of the judgment out of the assets of the firm. This action of the court constitutes the only other assignment of error. It is to be observed that the exception did not deny that there was such a judgment, but simply claimed that it was allowed without any proof. The report of the commissioner was made in obedience to the decree of the court, and, except for error apparent on its face, it was to be taken as *prima facie* correct, unless steps were taken to place before the court the evidence on which it was based, or it was shown, by the deposition of the clerk of the court in which the judgment was alleged to have been recovered, or otherwise, that there was no such judgment. This was not done. The commissioner stated that his report was made up from certain depositions, and "from the records of the clerk's office of your honor's court." It does not appear that he was directed by the court, or requested by the appellant, to return the evidence on which he reported the judgment. It was not his duty to do so, unless so directed or requested; and, the appellant not having taken steps to bring the evidence before the court, it could not review the finding of the commissioner, and the exception could not avail her. *Shipman v. Fletcher*, 91 Va. 473, 478, 22 S. E. 458; *Saunders v. Prunty*, 89 Va. 921, 17 S. E. 231; *Bowden v. Parish*, 86 Va. 67, 9 S. E. 616.

It appears from the deposition of J. M. Gambill that Evans, on account of his indebtedness to the firm of Maddock & Evans for certain mules, carts, and tools belonging to it, had assumed to pay the debt to Gambill & Co., and that he and Maddock approached the latter with the view of having them release Maddock from the debt on condition that Evans would secure the debt by a deed of trust on the said property, which was worth about \$2,000. Gambill & Co. agreed to do so, upon the condition being complied with. Evans returned the next day, and declined to give the deed of trust. The desired release was for the benefit of Maddock, and the duty was upon him, and not upon Gambill & Co., to see that Evans complied with the condition on which they had consented to release him. As Evans refused to secure the debt by deed of trust, the firm of Maddock & Evans continued liable for it. The evidence establishes, however, that Evans was indebted to the partnership for the mules, carts, and tools, and that he had assumed, on account of such indebtedness, to pay the judgment of Gambill & Co. The partners evidently considered that the interest of Maddock in the property was at least equal to the amount of the judgment, and it clearly appears that the share of Evans in the undivided assets is sufficient to discharge it. If the judgment has now to be paid out of the assets belonging to the firm, as

It must be, then Evans should be charged, in a proper settlement of the partnership, with such an amount, for the mules, carts, and tools, as would make the interest of Maddock therein equal to the judgment, or (which is the same thing, and prevents circuity) the estate of Maddock should receive out of the assets of the firm, after the payment of the judgment, a sum equal to the amount of the judgment, so as to adjust properly the accounts of the partners with the partnership and between themselves, before there is any division of the assets between the partners.

It was not questioned that, ordinarily, this would be the proper course; but it was contended that, inasmuch as individual creditors of Evans had obtained judgments against him, and sued out executions, they thereby acquired a lien on the share of Evans in the assets of the partnership remaining after the payment of the debts of the firm superior to the right of Maddock to have such settlement of the accounts between the partners and a distribution of the assets in accordance therewith. Partners are joint tenants of the property of the partnership. Neither partner has an exclusive right to any part of the property until all of the debts of the partnership are paid, including the debts which may be due from the partnership to either of the partners. The interest of each partner in the property of the partnership is his share of the surplus after all the firm debts are paid and a balance of accounts is struck between the partners. It is thus that his interest is ascertained; and it is only this interest, so ascertained, that is subject to the lien of the execution or attachment of an individual creditor. The law does not permit the separate creditor to obtain more than the partner, who is his debtor, is entitled to. *Christian v. Ellis*, 1 Grat. 396; *Diggs' Adm'r v. Brown*, 78 Va. 295; *Shackelford's Adm'r v. Shackelford*, 32 Grat. 481; *Taylor v. Fields*, 4 Ves. 396; *Dutton v. Morrison*, 17 Ves. 193; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Menagh v. Whitwell*, 52 N. Y. 146; *Phillips v. Cook*, 24 Wend. 389; *Pierce v. Jackson*, 6 Mass. 242; *U. S. v. Hack*, 8 Pet. 271; *Maxwell v. City of Wheeling*, 9 W. Va. 206; *Sirrine v. Briggs*, 31 Mich. 443; *Smith v. Evans*, 37 Ind. 526. See, also, *Story, Partn.* §§ 261-263, 311; 2 *Colly. Partn.* (6th Ed.) § 793, and notes thereto; 1 *Bart. Ch. Prac.* 618, 619; and 3 *Minor, Inst.* (2d Ed.) pt. 2, p. 692. In *Pierce v. Jackson*, supra, *Parsons, C. J.*, said: "At common law, a partnership stock belongs to the partnership, and one partner has no interest in it but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe the firm. Consequently, all the debts due from the joint fund must first be discharged before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his

debtor, whether his claim be founded on any contract made with his debtor, or on a seizing of the goods on execution." In *Nicoll v. Mumford*, supra, *Chancellor Kent* said: "The interest of each partner is his share of the surplus, subject to all partnership accounts; and that interest or surplus only is liable to the separate creditors of such partner, claiming either by assignment or under execution." In *Menagh v. Whitwell*, supra, *Rapallo, J.*, said: "Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts." In *Atkins v. Saxton*, 77 N. Y. 195, 190, the same judge, discussing the right of a purchaser of the interest of a partner in partnership property at a sale under an attachment or execution against such partner for his individual debt, said: "He takes it subject to the rights of the co-partners of the debtor and the creditors of the firm, and subject to an accounting which may disclose that he derived no beneficial interest from his purchase. All that he can ultimately obtain is the debtor's share of such surplus as may remain after payment of the firm debts and the adjustment of the accounts of the partners as between themselves." And in *Haynes v. Knowles*, 36 Mich. 407, 410, *Campbell, J.*, said: "The partner not sued cannot, on any principle of justice, be placed in any worse condition by a creditor of the partner than he could have been by his own partner."

It was error, therefore, in the hustings court to distribute any part of the share of George M. Evans in the undivided assets of the partnership, remaining after satisfying the judgment of Gambill & Co., to the separate creditors of Evans, until the payment of a sum equal to the amount of the judgment had been decreed to the estate of Maddock, to which sum he was entitled, according to the evidence, out of the firm assets, on account of the indebtedness of Evans to the partnership, and which the latter, in the lifetime of Maddock, had assumed to pay. Its decree must therefore be reversed, and the cause remanded to the said court, with directions to distribute the moneys in the hands of the said attorneys upon the principles herein declared.

(93 Va. 460)

DUPUY et ux. v. EASTERN BUILDING & LOAN ASS'N et al.

(Supreme Court of Appeals of Virginia. July 30, 1896.)

BUILDING AND LOAN ASSOCIATIONS—CONSTRUCTION OF BY-LAW—IMPOSITION OF FINES.

1. Under a by-law of a building association, providing that "borrowing members who shall neglect to pay any installments as the same become due shall pay to the association a fine of 20 cents per month on each \$100 that they have

borrowed from the association," the fine for one month is not repeated and added to that of each succeeding month, making the amount increase in arithmetical progression, but only 20 cents on each \$100 can be imposed in any one month.

2. Where the constitution of a building association prescribes the fines to be imposed on delinquent members, it thereby fixes the limit beyond which the association cannot go; but it may by by-law waive some part of the fines so authorized, and impose smaller ones, and in such case the by-law will govern.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by William P. Dupuy and Nella B. Dupuy against the Eastern Building & Loan Association and J. H. Cutchin, trustee. Decree for defendants, and complainants appeal. Reversed.

Scott & Staples, for appellants. Watts, Robertson & Robertson, for appellees.

KEITH, P. William B. Dupuy and Nella B. Dupuy, his wife, exhibited their bill in the hustings court for the city of Roanoke, from which it appears that on the 1st day of August, 1891, they borrowed from the Eastern Building & Loan Association of Syracuse, N. Y., the sum of \$5,500, and that they by deed of trust conveyed to Henry W. Loomis, trustee, a certain house and lot, situated in the city of Roanoke, to secure the payment of \$6,671.61. This last-mentioned sum is evidenced by 78 promissory notes of even date with the deed, executed by the plaintiffs and payable to the Eastern Building & Loan Association, one of each notes to be paid on or before the last Saturday of each and every month until all of said notes are fully paid, with interest on each at the rate of 6 per cent. per annum, payable semiannually; and it is further covenanted in the deed to pay all fines and penalties that may be imposed under the constitution and by-laws of the association. It seems that the plaintiffs paid all of their notes and dues up to the last Saturday in June, 1892, but they failed to meet the note maturing on that day, and the eight succeeding notes, of \$87.12, amounting to the sum of \$696.96. Fines are also due from the plaintiffs for default in paying the notes when they became due, which the plaintiffs claimed increased the amount due by them to the sum of \$797.15. They then aver that one J. H. Cutchin, who claims to be substituted trustee in the place of Henry W. Loomis, advertised that he would on the 6th of February, 1893, proceed to sell at public auction the property conveyed in the deed of trust for the payment of the sum of \$1,092.96, which he claims to be due. It thus appears that the contention of the plaintiffs is that on the 1st day of February, 1893, they were in arrears upon their notes due and unpaid, and the interest thereon, and for the fines imposed for their default in meeting the aforesaid payments, the sum of \$797.15, while the building association claims that there was due from them at that time the sum of \$1,092.96. The build-

ing and loan association and Cutchin, trustee, are made parties defendant to this bill, and an injunction was asked for and granted. The bill was answered by Cutchin, and the case was heard upon the bill and answer, and the exhibits filed with them.

It is provided by the constitution of the Eastern Building & Loan Association that the fine "for the nonpayment of dues shall be ten cents on each and every share of stock unpledged, and twenty cents on all stock pledged, for each and every month the payment may be in arrears." The by-law upon the subject is as follows: "Borrowing members who shall neglect to pay any installments on stock and interest on their loan as the same becomes due shall pay to the association a fine of 20 cents per month on each \$100 they may have borrowed from the association." The contention of the association is that, by a proper construction of the charter and by-laws, the fine of 20 cents per month is to be imposed upon each and every share of the stock pledged, and that this fine is to be repeated for each and every month that the delinquency of the borrower continues,—i. e. if the default should be made in the payment of the January installment, a fine of 20 cents per share should be imposed, amounting in this case, upon the \$5,500, to \$11; that, if default continued during the month of February, a fine of 20 cents per share, or \$11 in the aggregate, should be imposed for this new default, and another fine of an equal amount for the continued default which had occurred in January, making \$22; that in March there should be a fine for the default of that month and a fine also for the continued default in the January and February installments, making in the aggregate \$33; and so on for as many months as the default might continue. From a table which is printed with the petition for the appeal in this case, and the correctness of which is unchallenged, it appears that, according to this system, the total fines for the first year would amount to \$858, for the second year to \$2,442, for the third year to \$4,038, and for the fourth year to \$5,610; so that, the default having occurred in June, 1892, there would be due in June of the present year about \$12,000 of fines, and, if default should continue to the maturity of the last note, the aggregate of fines would be \$33,905.

Upon the part of the appellants it is contended that, by a proper construction of the constitution and by-laws, the failure to meet a monthly payment is a complete offense in itself, for which a punishment is prescribed, which cannot be repeated in arithmetical progression in the manner contended for by the association. To state the claim of the appellants in figures, it is, that upon default in the monthly payment they were properly chargeable with 20 cents for each \$100 that they had borrowed from the association, making in all \$11, and that this \$11 was to be re-

peated each and every month that the default continued; in other words, that the maximum of fines which could be imposed against them was \$132 per annum, or, for the four years of their default, from June, 1892, to June, 1895, \$528.

In *Endlich on Building Associations* (2d Ed., § 419) it is said: "It is necessary that every member should be aware, in advance, of the consequences of any action or omission in violation of the rules of the society. These rules or by-laws should therefore be explicit and unequivocal upon the subject. The rules imposing fines should be very precise in their terms and clear in their meaning, as the courts do not like penalties of any kind, and generally decide against them, if possible. \* \* \* They must be created by unambiguous language. If the by-law imposing them, by reason of ambiguousness, admit of several interpretations, the courts will adopt that most favorable to the member, and least favorable to the association." Where the rule was that "mortgagors neglecting to pay their monthly repayments will be subject to fines at the rate of 3 per cent. per share for the first month, and for each and every succeeding month three pence per share additional on such repayments," the association was allowed to collect only one fine of three pence on each share of the defaulting member, though this was less than the member himself had contended for. The society claimed three pence per share for the first month, six pence for the second, nine pence for the third, and so on, adding three pence for each month; but the court said: "The rule admits of three constructions,—the one contended for by the society, the other suggested in the argument for the borrower, and the third, more favorable to him, which is the right construction, and that is, that the society is only to be allowed one fine of three pence on each share." In *re Tierney's Estate*, 8 Ir. Law T. Rep. 29. So, too, under a by-law providing that "if any stockholder shall neglect or refuse to pay his weekly dues as often as the same shall be payable, every stockholder so neglecting or refusing shall forfeit and pay the additional sum of ten cents for every share by him held for every such weekly neglect or refusal, to be charged with the weekly dues," it was held that only one fine could be imposed for the nonpayment of the weekly installment. *Shannon v. Building Ass'n*, 36 Md. 383. We have been unable to examine these cases, but they are quoted fully in *End. Bldg. Ass'ns*, §§ 420, 421.

In the cases just referred to, the language upon which the associations relied for the imposition of the cumulative fines was as strong in support of their position as that which we are called upon to construe in this case. Indeed, the language in *Re Tierney's Estate* is in substance the equivalent to that before us. In that case the rule was that "mortgagors neglecting to pay their monthly repayments will be subject to fines at the rate

of three per cent. per share for the first month, and for each and every succeeding share three pence per share additional on such repayments." In this case the language is: "The fines for nonpayment of dues shall be ten cents on each and every share of stock unpledged, and twenty cents on all stock pledged, for each and every month the payment may be in arrears." That the construction contended for by the appellee would be most harsh and oppressive cannot be denied. It would, indeed, justify the terms in which it is characterized in the petition of the appellants, and compel us to sanction a "startling enormity." To support a construction leading to such a result, the language should be explicit and unequivocal,—should be precise in its terms, and clear in its meaning. *End. Bldg. Ass'ns*, § 419. We are of opinion that, relying upon the authorities just cited, we might be warranted in holding that the proper construction of the article from the constitution above quoted limits the power of the society to the imposition of one fine for each offense, and does not sanction its repetition.

The construction of the by-law is more free from doubt than that of the constitution, and upon that we prefer to rest our decision. "Borrowing members who shall neglect to pay any installments as the same become due shall pay to the association a fine of twenty cents per month on each \$100 that they have borrowed from the association." The amount borrowed in this case was \$5,500. A fine of 20 cents on each \$100 amounts, in the aggregate, to \$11; and the payment of a fine of \$11 per month would, therefore, seem to satisfy the terms of the by-law above quoted. The articles of the association prescribe the limits within which the corporation can properly act; the by-laws indicate the extent to which the corporation has seen fit to put into action the powers which the articles have conferred; and, though the charter or articles, in conferring the power, may use imperative or mandatory language, yet, if it be a benefit,—a privilege or advantage conferred upon the corporation, and not a duty imposed,—it may qualify, diminish, or waive its exercise in whole or in part. It is binding upon the association in the sense that the by-laws may ordain fines of less, but may not ordain fines of greater amount than those prescribed by its charter. *End. Bldg. Ass'ns*, § 422. If, therefore, there were any repugnancy between the charter and the by-laws, if the charter imposed a greater fine than the by-law, the courts would consider that, in the adoption of the by-law, the corporation had found it wise and expedient to forego the exercise of a portion of the power conferred upon it by the charter, and deem it a waiver to that extent of its privilege, and would enforce the fine imposed by the by-law.

We are of opinion that the appellants could be fined only 20 cents on each \$100 of money for each month that they were in default,

and that the decree of the court, which established the contention of the appellee, and permitted the imposition of fines of 20 cents per month for each \$100 borrowed, and also for each installment as to which appellants were in arrear, is erroneous, and must be reversed.

**OLD DOMINION INV. CO. v. MOOMAW  
et al.**

(Supreme Court of Appeals of Virginia. July 30, 1896.)

**INJUNCTION—SALE UNDER TRUST DEED—REGULARITY OF.**

A court will not enjoin the conveyance by a trustee of lots sold by him under a trust deed on the ground of the inadequacy of the price bid and because the lots were offered together in bulk, where no fraud is shown, and it does not appear that the sale was not open and fair, and made in accordance with the terms of the trust deed, nor that any one else would have bid more had the lots been offered separately.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by the Old Dominion Investment Company against George O. Moomaw and others. Complainant appeals from a decree dissolving an injunction. Affirmed.

W. L. Gooch, for appellant. Moomaw & Woods, for appellees.

**CARDWELL, J.** By his deed of March 11, 1890, George R. Allen conveyed to D. O. Moomaw, trustee, five certain lots of land in section 4 on the map of the property of the West End Land Company, in the city of Roanoke, in trust to secure George O. and W. H. Moomaw the payment of the sum of \$2,333.33, evidenced by two interest-bearing negotiable notes of \$1,166.66 each, drawn by Allen, payable to the order of George O. and W. H. Moomaw in one and two years from their date. Default having been made in the payment of the second note, the trustee, after being requested so to do by the holders of the note, and after advertisement, as required by the deed, sold the five lots of land at public auction in front of the courthouse in Roanoke city at 12 o'clock, November 23, 1892, at which sale the property was struck out to George R. Allen, as the highest bidder therefor, at \$1,400. Whereupon the Old Dominion Investment Company, claiming ownership of the lots, obtained an injunction from the judge of the hustings court of Roanoke city, restraining the trustee from conveying the property to Allen, or otherwise proceeding in the premises, until the further order of the court. D. O. Moomaw, the trustee, Allen, the purchaser, and G. O. and W. H. Moomaw, the holders of the note secured, were made parties defendant to the bill, and called on to answer; but oath to their answer was not waived, and the defendants filed their joint and separate demurrer and answer under oath to the bill, to

which answer plaintiff replied generally. December 3, 1892, in pursuance of notice duly given to plaintiff, the defendants moved the court to dissolve the injunction, which was done, and from this decree dissolving the injunction an appeal was taken to this court.

The motion to dissolve the injunction was heard on the bill, the demurrer and answer of the defendants, the general replication of the plaintiff to the answer, and affidavits on behalf of both plaintiff and defendants. The bill alleges that the plaintiff was the owner of the lots, and that it had purchased them, and agreed to pay therefor \$1,500 each, and had paid \$4,500 on the purchase money, but does not state when the purchase was made, or from whom. The injunction was asked for upon the grounds (1) that the price at which the property was knocked out and sold at the sale by the trustee was so grossly inadequate as to shock the conscience of a court of equity; (2) that undue haste and speed were exercised in the time that the property was put up, cried, and knocked out; and (3) that the property, consisting of five lots, should have been sold by the single lot, and not in bulk, as was done. There is no suggestion of fraud or misconduct on the part of the trustee, other than undue haste in closing the sale, or that the trustee did not sell the property in accordance with the provisions of the trust deed. Only the suggestions are made that the property might have brought more had the lots been sold separately instead of together, and that the price obtained was grossly inadequate. Every material allegation of the bill is responded to and denied in the answer, and the only proof in support of the bill is found in the affidavits of five persons, taken and read on behalf of the plaintiff at the hearing. Of these, three made oath that in their opinion the price for which the lots sold was grossly inadequate, and that they would have sold for more, in the opinion of the affiants, had they been sold separately, but neither gave any facts or data upon which their opinions were based; and the other two made oath that the sale was made in undue haste. On the other hand, the affidavits of Allen, the purchaser, Peck, the auctioneer, and Jamison, a bidder at the sale, were read in support of the answer of the defendant, all of whom made oath that the sale was open and fair; that the bidding was kept open a proper time, at least 15 or 20 minutes after the reading of the advertisement, which was not read until 12 o'clock; and that the lots were not knocked out until the bidding had entirely ceased. It appears, also, from the answer, and is not controverted, that the lots were, at the time of the sale complained of, advertised for sale to take place shortly thereafter for delinquent taxes due thereon for 1891, and that the taxes for 1892 were due and unpaid.

The bill does not allege, nor is there proof, that the plaintiff knew of other bidders

for the property who would have bid more for it had the sale been longer kept open, or who would bid more for the property if it were again offered. There is only the bare suggestion made that "some buyer might have bid more than the pro rata of the price paid for the whole for one lot, not desiring all, and so it may be that in offering them as a whole complainant's rights were prejudiced." As to the alleged undue haste in making the sale, the evidence is wholly insufficient to overcome the denial in the answer of this allegation. In fact, there is no proof in support of it except the affidavit of the affiant Chiles, the secretary and treasurer of the plaintiff company, who states that at 6 minutes past 12 m. he was in front of the courthouse, saw Mr. Allen and Mr. Moomaw, and went immediately in, found the auctioneer, and found that the sale had been made. This statement is in conflict with the statements of the affiants Allen, Peck, and Jamison, who say that the sale was not commenced till after 12 o'clock m., was kept open for 15 or 20 minutes, and not concluded till all bidding had ceased. Upon this state of the record it was plainly the duty of the court below to dissolve the injunction, and there is no error in the decree appealed from, and it is therefore affirmed.

(93 Va. 472)

## DONALDSON v. LEVINE et al.

(Supreme Court of Appeals of Virginia. July 30, 1896.)

## EQUITY—REFORMATION OF CONTRACTS—MISTAKE.

Where a contract for the sale of property has been executed by a conveyance by the vendor and the giving of notes for unpaid purchase money by the purchaser, such notes will not be reformed on the ground of mistake in the amount for which they were given, unless the mistake is established by the most satisfactory proof.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by Jane Donaldson against Leipschen Levine and others. Decree for defendants, and complainant appeals. Affirmed.

Scott & Staples, for appellant. L. H. Cocke and Moomaw & Woods, for appellees.

GARDWELL, J. On May 9, 1890, the appellant, Jane Donaldson, bought, through Chipman, Massie & Co., real-estate agents, of Mrs. L. Levine, one of the appellees, a lot of land, with improvements thereon, situated in the city of Roanoke, for \$6,000. The memorandum of agreement, entered into at the time, and signed by the agents, is as follows: "Roanoke, Va., May 9, 1890. This contract, made and entered into this day between Chipman, Massie & Co., agents of L. Levine, of the one part, and J. Donaldson, of the other part, witnesseth: That in consideration of the sum of six thousand (\$6,000) dollars the parties of the first part have sold to the party

of the second part that certain lot, with a house thereon, at the southwest corner of Henry and Kirk streets. Terms: Twelve hundred (\$1,200) dollars cash, and the balance, assume the indebtedness on the same, and the balance in one and two years, with interest at the rate of six (6) per cent. per annum. Chipman, Massie & Co." By deed of same date Mrs. Levine and her husband conveyed the property to Jane Donaldson. This deed provided "that, in consideration of the sum of \$6,000, to be paid as follows, to wit, \$1,200 cash in hand paid, receipt whereof is hereby acknowledged, and the assumption by the party of the second part of five certain negotiable notes of \$750 each, and one note for \$150, and four notes for \$135 each, all the said notes bearing date January 17, 1890, payable in one, two, three, four, and five years, without interest (said notes being made and signed by Leipschen Levine, and payable to Estella G. Engleby), and the balance of the deferred payments to be paid in two equal annual payments of \$487.71 each, as evidenced by two certain negotiable notes made and signed by Jane Donaldson, and payable to Leipschen Levine or order at the First National Bank of Roanoke; the said parties of the first part do grant," etc. By deed of same date Jane Donaldson and her husband conveyed the property described in the first-named deed to Henry S. Trout, Jr., in trust to secure the two notes, of \$487.71 each, before mentioned and described. It seems that, after the two notes of \$487.71 were executed by Jane Donaldson and delivered to Mrs. Levine, they were negotiated before maturity by the latter to J. M. Watts, who becomes a party defendant to this suit on his own petition. At the maturity of the first note for \$487.71, Jane Donaldson claimed that a mistake had been made in the settlement for the purchase of the lot conveyed to her, and that she did not owe the whole of said note, but only \$180 thereof and interest thereon; and, in order to avoid a sale of the property under the deed of trust to Trout, Mrs. Levine and Mrs. Donaldson agreed between themselves that Mrs. Donaldson should pay \$192.92 of the note, and Mrs. Levine \$329.25, the balance, but the arrangement not to be conclusive on either party as to their liability upon the note or as to the true amount of the consideration for the lot of land. When the last \$487.71 note became due it was not paid, and Watts, the holder thereof, directed the trustee, Trout, to sell the property under the trust deed, and the trustee was proceeding to do so when Mrs. Donaldson obtained an injunction from the judge of the corporation court of Buena Vista, restraining the trustee from selling the property until the further order of the corporation court of Roanoke city. The ground upon which the injunction was obtained, and the relief prayed for in the bill, was that there was a mutual mistake made by the parties in the deed of conveyance from Mrs. Levine

and her husband to Mrs. Donaldson of May 9, 1890; the alleged mistake being that, after deducting the cash payment of \$1,200, the five notes of \$750 each, the note of \$150, and the four notes of \$135 each, the true balance due from Mrs. Donaldson was \$360, instead of \$975.42, and, when divided into two notes, they would have been \$180 each, instead of \$487.71. In other words, the contention of Mrs. Donaldson is that she was only required to assume the payment of the five notes of \$750 each, held by Engleby, and secured on the property, the note of \$150, and the four notes of \$135 each; and then, deducting the cash payment of \$1,200, and the several notes mentioned, aggregating \$4,440, from the \$6,000, she would have been owing only \$360, which was to be divided into two notes, of \$180 each, payable at one and two years, with interest. The defendants, Mrs. Levine and her husband, filed their joint answer and amended answer, to which plaintiff replied generally, and the cause was heard before the judge of the corporation court of Roanoke, March 21, 1893, upon the bill and exhibits therewith, the answer and amended answer of Mrs. Levine, the exhibits therewith, and plaintiff's general replication thereto, and the petition of James M. Watts. Whereupon the court dissolved the injunction awarded in the case, and decreed that Mrs. Levine recover of Jane Donaldson the sum of \$329.75, with interest from July 20, 1891, being the part of the first \$487.71 note that was paid by Mrs. Levine, and which should have been paid by Mrs. Donaldson in whole. From this decree an appeal was obtained to this court.

It was said by Lewis, P., in *Railroad Co. v. Dunlop*, 86 Va. 346, 10 S. E. 240: "The authorities all agree that equity has jurisdiction to reform written instruments in two well-defined classes of cases only, viz.: (1) Where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagements of parties, when reduced to writing, to be varied by parol evidence, that in no case will relief be granted except where there is a plain mistake, clearly made out by satisfactory and unquestionable proof. According to some of the cases, there must be a certainty of the error. At all events, the party alleging the mistake must show, by evidence which leaves no reasonable doubt upon the mind of the court, not only exactly in what the mistake, if any, consists, but the correction that should be made. \* \* \* A rule less rigid would be fraught with infinite mischief, since it would be destructive to the certainty and safety of written contracts." In the case of *Carter v. McArtor*, 28 Grat. 360, Staples, J., said that, "although a deed or other instrument may be reformed, when through

mistake or accident it does not accurately represent the agreement of the parties, it is necessary that both the agreement and the mistake shall be made out by the clearest and most satisfactory testimony. Where the mistake is established by other preliminary written agreements, equity more readily interferes than in cases where the mistake is to be established by parol evidence. But, even where there is a preliminary article of agreement or settlement, it must be made plainly to appear that the parties intended in the final instrument merely to carry into effect the contract or arrangement set forth in the prior agreement. The very circumstance that the final instrument of conveyance differs from the preliminary contract affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attending circumstance, which demonstrates that it was merely in pursuance of the original contract." See, also, *Story, Eq. Jur. § 160; Leas' Ex'r v. Eldson*, 9 Grat. 277; *Mauzy v. Sellars*, 26 Grat. 641; *Perkins v. Lane*, 82 Va. 63; *Morgan v. Fisher's Adm'r*, Id. 423; *Major v. Ficklin*, 85 Va. 738, 8 S. E. 715; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *Hearne v. Insurance Co.*, 20 Wall. 488; *Lyman v. Insurance Co.*, 2 Johns. Ch. 630. The burden of proof is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement by the clearest and most satisfactory evidence. It must not only appear that the parties entertained a different intention in the first instance, but that it was not changed at or before the execution of the instrument; for otherwise the legal and natural inference is, it was laid aside for that expressed in the writing. 2 *White & T. Lead, Cas. Eq. (Ed. 1877)*, pt. 1, p. 980; *Pom. Eq. Jur. § 859*.

In the case here, the answer of Mrs. Levine denies the allegation of the bill that there was a mutual mistake in the deed conveying the property to Mrs. Donaldson, and, instead of the clear and satisfactory proof of the alleged mistake that is required, there is absolutely no proof whatever. It is contended, however, that the mistake appears on the face of the contract and the deed, though it is conceded that, as a general proposition, a deed operates as a merger of the contract in execution of which the deed was made. If we look, then, to the deed, we are wholly unable to perceive the mistake complained of. The consideration of the deed is \$6,000, and to assume that Mrs. Donaldson was only to pay the five notes of \$750 secured on the property, payable at one, two, three, four, and five years, and which doubtless represented the principal sums which constituted the incumbrances on the property, and was not to pay the other five notes, one of \$150, and four of \$135 each, which doubtless represented the accruing interest on the principal sums, or that, if she was to pay these interest notes, they, also, were to be deducted from the purchase price of the property, \$6,000, although she took possession of the property and received

the benefits therefrom from the date of the purchase, would, it would seem, be a violent assumption. Certainly, the fact, appearing in the deed, that the interest notes were not deducted from the \$3,000 is by no means sufficient to warrant the conclusion that it was a mistake. There is a slight variance between the amount of these notes that are supposed to be interest notes and the amount of the interest that would have accrued on the principal notes of \$750 each, but it is inconsiderable. It is by no means unreasonable that the purchaser, Mrs. Donaldson, should have agreed, as the deed provided, to pay the interest on her purchase money to accrue after she came in possession of her property, and this is no more than she assumed to do by the acceptance of the deed of conveyance; and to hold that she did not so agree would be to hold that she had five years within which to pay the aggregate of the five notes of \$750 each, without interest thereon, and leave the corresponding interest notes, secured also on the property, to be paid by Mrs. Levine, from whom she purchased; for, if the notes spoken of here as interest notes had been deducted from the consideration of the deed, it would have been in effect to make Mrs. Levine, the vendor, pay the interest on the principal notes of \$750 each, accruing at one, two, three, four, and five years from their date, while the vendee, Mrs. Donaldson, was in possession of the property, and in the full enjoyment of it. We are of opinion that there is no error in the decree appealed from, and it is therefore affirmed.

(93 Va. 447)

## STATE SAV. BANK v. STEWART.

(Supreme Court of Appeals of Virginia. July 30, 1896.)

## CONSTRUCTION OF DEED — REPUGANT DESCRIPTIONS.

A deed contained two complete descriptions of the property, one by metes and bounds along certain streets, and the other by giving the numbers of the lots and blocks according to a certain map therein referred to. The property actually sold and intended to be conveyed was correctly described by the numbers given, but was not that described by the boundaries, which was on another street, and was not owned by the grantor. *Held*, that the false description should be rejected, and that the deed constituted a good conveyance of the property intended.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by State Savings Bank against E. H. Stewart and others. Decree for complainant, and defendant Stewart appeals. Affirmed.

McHugh & Baker, for appellant. L. H. Cocks, for appellee.

BUCHANAN, J. The appellee brought suit to subject two lots in the city of Roanoke to the payment of liens thereon. The appellant denied that the debt of the appellee was a lien upon the lots sought to be sold, but the court was of opinion that it was not

only a lien, but superior to that of appellant, and so decreed. From that decree this appeal was taken.

A separate deed of trust was given to secure each debt. If the lots sought to be sold were embraced in the deed of trust given to secure the debt of the appellee, there is no question that his lien is superior to that of the appellant, as his deed of trust is prior in point of time, and was properly recorded.

The appellee sold and conveyed to James Ellwood, in March, 1890, two lots in the city of Roanoke, at the price of \$2,000. It is admitted that there was a mistake in the description of the lots conveyed, in so far as it described them as being situated at the northwest corner of Trout avenue and I street. They are in fact situated at the northwest corner of Trout avenue and H street. In all respects, except where I street is named instead of H street, the description given was strictly accurate. There was no mistake as to the identity of the lots intended to be conveyed. In November following, the parties having in the meantime discovered the mistake, the grantor, after reciting the fact that a mistake had been made in the deed in the description of the lots, and in what it consisted, executed a new deed, in which the mistake was corrected. This deed did not reserve a vendor's lien for the unpaid purchase money, nor was a deed of trust executed contemporaneously therewith to secure it, but it was expressly provided that the execution of the last deed should not in any way affect the lien of any outstanding deed of trust on the lots conveyed.

If the lots intended to be conveyed by the deed of March, 1890, were so described therein that title to them passed to the grantee, then the grantee's deed of trust, given to secure the payment of the purchase money due the appellee, and which contained the same description of the lots as was given in the deed to the grantee, passed his title to the trustee, and created a lien on the lots sought to be subjected for its payment; but, if the title to the lots did not pass by the deed of March, 1890, by reason of the mistake in describing them, then, of course, the deed of trust given for the purpose of securing appellee's debt thereon, and which contained the same description, conveyed no interest in those lots to the trustee, and created no lien thereon for the payment of appellee's debt.

There are two descriptions of the lots in the deed of March, 1890, either of which contains sufficient particulars to enable the parties to identify the lots described; but, when each description is applied to its subject-matter, it is ascertained that they describe, not the same, but different, parcels of land. One of the descriptions given describes the lots as "beginning at the northwest corner of Trout avenue and I street; thence, with Trout avenue, west, 100 feet, to a point; thence in a northerly direction,

150 feet, to an alley; thence in an easterly direction, along said alley, 100 feet, to I street; thence in a southerly direction, along I street, 150 feet, to Trout avenue, the place of beginning." Immediately following this they are declared to be "known as lots Nos. 9 and 10, section 5, of the West End Map, to be found on file in the clerk's office of the hustings court of the city of Roanoke, Va., to which map reference is hereby made for a further description of said lots."

By the first description the lots are located at the northwest corner of Trout avenue and I street, but it is not pretended that the grantor owned the lots at that point, or that the parties dealt with reference to them. By the second description lots 9 and 10 in section 5 of the West End Map are located at the northwest corner of Trout avenue and H street. These lots were owned by the grantor in the deed of March, 1890. It was with reference to them that the parties dealt, and they were intended to be conveyed by that deed.

Where several particulars are given in the description, all of which are necessary to identify the land intended to be conveyed, nothing but what will correspond with all the particulars will pass by the deed; but where the deed contains two descriptions of the land equally explicit, but repugnant to each other, that description which the whole deed shows best expresses the intention of the parties must prevail. The court will look into the surrounding facts, and will adopt that description, if certain and definite, which, in the light of the circumstances under which it was made, will most effectually carry out the intention of the parties.

It is one of the maxims of the law that a false description does not render a deed or other writing inoperative, if, after rejecting so much of the description as is false, there remains a sufficient description to ascertain with legal certainty the subject-matter to which the instrument applies. This rule of construction is said to be derived from the civil law. "*Falsa demonstratio non nocet, cum de corpore constat.*" 2 Minor, Inst. (4th Ed.) 1063; 1 Greenl. Ev. § 301; 2 Tayl. Ev. § 1218 et seq.; Wootton v. Redd, 12 Grat. 196, 208; Preston v. Helakell, 32 Grat. 48, 59, 60; Broom, Leg. Max. (7th Ed.) 629 et seq.

In the case of *Loomis v. Jackson*, 19 Johns. 449, a lot was described in the deed by a wrong number, yet, being also described by fixed and known objects, it was held that the number of the lot might be rejected.

In *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61, the mortgage under consideration described the several lots conveyed by numbers, with the additional clause, "being all block 25." Block 25 did not contain the lots mentioned in the deed, but they were in another block. It appearing, however, that it was the intention of the mortgagor to mortgage the block in which he resided, and that he resided in block 25, it was held that block

25 was, and the lots named were not, subject to the mortgage.

In *Worthington v. Hylyer*, 4 Mass. 196, the description in the deed was "all that my farm of land in Washington, on which I now dwell, being lot No. 17 in the front division of lands there, containing one hundred acres, with my dwelling house thereon standing, bounding west on the land of Joseph Chapel, northerly by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." The limits of the lots were correctly described, but the farm on which the grantor lived was not No. 17, but a different parcel of land. The court rejected the false description, because the description was sufficiently definite without it, and, if it were considered an essential part of the description, the effect would render the deed inoperative. Many instances of the application of this rule are cited in the text-books and decisions. 2 Minor, Inst. p. 1063 et seq.; 1 Greenl. Ev. § 301 et seq.; Broom, Leg. Max. p. 629 et seq.; 2 Devl. Deeds, §§ 1016, 1068, et seq.; Wootton v. Redd, 12 Grat. 196.

Applying it to this case, there is no difficulty in reaching the conclusion that the lots bought and sold, and which were intended to be conveyed by the deed of March, 1890, passed by it.

After rejecting the first, or false, description, the lots conveyed are described as two lots, "known as lots Nos. 9 and 10, section 5, of the West End Map, to be found on file in the clerk's office of the hustings court of the city of Roanoke, Va., to which map reference is hereby made for a further description of said lots."

This remaining description is explicit, and clearly sufficient to fully identify the lots intended to be conveyed. In the subsequent conveyances of the lots, including that correcting the mistake in the deed of March, 1890, one of the descriptions given them is in substance that they are known as "lots 9 and 10, section 5, in the map of the West End Land Company of Roanoke, Va." In the deed of trust which secures the debt of the appellant, they are described as "all those certain lots or parcels of land situated in the city of Roanoke, Va., and known as lots 9 and 10, section 5, as shown by the map of the property of the West End Land Company on file at the office of the clerk of the hustings court of the city of Roanoke, Virginia, it being the same property conveyed to the party of the first part by deed bearing date of January 22, 1891."

Where a map of land is referred to in a deed for the purpose of fixing its boundaries, the effect is the same as if it were copied into the deed. *Cox v. Hart*, 145 U. S. 376, 12 Sup. Ct. 962; *Jefferis v. Land Co.*, 134 U. S. 178, 10 Sup. Ct. 918.

It is a matter of no consequence which part of the description be placed first, and which

last. The courts will reject the false wherever found, and give effect to the intention of the parties, if the remainder of the description is sufficient to enable the premises that were intended to be conveyed to be identified. 2 Tayl. Ev. § 1222; 1 Greenl. Ev. § 301.

The lots which are sought to be sold in this case having passed by the first conveyance of the appellee to Ellwood, dated in March, 1890, his conveyance of the same lots in trust to secure the payment of the appellee's debt for purchase money created a lien thereon which is superior to the lien of the appellant.

This was the conclusion reached by the corporation court of the city of Roanoke, and its decree must be affirmed.

(96 Va. 60)

**ECKLES' ADM'X v. NORFOLK & W. R. CO.**

(Supreme Court of Appeals of Virginia. July 30, 1896.)

**INJURY TO EMPLOYE—FELLOW SERVANTS—NEGLIGENCE—PLEADING AND PROOF.**

1. The engineer and fireman of a shifting train are fellow servants of the conductor, who, while attempting to act as brakeman, is injured by their negligence.

2. Recovery for injury to an employé cannot be had for negligence other than that from which the declaration alleged that it resulted.

Error to hustings court of Roanoke; John W. Woods, Judge.

Action by Eckles' administratrix against the Norfolk & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

G. W. Crumpecker, L. H. Cocke, and Hansbrough & Hall, for plaintiff in error. Watts, Robertson & Robertson, for defendant in error.

**BUCHANAN, J.** The plaintiff's intestate was an employé of the defendant company. While acting as conductor of a shifting crew upon its yard at Pulaski, Va., he was run over by one of its cars, which caused his death. An action was instituted to recover damages therefor by his administratrix, and upon the trial of the cause, a judgment was rendered in favor of the defendant upon a demurrer to the evidence. To this judgment, the plaintiff obtained this writ of error.

The first and second assignments of error may be considered together. They are based upon the ground that neither the engineer nor the fireman was in his proper place when the injury complained of was inflicted, and, if they had been, it might have been avoided. The evidence does not show that they were not in the performance of their duties at that time; but if it were true that they were not, and that the injury to the plaintiff's intestate might have been prevented if they had been in their proper positions, it could not aid the plaintiff's case. Her intestate, while acting as conductor of the shifting crew, undertook

to act as a brakeman, and, while so acting, was injured. So far as his injury was caused by or resulted from the negligence of the engineer or fireman, it resulted from the act of fellow servants. Their negligence was one of the risks he assumed when he entered the service of the defendant, and, for injuries resulting to him therefrom, it was not responsible. *Railroad Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342.

It is also assigned as error that the engineer was an incompetent employé. This is not sustained by the record, and, if it were, it could not be considered, as there is no allegation in the declaration under which it could be proved.

The third assignment of error is that the yard master who had control of the shifting crew and of the yard at that place was guilty of negligence, in this: that he ordered the plaintiff's intestate to shift the car by which he was injured, saw him go between that and another car, and yet paid no attention to nor gave himself any concern for his safety. The yard master did order him to shift the cars in question from one track to another the morning of the injury, and directed him not to forget it. Although the yard master may have been upon the yard when the injury occurred, it does not appear that he ordered Eckles to act as brakeman, or to go between the cars, or even knew that he was between them, until after he was injured. So far as the record shows, the unfortunate man went of his own motion into a position of danger, not in the line of his duty, and undertook to perform a service which it was the duty of a brakeman to perform, and, while so engaged, received the injury from which he died.

The fourth assignment of error is that the brake on the engine was out of repair, and that, if it had been in good working order, the injury could have been avoided. It is unnecessary to discuss the evidence upon this point, for there is no allegation in the declaration that the injury resulted from or was in any manner brought about by reason of defective machinery.

The proofs must correspond with the allegations in the declaration, and the plaintiff must recover, if at all, upon the case made by her pleadings. A party cannot charge one ground of negligence in his declaration, and recover upon another. The object of a declaration is to set forth the facts which constitute the cause of action, so that they may be understood by the defendant, who is to answer them; by the jury, which is to ascertain whether or not they are true; and by the court, which is to give judgment. *Bush v. Campbell*, 28 Grat., at page 431; *Railroad Co. v. Whittington's Adm'r*, 30 Grat., at page 810; 4 Minor, Inst. 471, 472; 1 Chit. Pl. p. 255, and note.

We are of opinion that the plaintiff failed to make out her case; that there is no error in the judgment complained of; and that it must be affirmed.

(98 Va. 504)

**FIDELITY LOAN & TRUST CO. v. DENNIS et al.**

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

**MECHANICS' LIENS—PRIOR MORTGAGE—APPORTIONMENT OF PROCEEDS.**

Code, § 2483, provides that, in the enforcement of mechanics' liens, any incumbrance on the land before the work was commenced shall be preferred, on the distribution of the proceeds of sale, only to the extent of the value of the land, estimated, exclusive of the building, at the time of the sale, and the residue of the proceeds of the sale shall be applied to the satisfaction of the mechanics' liens. *Held*, that the values of land and improvements are not to be estimated as bearing a certain ratio to each other, in which proportion the proceeds shall be distributed, but that the value of the land is to be estimated at a certain fixed amount, which is to be paid to the prior incumbrancer from the proceeds before the holders of the mechanics' liens can participate therein.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Suit between R. G. Dennis and others and the Fidelity Loan & Trust Company. From the decree the trust company appeals. Reversed.

Thos. W. Miller and L. H. Cocke, for appellant. Scott & Staples, for appellees.

**RIELY, J.** The controversy here is between the owner of a prior incumbrance by deed of trust on real estate and certain persons holding mechanics' liens for the construction of buildings thereon and materials furnished for the same as to the proper distribution of the proceeds of sale of the property. Its solution depends upon the true construction of section 2483 of the Code. It is a general rule that all buildings and improvements put upon mortgaged premises by the mortgagor, after the execution of the mortgage, become a part of the freehold, and inure, as such, to the benefit of the mortgagee. And there is no difference in this respect between a mortgage and a deed of trust, but the principle is equally applicable to both. Many exceptions have been ingrafted upon this rule in modern times, and among them an exception in favor of that deserving class of citizens who, by their skill and labor and materials, have contributed to the improvement of the incumbered property. The law-making power of this state, as that of governments generally, deeming it inequitable that a prior incumbrancer should have the benefit of the increased value imparted to his security by the improvements put upon it until the claims of those whose skill, labor, and property created the improvements are satisfied, has wisely restricted the lien of the incumbrancer, until their claims have been discharged, to the land itself, exclusive of the improvements, and given to them a first lien on the improvements for their claims. This equitable principle pervades every part of the statute. It preserves to the prior incumbrancer the benefit of his lien to the extent of his original security, which is the value of the land without the improve-

ments, and at the same time gives to the mechanic and to the furnisher of materials the first lien on the building or structure put upon the land for the amount of their debts. All this is very plain upon the face of the statute; and this equitable principle, which lies at its foundation, and pervades its every provision, is expressly directed to be applied in the distribution of the proceeds of sale of the premises, when these several liens are enforced by the court. It is only as to the manner of ascertaining the value of the land exclusive of the improvements, and giving to the prior incumbrancer the benefit of his security to that extent, that any difficulty arises. As this is the only question to be decided, it is only necessary to refer to and construe that part of section 2483 which bears directly upon it. It is there provided that, in the enforcement of mechanics' liens, "any lien or incumbrance created on the land before the work was commenced or materials furnished shall be preferred in the distribution of the proceeds of sale only to the extent of the value of the land, estimated, exclusive of the buildings or structures, at the time of sale, and the residue of the proceeds of sale shall be applied to the satisfaction of the liens provided for in the previous sections of this chapter,"—that is, to the mechanics' liens. It is very clear that the prior incumbrancer is to have the benefit of his lien upon the land to the extent of the value thereof, exclusive of the buildings or structures placed thereon since the lien was created, and that its value is not to be ascertained as of some other time, when the land may have been worth more or less in market, but is to be ascertained at the time the liens are enforced by the court. It is to be ascertained at the time of sale. Nor can there be any doubt as to the manner whereby it is to be ascertained. It is to be ascertained by estimation. It is to be fixed by the court, either from evidence submitted directly to it, or through the finding of a commissioner, subject to review by the court, as in other chancery causes. But the value is to be estimated, and fixed by the court before the property is sold; and the prior incumbrancer, as to the sum so fixed, is to be preferred in the distribution of the proceeds of sale. This amount, however, is all that he can obtain from the proceeds of sale until the mechanics having liens thereon are satisfied; and they are entitled to the residue of the proceeds of sale for the payment of their liens, if not more than sufficient for that purpose, or, if more than sufficient, to so much as may be requisite to satisfy them.

The hustings court referred the matter to a special commissioner, to take the accounts and make the necessary inquiries in the case; and he, after going upon the premises, and taking with him practical appraisers of property for the purpose, who were unanimous in their estimate of the value of the land, exclusive of the improvements, assessed its value at \$600. They also valued the land with the buildings at \$3,600, and stated that the value of the land by itself, as compared

with the value of the land and buildings, was as 1 to 6. The report of the commissioner, in so far as it assessed the value of the land, exclusive of the buildings, at \$600, was not excepted to by any party, which each had the right to do, and the court confirmed the report as to that particular matter without exception from either side. It was excepted to by the prior incumbrancer in so far as it purported to apportion the proceeds of sale between it and the holders of the mechanics' liens according to a fixed ratio, because such distribution was contrary to the statute; but the exception was overruled by the court. The value of the land by itself, exclusive of the buildings, became thereby fixed, and determined the amount the prior incumbrancer was entitled to receive on account of his lien. He was, as to this sum, to be preferred in the distribution of the proceeds of sale of the property, and the holders of the mechanics' liens were entitled to the residue, or to so much thereof as might be necessary to satisfy their respective claims. This is, to our mind, the plain meaning of the statute. To adopt the construction so earnestly contended for by the counsel for the appellees, that the value of the land exclusive of the buildings should be estimated to bear a certain ratio to the estimated value of the land inclusive of the buildings, and that the owner of the prior incumbrance should receive such fixed proportion out of the proceeds of sale, would be in conflict with the principle that runs all through the statute, as well as contrary to its plain terms. Such distribution would cause the owner of the prior incumbrance and the holders of the mechanics' liens to share between them the proceeds of sale upon a fixed ratio, and destroy the preference expressly given by the statute to the former. Preference and ratio are not the same, but wholly distinct in principle. Where ratio prevails, there can be no preference. The statute, besides preserving, in the distribution of the proceeds of sale of the property, the equitable principle of natural justice, which is the basis of the mechanic's lien law, of giving to each lienor the benefit of his particular security, keeps also in view the settled practice in this state, which requires that the liens and incumbrances upon real estate, with their amounts and priorities, shall be ascertained and determined before it is sold, in order that the parties interested may know how to act or to bid to protect their respective interests. *Shults v. Hansbrough*, 33 Grat. 567, 577, and the cases there cited.

We are the better satisfied with the conclusion thus reached as to the true meaning of the statute because the result tends to encourage the lending of money upon unimproved property. If the legislature had intended by the provision in question what the counsel for the appellees contended for, few persons would be willing to lend money upon

vacant or unimproved property, and take the risk of some building or structure being thereafter erected upon it by the owner, which he may at any time do without the consent of the lender, and be compelled, against their wishes, and contrary to their interests, to suffer an impairment of their security by having to share proportionately with the holders of mechanics' liens the proceeds of a forced sale of the premises. All would be slow to lend their money under such conditions, especially in cities and towns, where mechanics and furnishers of building materials find the most extensive and profitable field for their operations. So, aside from the terms of the statute, by which we are bound in ascertaining its true meaning, a different intention by the legislature would inaugurate a policy that would discourage loans upon vacant property, and greatly retard the progress of its improvement.

The hustings court, having refused to allow the appellant, in the distribution of the proceeds of sale of the property, the value of the land, exclusive of the buildings, as estimated, its decree, for the foregoing reasons, must be reversed.

(98 Va. 487)

**LYLE et al. v. COMMERCIAL NAT. BANK et al.**

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

**RECEIVERS—APPOINTMENT OF—DISCRETION OF COURT.**

The appointment of a receiver rests in the sound discretion of the court, and such an appointment will not be disturbed on appeal, when made on a bill by a creditor charging that the defendant debtors had conveyed their property, including a large mercantile establishment, on a trust for the purpose of defrauding their creditors, as was known to the trustee, which allegations were not denied by either the debtors or the trustee.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by the Commercial National Bank and others against Edward Lyle, trustee, and others. Decree appointing a receiver, from which defendants appeal. Affirmed.

L. Griffin and Edward Lyle, for appellants. Thos. W. Miller, L. H. Cocke, Moomaw & Woods, and Scott & Staples, for appellees.

**BUCHANAN, J.** This is an appeal from a decree appointing a receiver in a suit brought by the appellees against the appellants and others to set aside two deeds of trust, on the ground that they were made for the purpose of hindering, delaying, and defrauding the appellees and other creditors of the grantors.

It is unnecessary to consider the allegations of the bill further than is required to determine the propriety of the court's action in appointing the receiver, as that is the only question brought up on this appeal.

The bill alleges that the deeds of trust were made with the intent to hinder, delay, and defraud the appellees and other creditors of the grantors; that the trustee and beneficiaries in the deeds had full knowledge of this fraudulent intent; that the trustee was an attorney at law, and had no experience in and no capacity for carrying on a large clothing and barroom business, such as was contemplated by the provisions of the deed of trust; that he did not own property in his own name of greater value than \$500; that he was peculiarly irresponsible for the large trust reposed in him; that one of the debts secured by the deed of trust, naming it, was in part, if not wholly, fictitious; that the trustee was the attorney who drew the deed, and had full knowledge of all the circumstances in reference to the indebtedness and pretended indebtedness of the grantors in the deeds; and that the property conveyed was still in the possession of the grantors.

Upon the hearing of the motion for the appointment of a receiver, which was made after giving notice to the appellants, affidavits were filed by both parties. From these it appeared that the trustee had experience in business, and "that he was not only competent but well qualified to act as trustee in closing up a mercantile business, or any business of like character."

The trustee himself made an affidavit, showing that he had taken immediate possession of the trust property, and as soon as he was authorized to do so.

But there was no denial by the appellant debtor of the allegations in the bill charging that the conveyances were made with the intent to hinder, delay, and defraud the appellants and other creditors, and to secure a fictitious debt. Neither was there any denial by the appellant trustee of the charges that he had knowledge of the fraudulent intent of the grantors, nor of the character of the indebtedness which was charged to be fictitious. It is claimed in argument by the counsel of the appellants that the only question in issue before the court when the receiver was appointed was as to the competency of the trustee to perform the duties reposed in him by the deeds of trust. This, however, is denied by opposing counsel. The question before us must therefore be considered and decided upon the case as made in the trial court, as shown by the record.

The appointment of a receiver is always a matter resting in the sound judicial discretion of the court, to be exercised or refused as may be right and proper under all the circumstances of the case. It is not to be exercised rashly, or when it would be productive of injustice or injury to private rights. The court must be satisfied that such relief is needful, and that it is the appropriate means of securing an appropriate end. High, Rec. § 8; 2 Story, Eq. Jur. § 880; 3 Pom. Eq. Jur. § 1831; 1 Bart. Ch. Prac. 481, 482.

The appellants were charged with fraud in the bill, which was sworn to. They had an op-

portunity to deny these charges, and failed to do so. The property conveyed by the deeds of trust was large, much of it personal, and of a character that required careful and faithful attention to secure the best results for the creditors. One of the trusts provided for a continuation of the barroom business for a period of five years, with power given to the trustee to make purchases to continue the business, which, together with the other costs attending the execution of the trust, were to be paid before the creditors could receive anything on their debts. Under these circumstances, we cannot say that the hustings court erred in appointing a receiver to take possession of the property conveyed, and hold it until the further order of the court.

The decree complained of must be affirmed.

(32 Va. 498)

#### DICKERSON v. BANKERS' LOAN & INVESTMENT CO. et al.

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

EQUITY — PLEADING FRAUD — USURY — ENJOINING TRANSFER OF NOTE.

1. Where fraud is charged in a bill as a ground for an injunction, the facts relied on to constitute the fraud must be stated.

2. A purchaser of property, who, as a part of the consideration for the conveyance, assumes payment of a debt secured thereon by a trust deed, cannot plead usury as a defense to a sale under the trust deed.

3. A bill by the maker of a negotiable note, alleging its transfer by the payee to another, who is made defendant, without consideration, to avoid a defense shown to exist, states sufficient ground for equitable relief, and for an injunction restraining further transfer of the note.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by Laura W. Dickerson against the Bankers' Loan & Investment Company and others. Decree dismissing the bill on demurrer, and complainant appeals. Reversed.

G. W. Crampecker, for appellant. L. H. Cocke, for appellees.

BUCHANAN, J. This is an appeal from a decree sustaining a demurrer to the bill and dismissing the case.

The bill alleges that the appellant purchased from Clara M. Jackson a house and lot, situated in the city of Roanoke, at the price of \$1,850; that of this sum she paid in cash \$264, executed her negotiable notes for the sum of \$680, and the residue, to wit, \$900, she assumed to pay to the Bankers' Loan & Investment Co. of New York, which held a lien on the property for that sum, in monthly installments of \$15.80; that her contract was made known to the said company, and the terms thereof assented to by it; that she paid the monthly installments promptly as they fell due for 20 months to Mrs. Jackson, who represented that she was authorized by the company to collect the same; that the appellant then learned accidentally and to her great sur-

prise that Mrs. Jackson had not paid the money to the company, and that it depled her authority to collect it; that appellant went to the office of the company, and was informed by its agent that Mrs. Jackson had no authority to receive the installments paid her, and that she had not paid them over to the company; that she then went to Mrs. Jackson, who asserted most positively that she did have such authority; that appellant then informed both of them that she would not pay anything more on the property until they settled the matter between them, and gave her credit for what she had paid; that the company's agent then informed her that it would take the matter under advisement, and would inform her what it was willing to do; that several months afterwards it proposed that it would arrange with Mrs. Jackson to pay the monthly installments collected by her if the appellant would pay the accumulated dues, fines, costs, etc., which proposition she declined to accept. She further alleges: That she had been duped and defrauded by Jackson and the company. That she had paid on the purchase price of the property \$625, and placed improvements upon it of the value of \$900. That, pending the negotiations to settle the controversy between them, the property had greatly depreciated in value, and was not worth more than \$900. That the trustee in the deed of trust to secure the debt of the company which she had assumed to pay had advertised the property for sale for cash as to \$1,054.79, the sum claimed by the company as due, but the correctness of which she denied. That, when the company refused to give her credit for all the installments which she paid Mrs. Jackson, she demanded that it should make sale of the property, believing, as she did then, that Jackson was solvent, and might be compelled to comply with her contract with appellant, or be compelled to return what she had received upon it; but the company refused to comply with her request, and allowed 10 months to elapse, within which time Mrs. Jackson had become hopelessly insolvent, as she was informed and believed, and so charged, and had assigned the purchase-money notes held by her to the company for a pretended valuable consideration, but in truth for the sole purpose of defrauding appellant. That the company was fully informed of Mrs. Jackson's misconduct, and of the fact that she had not complied with her part of the contract, and had forfeited her right to said notes before the same were assigned to the company. She further alleged that the contract which the company was about to enforce by a sale of the property was usurious, and that the fines and costs which it provided for were in the nature of a penalty, and would not be enforced by a court of equity, but that it would extend relief against their enforcement because of the fraudulent acts of the company and Mrs. Jackson in misappropriating her funds, and thereby allowing the fees, fines, costs, etc., to

accumulate, which would not have otherwise existed. She prayed that the company, Jackson, and the trustee in the deed of trust be made parties defendant, and answer the bill under oath; that the sale under the trust be enjoined; that an account be taken to ascertain the liens upon the property and their priorities, the balance due the company, whether the contract between the parties is usurious or not, the value of the property when she purchased it and of the improvements she had put upon it, when appellant ascertained that Mrs. Jackson was misappropriating the moneys paid her for the company, the amount of the outstanding purchase-money notes executed by appellant, and who was the present holder thereof; that the contract be rescinded, the money she had paid and the notes she had executed be returned to her, together with the costs of the improvements made upon the property by her; that her claims be declared a first lien upon the property, and that it be sold for their payment; and that general relief be granted her.

An injunction was granted in accordance with the prayer of the bill. Upon a hearing of the cause upon the bill and exhibits and demurrer thereto, the court sustained the demurrer, dissolved the injunction, and dismissed the bill.

The facts alleged and relied on to show that the company had authorized Mrs. Jackson to collect the monthly installments as they became due from appellant, and had colluded with her in misappropriating the same, when read in connection with the statements of the bill containing the company's denial of any authority in Mrs. Jackson to make these collections, and of her failure to pay over what she had collected, do not state a case which shows that Mrs. Jackson was the agent of the company, nor that it had perpetrated a fraud upon the appellant.

To charge fraud, without stating the facts which constitute the fraud, is insufficient. To make statements in the bill which, if true, would constitute fraud, and follow them by statements which are contradictory of or inconsistent with the statements which show fraud, although fraud be charged, is not sufficient.

Fraud is a conclusion of law, and the facts relied on to constitute it must be stated in the bill, and must, when taken together, be sufficient to make out a case of fraud. Kerr, *Fraud & M. p. 385*; Story, *Eq. Pl. § 251, 252*; 1 Bart. Ch. Prac. 427; High, *Inj. § 28*.

Even if the contract between the company and Mrs. Jackson were usurious, as alleged, it would furnish the appellant no ground for relief. Where land subject to a usurious deed of trust is conveyed to a grantee, who assumes the payment of the debt named therein as a part of the consideration for the conveyance, he cannot set up the usury as a defense to a sale under the deed of trust. He has received a consideration for his undertaking to pay the debt, and will not be

permitted to get rid of its payment by relying upon a defense which is personal to the original debtor, and which he has waived. *Crenshaw v. Clark*, 5 Leigh, 69 (side p. 65); *Spengler v. Snapp*, Id. 519 (side p. 478); *Michie v. Jeffries*, 21 Grat. 334; *Christian v. Worsham*, 78 Va. 100.

If it be true, as charged in the bill, that Mrs. Jackson, being insolvent, assigned the unpaid negotiable purchase-money notes held by her to the company without consideration, and for the purpose of defrauding the appellant, she had the right to come into a court of equity to have the company restrained from assigning or transferring these notes, and to have them canceled so far as was necessary to protect her from loss and damage by reason of the failure of Mrs. Jackson to pay over the monthly installments collected by her from the appellant.

This being a sufficient allegation for equitable relief, the demurrer should have been overruled, and the parties required to answer.

The decree of the hustings court must be reversed, the demurrer overruled, and the cause remanded to that court for further proceedings to be had therein.

(93 Va. 510)

#### STATE SAV. BANK v. BAKER.

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

ACCOMMODATION NOTE—PLEDGE—RIGHTS OF ACCOMMODATION INDORSER—EXTENSION OF TIME OF PAYMENT—RELEASE OF INDORSER.

1. Where a note indorsed by the payee for accommodation of the maker is pledged by the maker, without consent of the indorser, as collateral to his own note for the same amount, given at the same time, and payable at the same time, a renewal of the principal note without the consent of the indorser of the collateral note releases him from liability.

2. An accommodation indorser of a note pledged by the maker, without the indorser's consent, as collateral to his own note for the same sum, given at the same time, is entitled to have all payments made on the debt credited on the collateral note.

Error to hustings court of Roanoke; John W. Woods, Judge.

Action by the State Savings Bank against William F. Baker and others. Judgment for defendant Baker, and plaintiff brings error. Affirmed.

McHugh & Baker, for plaintiff in error. Watts, Robertson & Robertson, for defendant in error.

CARDWELL, J. On May 5, 1892, Thomas G. Penn, with three others, made their joint note for \$550; payable 90 days after date to the order of William F. Baker, negotiable and payable at the Commercial National Bank of Roanoke, which was indorsed by Baker, and taken by Penn to the State Savings Bank of Roanoke for discount, which was refused by the bank. But it was proposed by the bank, and agreed to by Penn, that if he (Penn) would execute his own note for \$550, payable to the

State Savings Bank 90 days after date, and deposit with the bank the note of \$550 made by Penn and others, and indorsed by Baker, and also 100 shares of the Eastern Building & Loan Association stock, of Syracuse, N. Y., as collateral security for the note then executed by Penn, or any indebtedness of Penn to the bank, the bank would discount his note. The note was accordingly drawn up and signed by Penn as agreed; bearing date, also, May 5, 1892. The note contained a provision which authorized the State Savings Bank to sell the collateral securities, or any part thereof, for cash, at any time, at public or private sale, at the bank's discretion, without advertising the same or giving Penn any notice, and to apply so much of the proceeds as might be necessary to pay the note, or any other indebtedness of Penn to the bank. When the two notes became due, Penn desired an extension of the time for payment; and obtained from Baker, on the back of the note upon which he was indorser, a waiver of notice and protest, whereupon the bank gave Penn an extension of 30 or 60 days within which to pay his note, Penn paying the discount thereon; and from time to time an extension of 30 or 60 days was given Penn, upon his paying the discount required by the bank. Before the note indorsed by Baker became due according to its tenor and effect, the State Savings Bank sold the building and loan association stock deposited by Penn as collateral, and the proceeds, \$242.43, were credited on the note indorsed by Baker, as he claims, before he indorsed thereon a waiver of protest; and subsequently the note indorsed by Baker was sold by public auction in front of the State Savings Bank, and purchased by F. A. Barnes, president of the bank, at the price of \$50, but was turned over, according to the statement of Barnes, to the bank, in order, as he says, to evade the law. Afterwards, at the March term, 1893, of the hustings court of Roanoke, the State Savings Bank proceeded, by motion upon notice under the statute, against Penn and others as drawers, and Baker as indorser on the note, which will be spoken of hereafter as "Note No. 1"; and at the March term, 1893, judgment by a default was entered against the drawers, but the cause was continued, as to Baker, to the June term, 1893, when a trial was had upon the issue joined. After the evidence was all in the court instructed the jury as follows: "(1) The court instructs the jury that if they believe from the evidence that the note payable to W. F. Baker, and indorsed by him, signed by Hannabus, Dunger, Henry, and Penn, and the note payable to State Savings Bank, and signed by said Penn, were both delivered to State Savings Bank at the same time, and were given to secure the same debt, then they must be taken together,—all as parts of the same transaction; and if they further believe from the evidence that after the debt secured by said note became due an extension of time was given, for valuable consideration, by said bank, to said Penn, without the consent of said W. F.

Baker, then said Baker is released from all liability on said note, and they must find for the defendant." "(3) If the jury believe from the evidence that W. F. Baker is liable at all on said note, under instruction No. 1, then they can only find a verdict for the amount remaining unpaid on said note after deducting the amounts paid by Thomas G. Penn on the indebtedness secured by said note." The giving of these instructions constitutes the plaintiff's second and third bills of exceptions. The verdict of the jury was for the defendant, and the plaintiff moved the court to set the verdict aside and grant it a new trial, on the ground that the verdict was contrary to the law and the evidence, which motion was overruled, and to this ruling the plaintiff took its first bill of exceptions.

The first assignment of error in the petition for the writ of error awarded by one of the judges of this court is as follows: "The instructions complained of, and especially that set forth in bill of exceptions No. 2, are based on the opinion of the court (clearly expressed in the instruction, and yet more clearly and fully stated in the oral charge to the jury explanatory of the instruction) that the holder of accommodation paper cannot use, as collateral security, paper on which he is the maker, or one of several makers." This assignment, and the able argument of counsel in support of it, is founded upon a misconception of the question involved. It was not whether the maker of accommodation paper could use it as collateral security, but whether, in the transaction between Penn, the maker of notes Nos. 1 and 2, and the State Savings Bank, the notes were both delivered to the bank at the same time, given to secure the same debt, and each as a part of the same transaction, and whether or not the bank had extended credit to the principal, Penn, without the consent of the indorser, Baker, whereby Baker was released from liability on note No. 1. In the case of *Dey v. Martin*, 78 Va. 1, it was said by Lewis, P.: "There is no doubt that, by the indulgence granted the maker of the note, the appellee, as indorser thereon, was discharged. An indorser of a note is a surety for the maker; and the doctrine is well established that any change in the contract, however immaterial, and even although it be for his advantage, discharges the surety, if made without his consent." "An agreement to give time to the principal gives rise to the presumption that the surety has been delayed or hindered in the use of his rights and remedies, which is absolutely conclusive, and cannot be overthrown by the most convincing proof that nothing has really been lost by the delay." When the obligation of the surety is for the debt of the principal, if the time of payment is, without the consent of the surety, by a binding agreement between the creditor and principal, extended for a definite time, the surety is discharged. The reason is that the surety is bound only

by the terms of his written contract, and if those are varied without his consent it is no longer his contract, and he is not bound by it. *Brandt*, Sur. § 296; *Alcock v. Hill*, 4 Leigh, 622; *Dey v. Martin*, supra; *Christian v. Keen*, 80 Va. 369; *Burson v. Andes*, 83 Va. 445, 8 S. E. 249; *Miller v. Stewart*, 9 Wheat. 680; *Smith v. U. S.*, 2 Wall. 219.

When we come to examine the evidence, it will be seen that it is conclusive as to notes Nos. 1 and 2 having been delivered to the bank at the same time, to secure the same debt, and as parts of the same transaction, and as to an extension of time having been granted by the bank to Penn, the maker of note No. 1, as well as No. 2. It fully justified the instruction complained of, and we are therefore of opinion that it was proper to be given.

We are also of opinion that instruction No. 3 was clearly applicable to the case, because there certainly can be no doubt that, if Baker was not relieved by the extension of time given without his consent, he was entitled to have every payment made upon the debt which his note was given to secure credited on the judgment, if any, to be given against him. The testimony of Baker is to the effect that he indorsed note No. 1 for accommodation; that he never intended that it should be used as collateral by Penn, or authorized it to be so used; that he never consented to any extension of time being allowed to the makers of note No. 1; that he knew nothing of the existence of note No. 2, or any other except the note he indorsed; that he did sign the waiver of notice and protest indorsed on note No. 1, but did not consent to an indefinite extension of time, nor to any extension whatever; that Penn was present, and asked Barnes to extend the note for 30 or 60 days, and that he (witness) simply said nothing. Baker further testifies that at the time he indorsed a waiver of protest there was a credit in pencil on the back of note No. 1 for \$243.43; that he did not see note No. 2, or know of its existence, until after the institution of the suit; and that the credit of \$243.43 was not then on note No. 1. In all this Baker is corroborated by Penn, who was examined as a witness on his behalf, and who testifies to the effect that notes Nos. 1 and 2 were delivered to the bank at one and the same time, and as parts of the same transaction; that, when the building and loan association stock was sold, he consented to the sale being made, and saw the credit of the proceeds of sale, \$243.43, indorsed on back of note No. 1; that the note was renewed three or four times, and on each occasion witness paid the discount, but Baker was not present at any of the occasions when the renewals were negotiated and effected, and that he never informed Baker that he had used the note No. 1 as collateral to note No. 2; and that when the bank discounted note No. 2, to which note No. 1 and the building and loan association stock were

placed as collateral, witness received of the amount of the note (\$500) only \$400, the bank having taken \$90 as the discount for the first 90 days. The testimony of Barnes, the only witness examined for the plaintiff, and which is not at all definite, does not contradict that of the defendant upon the most vital points. It cannot be said that the verdict of the jury was either without evidence to sustain it, or against the evidence. The contrary, we think, fully appears. We are of opinion that there is no error in any of the rulings of the court below, and its judgment is therefore affirmed.

(93 Va. 491)

**GLEAVES et al. v. TERRY.**

(Supreme Court of Appeals of Virginia. Aug. 4, 1896.)

**RECORDS — ELECTORAL BOARDS OF COUNTIES — RIGHT OF PUBLIC INSPECTION — MANDAMUS.**

1. So much of the record of the proceedings of the electoral board of a county, required to be kept by law, as relates to matters other than the preparation of official ballots, is a public record, open to the inspection of any citizen and voter, who may make notes or memoranda therefrom at any reasonable time, and within a reasonable space of time, in the presence of the secretary; but so much of said record as relates to the preparation, printing, or certification of official ballots to be used at elections, which proceedings are required by Laws 1895-96, pp. 763-770, to be secret, is not a public record, and is not open to the inspection of any one, except officers charged with duties in connection therewith.

2. A writ of mandamus will not be granted, on application of citizens, to compel the secretary of the electoral board of a county to permit the relators to inspect and copy from the record of the proceedings of said board, where it is not shown that the portions desired to be inspected and copied are such as are properly open to the public, and that their reasonable request therefor has been refused.

Petition for mandamus by J. L. Gleaves and others against F. H. Terry, secretary of the electoral board of Wythe county. Writ denied.

Jas. A. Walker, for petitioners. J. H. Fulton, for respondent.

CARDWELL, J. The petitioners represent that they are citizens and voters of Wythe county; that they have applied to F. H. Terry, secretary of the electoral board of the county, at his office in Wytheville, and demanded the right to examine and inspect the records kept by the secretary of the proceedings of the electoral board, and to take written memoranda therefrom; and that said Terry, while allowing them to inspect the records in his presence, refused to permit petitioners to copy the records or to take memoranda therefrom. The prayer of the petition is for a mandamus commanding Terry to allow petitioners to examine the records of the electoral board of Wythe county, and to take memoranda or copies thereof. The respondent answers the petition, and says that it is true that he is a public officer

of this state; that he is a member of the electoral board of Wythe county, and its secretary, duly qualified as such by taking the oath to perform the duties of his office according to law; that he has faithfully performed his duties as such, and has always looked to the statute creating the office for his duties and the manner of performing them. Respondent further says that, while it is also true that the petitioner J. L. Gleaves has within the past six weeks made frequent visits to respondent's office, with first one and then another of the petitioners, demanding an inspection of the records of the electoral board, asserting the right to take extracts from and to bring a clerk to make copies of them, respondent has not refused to allow the records which were under his control to be inspected in his presence, as far as proper, by petitioners, or any citizen who wished to do so, and offered to allow all of the petitioners to inspect the same, although respondent does not consider it his duty to do so; but, knowing that these records were under his authority and in his custody, and being responsible for same, has ever, and will ever, unless compelled by authority of law, refuse to allow the records to be taken out of his presence, or memoranda to be taken, or copies of same to be made. He responds, further, that he told petitioners that he was only a member of the electoral board of Wythe county, and that, if petitioners would get the consent of the electoral board, respondent would cheerfully allow, not only an inspection, but a copy, of the records of the proceedings of the board to be made, etc.

Section 67 of chapter 8 of the Code provides for the appointment of registrars by the electoral board in the several counties and cities of the commonwealth; section 69, for the filling of vacancies in the office of registrar, and for the removal of judges of election who fail to discharge their duties according to law; section 71, for the ordering of a new registration under certain contingencies; section 117, for the appointment of judges of election; and section 133, for the designation by the electoral board of five persons to act as commissioners to canvass the election returns. By an act of the assembly (Sess. Acts 1893-94, p. 730), amending section 68 of the Code, the secretary of each board is required to keep in a book, to be provided for the purpose, an accurate account of all the proceedings of the board, including all appointments and removals of judges and registrars; and, by an act approved March 4, 1896 (Sess. Acts 1895-96, pp. 763-770), amendatory of the act of March 6, 1894, entitled "An act to provide for a method of voting by ballot," the printing of the ballots, the certification of the same as the official ballots, and their distribution to the judges of election of the several precincts of their county or city, are delegated to the electoral board of each county and city. So

far as the appointment or removal of registrars, judges, and commissioners of elections is concerned, or the ordering of a new registration of voters, the law enjoining no secrecy. Therefore, the inspection by the public of this part of the board's acts is not in conflict with any provision of law; but the duties of the board as to the preparation of the ballot, its verification, and the stamping of the seal of the board thereon, as required by sections 9 and 10 of the act of March 4, 1896, *supra*, are required to be performed in secret; and it is manifest that, if this were not so, the whole object of the law, viz. to provide for the voter a legal ballot, verified in such manner as to preclude its being counterfeited, and to frustrate as far as possible the use of unofficial and illegal ballots, would be defeated. The vote by ballot *ex vi termini* implies a secret ballot. *Pearson v. Supervisors*, 91 Va. 334, 21 S. E. 483. And the provisions of the statutes referred to, for the use of an official ballot, are, we think, plainly in furtherance of the constitutional provision for the exercise of the right of the voter to cast a secret ballot.

"To justify the issuance of a writ to enforce the performance of an act by a public officer, two things must concur: The act must be one the performance of which the law specially enjoins as a duty resulting from an office, and an actual omission on the part of the respondent to perform. It is incumbent on the relator to show, not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him, at the time of the application." "The office of the writ of mandamus, when addressed to a public officer, is to compel him to exercise such functions as the law confers upon him." "But the writ neither creates nor confers power upon the officer to whom it is directed. It can do no more than to command the exercise of powers already existing." "The writ of mandamus lies to compel a public officer to perform a duty concerning which he is vested with no discretionary power, and which is either imposed upon him by some express enactment or necessarily results from the office which he holds." 14 Am. & Eng. Enc. Law, pp. 105, 130, 140, and authorities there cited in notes. That the record of the proceedings of the electoral board of Wythe county, required by law to be kept by its secretary and custodian, is a public record, and open to inspection by the public, except in so far as secrecy is enjoined by law, there can be no doubt; but where the disclosure of their contents would be injurious to the public interest, an inspection will not be granted. 1 Greenl. Ev. §§ 475, 476; 4 Minor, Inst. p. 714. The law, however, does not require of the secretary of the board, expressly or by fair implication, the duty of making copies when demanded, or provide compensation to him for doing so, as is the case with all public records, so far as we now recall; nor does the law by express enactment require him to allow copies to be made; and

the granting of the writ of mandamus applied for in this case must therefore depend upon whether or not the duty to allow copies to be taken of the record of the proceedings of the electoral board necessarily results from the office of secretary to the board, held by the respondent. It has already been observed that there are portions of these records the disclosure of which would be injurious to the public interests; and by law, if there be a disclosure of any part of the record by the secretary as to which secrecy is enjoined, he is subjected to a penalty for his neglect or violation of duty. Therefore, if copies of these records are to be made by any citizen who demands the right, to avoid a disclosure of that part as to which secrecy is enjoined the secretary would necessarily have to be constantly in attendance while the copies are being made, and in the performance of a duty not prescribed by law, and for which no compensation is provided. If copies can be made by one person, no one could be refused; and it well might be asked, is it reasonable to assume that the secretary is to be required to devote an unreasonable portion of his time to allowing copies to be made of the records in his custody, and that this duty necessarily results from the office he holds? When, in point of time, are these copies to be made? And what discretion is to be exercised, and by whom, as to the length of time to be consumed in making the copies? If the secretary is clothed with discretion as to when the copies may be made, or the length of time that is to be consumed in making the copies of the records, or as to what portions thereof may be inspected or copied without injury to the public interests, and without violation of his duties, a mandamus must be denied. The statement is not made that respondent has denied petitioners the right to inspect the records. On the contrary, the statement is that respondent did not deny them this right. Nor is the statement made as to what memoranda or notes from the records petitioners desired to make, or the length of time that would have been required to make the memoranda or notes; but the complaint is merely that respondent refused to allow copies or memoranda to be made of the records. The court is of opinion:

1. That so much of the record of the proceedings of the electoral board of Wythe county, contained in the book provided by law, and committed to the custody of the respondent as secretary of the board, as relates to the appointment and removal of judges and commissioners of election and registrars, or the ordering of a new registration, is a public record, open to inspection by any citizen and voter of Wythe county, and that he may take therefrom memoranda or notes of the proceedings of the electoral board as to which secrecy is not enjoined by law, which memoranda or notes may be made at and within a reasonable time, in the presence of the secretary; but, until it is shown that the right to inspect these records, or to make memoranda or notes, proper to be

made as aforesaid, has been denied, a mandamus should not issue requiring respondent to allow such memoranda or notes to be made.

2. That so much of the record of the proceedings of the electoral board of Wythe county, in the custody of its secretary, as relates to the preparation and printing of the official ballots prescribed by law, certification of the same, and their distribution to the judges of election of the several precincts in the county of Wythe, is not a public record, that is open to inspection by any one, other than the officers of the county to whom the duties of preparing, printing, certifying, and distributing the ballots is delegated by law, and that the respondent cannot be compelled to allow petitioners to make memoranda or notes of these proceedings, or to inspect them.

3. That the petition of the applicants here, Gleaves and others, does not make a case upon which the mandamus prayed for should issue, and it must therefore be denied.

(98 Ga. 532)

**BURBAGE v. FITZGERALD et al.**

(Supreme Court of Georgia. June 18, 1896.)

**EJECTMENT—PLEADING—AMENDMENT—VARIANCE  
—TITLE OF PLAINTIFF—INSTRUCTIONS—  
LIMITATION OF ACTIONS.**

1. Although the declaration in an action of ejectment which was brought upon the joint demise of several persons would be amendable by striking the names of all except one of the plaintiff's lessors, the same thing is not accomplished by leaving the original demise intact, and laying a new and distinct demise in the name of one only of the joint lessors; for in that event the right to recover upon either demise would be retained.

2. Such an amendment as that first above indicated would relate back to the beginning of the action, and leave the declaration, as to all matters of defense, as if it had been brought in the first instance upon the sole demise of the person whose name was not stricken; but, when the declaration is amended by laying an entirely new demise, the case as to it should be tried as though the action had not been commenced until the date upon which the amendment introducing this demise was filed, and, relatively to the plaintiff's right to recover thereon, the statutes of prescription would run in favor of the defendant until that date.

3. There can be no recovery upon a joint demise when the evidence shows that the entire title to the premises sued for is in a single lessor of the plaintiff; nor upon a new demise in the name on that lessor, if the defendant had acquired a good title by prescription before this demise was introduced into the action.

4. A plaintiff in ejectment may recover upon his own prior possession, or that of his ancestor, against one who does not show a better right to the property; and in such case the mere belief of the defendant that he purchased a good title will not, unless supported by evidence showing title, or adverse possession for the requisite period, suffice to defeat the plaintiff's action.

5. It was error, on the trial of an action of ejectment, to charge that, if the plaintiff showed a statutory title by prescription to the property sued for, he would be entitled to recover, "independent of and regardless of any right or title shown by the defendant, or the circumstances or manner in which he may have entered into possession of the land."

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Ejectment by John Fitzgerald and others against W. E. Burbage. From a judgment for plaintiffs, defendant brings error. Reversed.

Mershon & Smith and Johnson & Krauss, for plaintiff in error. C. Symmes, for defendants in error.

**LUMPKIN, J.** This was an action of ejectment against Burbage in the fictitious form, the real plaintiff in which was Mrs. Flanders. As originally brought, a demise was laid from Fitzgerald, and another from the heirs at law of one Gatchell, among whom was Mrs. Flanders. After the action had been pending in court for a number of years, by way of amendment, a new demise was laid in the name of the latter alone. There was no evidence authorizing a recovery upon the demise from Fitzgerald. There was evidence showing possession in Gatchell, and also that he conveyed whatever title he had in the premises to Mrs. Flanders. The defendant relied upon a prescription of seven years under written evidence of title. There was a verdict against him, and he complains of the overruling of his motion for a new trial. We find it necessary to order a new trial, and, without dealing with the assignments of error precisely as set forth in the motion, have chosen rather to lay down the rules of law under which the case should be tried at the next hearing. As will presently appear, it will then become a very important matter to fix the date up to which the statute of prescription ran in favor of the defendant. Relatively to the rights of Fitzgerald and the heirs at law of Gatchell, collectively, the statute stopped running in the defendant's favor as soon as the original declaration was filed. Among these heirs was Mrs. Flanders. Relatively to her individual rights under the amended declaration, the statute ran in the defendant's favor up to the time when the amendment was made. It will thus be seen that her position in the case is somewhat anomalous, and this fact has constrained us to deal with it as we have done. The prescription relied upon by the defendant, if good at all, not having continued for the requisite seven years against the joint plaintiffs, including herself, and yet having done so for that period against her regarded as an individual plaintiff, it is a matter of some difficulty to determine exactly how the case, as to her, is affected by the statute of prescription upon the pleadings as they stand; and it has therefore seemed proper, if not inevitably essential to justice, that we should solve the matter by indicating how this difficulty may be removed and a hearing had upon the real merits of the case.

1. If, instead of laying a new demise in her own name, Mrs. Flanders had amended the declaration by striking therefrom the names of all the original lessors of Doe, the plaintiff, except her own,—which she had an undoubted right to do,—the case would have stood as if

It had been brought in the first instance upon this demise alone; but the same thing was not accomplished by introducing a new and separate demise from herself, for the reason that this course left her free to recover either upon the joint demise from the heirs of Gatchell, or the several demise from herself.

2. Had she pursued the course above indicated, the amendment would have related back to the commencement of the action. She was undoubtedly a plaintiff at the time the declaration was filed; and if she had simply stricken from the declaration the names of her co-lessors, no reason occurs to us why the declaration should not then have been treated as though she was the sole plaintiff from the beginning, or why the declaration would not then have stood, as to all matters of defense, as if it had been originally brought upon the demise of Mrs. Flanders alone. The new demise, however, introduced by way of amendment, stands upon an entirely different footing. As to it, the action should be treated as though it had not been commenced until the date upon which this amendment was filed; and, relatively to the right of action set up in the amendment, the statute of prescription, as above remarked, ran in favor of the defendant until that date. *Jones v. Johnson*, 81 Ga. 293, 6 S. E. 181. And there are previous decisions of this court to the same effect.

3. It is evident, from what has already been said, that Mrs. Flanders could not recover upon the joint demise from herself and the other heirs of Gatchell, because, even assuming that he originally had title, it appeared that he had conveyed it to Mrs. Flanders. Treating the action, so far as it related to the new demise, as having been commenced when the amendment was filed, there was evidence tending to show that Burbage had acquired a good title by prescription before this new demise was introduced into the action. We do not mean to say this defense was established, but simply that, as it cannot be known but that the jury found for the plaintiff upon the joint demise, there must be another trial, which should be conducted in the light of what is here written.

4. This court has decided in several cases—among them *Wolfe v. Baxter*, 86 Ga. 705, 13 S. E. 18, and *McLendon v. Horton*, 95 Ga. 54, 22 S. E. 45—that an heir at law may recover in ejectment upon the prior possession of an ancestor, as against one who does not show a better title. Where the plaintiff in this manner makes out a prima facie case, and the sole defense is that the defendant purchased in good faith from another, mere belief that in so doing he obtained a valid title will not alone suffice to defeat the action. The defendant in such case must show that his grantor actually had title, or else make out a title in himself by prescription, based upon his own possession or that of those under whom he holds. Good faith is essential to the validity of such a title, but will count for nothing unless supported by evidence of possession for the requisite period.

5. It requires no comment to show that the

charge referred to in the fifth headnote was erroneous. It must have been the result of mere inadvertence. Judgment reversed.

(98 Ga. 686)

# SIMMS v. TIDWELL et al.

(Supreme Court of Georgia. April 6, 1896.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—CREDITORS' BILL—TRADERS.

1. Where a wife loaned money to her husband for use in his business as a merchant, and he subsequently sold and conveyed to her all his merchandise in payment of the debt thus created, she in good faith accepting the conveyance in payment of, and for purpose of collecting, the debt, there was no fraud in the transaction; it appearing that the goods sold to the wife were not worth more than the amount of the loan, and it not appearing that she, by her conduct or otherwise, had in any manner misled others, or induced them to extend credit to the husband.

2. The evidence in the present case showing conclusively that at the time of the filing of the plaintiffs' equitable petition the defendant had ceased to be a trader, for the reason that he had previously made a bona fide sale of all his merchandise to his wife, upon a valuable consideration, it was error to grant an injunction or appoint a receiver.

(Syllabus by the Court.)

Error from superior court, DeKalb county; J. S. Candler, Judge.

Creditors' bill by Tidwell & Pope and others against R. L. Simms. From a judgment for plaintiffs, defendant brings error. Reversed.

G. K. Looper, R. L. Avary, and Simmons & Corrigan, for plaintiff in error. Rosser & Carter, W. T. Braswell, and J. T. Pendleton, for defendants in error.

SIMMONS, C. J. The petition was brought under the traders' act (Code, § 3149 et seq.). In order to maintain such a petition, it must appear that at the time of its filing the debtor was engaged in business as a trader. *Mercer v. Warehouse Co.*, 95 Ga. 359, 22 S. E. 638, and cases cited. It appears that the defendant had ceased to be a trader before the filing of the petition, having several days before that time made a sale of his entire stock of merchandise to his wife. It was alleged by the plaintiffs that the sale was fraudulent, but the allegation is not sustained by the evidence. The defendant, in his sworn answer, denied this allegation, and alleged that the sale was for a full, complete, and valuable consideration, that possession was delivered to his wife at the time, and that his only connection with the goods since then was that of agent for her. The plaintiffs having failed to waive discovery, were bound by the defendant's answer as to facts within his own knowledge responsive to the allegations in the petition, unless the answer was rebutted by two witnesses, or by one witness and corroborating circumstances. Code, § 3105. The only facts relied on to show that the sale was fraudulent were that, during the period in which the alleged indebtedness to the wife was claimed to have existed, no tax returns

were made by her in the county of her residence, and that the real estate above mentioned, and the funds invested by the husband in his business, were spoken of by him as his own. It is not uncommon for men to speak of the property of their wives in this manner, and the statement that the money was his own is not inconsistent with his having borrowed it. Besides, whatever significance may attach to these facts is overcome by abundant and convincing evidence that the title to the realty mentioned was in the wife, and that the husband did receive the money arising from the sale of it as a loan from her. It does not appear that the wife said or did anything to mislead the plaintiffs or any one else; and, no inquiry having been made of her, she was not bound to disclose to persons dealing with the husband the fact of his indebtedness to her. *Robinson v. Stevens*, 98 Ga. 535, 21 S. E. 96. We think, therefore, that the court erred in granting the injunction. Judgment reversed.

(98 Ga. 388)

**PERKINS MANUFACTURING CO. v. WILLIAMS.**  
(Supreme Court of Georgia. May 4, 1896.)

**VENDOR AND PURCHASER—ACTION FOR FRAUD—PROVINCE OF COURT—LESSEE—LIABILITY FOR TRESPASS OF SUBTENANT.**

1. Whether or not a deficiency in the quantity of land sold by the tract, and described as so many acres, "more or less," is "so gross as to justify the suspicion of willful deception, or mistake amounting to fraud," is ordinarily a question of fact, to be decided by the jury in view of all the circumstances of the particular case, and not one of law, for determination by the court. An exception may arise "in such extraordinary and pronounced cases as would afford no room for difference of opinion." Under the facts disclosed by the record, the present case falls within the general rule.

2. Where a deed conveyed absolutely to the grantee and his heirs and assigns all the sawmill timber on a given tract of land, with the privilege of boxing the same for turpentine purposes for a designated period, and with "full privileges" to the grantee, his heirs and assigns, "of right of way for railroad, tramroads, and wagonroads across said tract of land during the time of this sawmill operation in that section," trees of a specified size being expressly excepted from the operation of the deed, such grantee is not liable to the grantor for damages caused by the cutting or boxing of the excepted trees during the period indicated, by a third person, to whom the grantee had leased the turpentine privileges upon the land, the lease to that person itself expressly declaring that no trees of this description were to be boxed by him.

(Syllabus by the Court.)

Error from superior court, Glascock county; Seaborn Reese, Judge.

Action by the Perkins Manufacturing Company against John B. Williams. From the judgment rendered, plaintiff brings error. Reversed.

Rawlings & Hardwick and Evans & Evans, for plaintiff in error. Jas. Whitehead, for defendant in error.

**SIMMONS, C. J.** The Perkins Manufacturing Company in 1887 purchased from Williams

the sawmill timber on a certain tract of land, described in the deed as "containing 672 acres, more or less," for which it paid him \$1,300. It subsequently ascertained that there was a deficiency in the number of acres, and brought suit against Williams, alleging that "the discrepancy is so glaring as of itself to suggest fraud and deception; that the warranty in the deed was intended to cover, not only the title to the land, but also the number of acres conveyed"; and that by reason of the deficiency the plaintiff was damaged \$1,000. Williams, in his answer, admitted that there were only 465½ acres. Upon the trial of the case, counsel for the plaintiff requested the court to charge the jury that "it being conceded by the plea of defendant that the tract of land contained 465½ acres only, and that the amount stated in the deed is 672 acres, more or less, therefore I charge you, as matter of law, that the discrepancy is so gross as to justify the suspicion of willful deception, or mistake amounting to fraud." The court refused to give this in charge, and the refusal is complained of as error.

The words "more or less" will cover any deficiency not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud. Code, § 2842. Questions of fraud, or of what amounts to fraud, in a particular case, are generally for determination by the jury. Each case presents its own peculiar facts. The deficiency in one case is greater than in another. The purpose for which the land is purchased is very different in one case from what it is in another. If a man should purchase land for a mill site, the water power would be the principal thing he would have in view. He would not care so much for the number of acres as he would for the mill site, and would therefore pay less attention to the representations of the vendor as to the number of acres than he would if he were buying merely for the purpose of cultivation. The suspicion of willful deception, or of mistake amounting to fraud, "could not arise or be justified unless some suggestion of fraud or gross mistake would occur to the mind as probable, in consequence of the magnitude of the deficiency, in view of the object of the purchase and all the attendant circumstances"; and whether, in a given instance, such a suspicion is justified, is, in ordinary cases, as was said by Bleckley, C. J., in *Estes v. Odom*, 91 Ga. 606, 18 S. E. 356, "a question of fact, to be decided by the jury on all the circumstances of the particular case, including, as one of the main considerations, the object of the purchase, if any in particular, as understood between the parties at the time of the transaction." "In such extraordinary and pronounced cases as would afford no room for difference of opinion, that question could doubtless be decided by the court hypothetically, as one of law. The deficiency might be so slight and trivial, on the one hand, or so excessive, on the other, as either to present nothing whatever for trial by the jury, beyond ascertaining the extent of the deficiency, or limit

their functions to that and to the ultimate question, together with the assessment of damages." Under the facts in evidence, we think the present case falls within the general rule, and that the court did not err in refusing to give in charge the request above quoted.

2. The deed made by Williams to the plaintiff conveyed to the grantee and its heirs and assigns all the sawmill timber on the tract described therein, except certain specified trees, with the privilege of boxing the trees for turpentine purposes for six years, and with "full privileges of right of way for railroad, tramroads, and wagonroads across said tract of land during the time of this sawmill operation in that section." The trees excepted were 100, to be marked by Williams, and all trees "measuring under fourteen inches at usual stump height"; it being stipulated that no such trees should be cut or boxed. Williams, in his answer to the action, pleaded that the plaintiff had violated this stipulation, and had cut and boxed the 100 trees he had reserved, thereby damaging him \$500, and had boxed all the trees on the land measuring under 14 inches at usual stump height, thereby damaging him \$1,000. It appears from the evidence that the plaintiff had sold to Blue & Co. the privilege of boxing the timber on the tract, except trees measuring under 14 inches at the usual stump height, and that the boxing of trees under that size, if done at all, was done by Blue & Co., and not by the plaintiff. The court charged the jury, in substance, that as it was conceded that the plaintiff re-leased to Blue & Co., and thus permitted and licensed Blue & Co. to enter into possession of the premises under their conveyance, the plaintiff became answerable for the acts of Blue & Co. in the premises, to the same extent as it would be chargeable with its own acts operating under the conveyance, and, if Blue & Co. cut and boxed trees under 14 inches in diameter at the usual stump height, while operating under the license of the plaintiff, the plaintiff was liable to the defendant for such damage as resulted therefrom to the defendant. Under the facts of the case, we think this part of the charge was erroneous. The deed from Williams to the Perkins Manufacturing Company conveyed title to the timber to the grantee and its assigns. It also conveyed the right to build a railroad and tramroads to the grantee and its assigns. The grantee sold to Blue & Co. the privilege of boxing the timber for turpentine purposes. Under the deed from Williams, the grantee had the legal title to the standing timber, and the right to sell the privilege of boxing the trees, and therefore had the right to make the stipulation as to cutting and boxing the 100 trees, and boxing trees under 14 inches. The conveyance to Blue & Co. was not a mere license, but a sale of so much of the timber as was necessary for turpentine purposes. *Coody v. Lumber Co.*, 82 Ga. 798, 10 S. E. 218; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574. Blue & Co. were not agents or mere licensees of the Perkins Manufacturing Company, nor were they the tenants

of the company. If, therefore, they violated the stipulation in the deed by cutting and boxing timber which had been reserved, they, and not their vendors, were answerable for the damages occasioned thereby. The stipulation in each deed was in the nature of a covenant running with the land. It was a covenant for the benefit of the land, and created a privity in estate between the original grantor and the assignee of the original grantee; and inasmuch as the Perkins Manufacturing Company did not break the covenant, but Blue & Co., its assignee, did, Blue & Co. are liable, and not the Perkins Manufacturing Company. See 1 *Warr. Vend.* 422. Judgment reversed.

(98 Ga. 392)

# WILLIAMS v. AUGUSTA SOUTHERN R. CO.

(Supreme Court of Georgia. May 4, 1896.)

## APPEAL—ASSIGNMENTS OF ERROR.

There being in the bill of exceptions no assignment whatever of any error alleged to have been committed by the trial court, nothing for adjudication by this court is presented, and therefore the motion of defendant in error to dismiss the writ of error is well taken.

(Syllabus by the Court.)

Error from superior court, Glascock county; John C. Hart, Judge.

Action by the Augusta Southern Railroad Company against John B. Williams. From a judgment for plaintiff, defendant brings error. On motion to dismiss. Granted.

Jas. Whitehead, for plaintiff in error.  
Leonard Phinkey and E. B. Rogers, for defendant in error.

LUMPKIN, J. The following is a statement of all the material contents of the bill of exceptions: The case of the Augusta Southern Railroad Company against John B. Williams was tried in Glascock superior court, and resulted in a verdict for the plaintiff. The defendant duly filed a motion for a new trial, and an approved brief of the evidence. This motion was, on the second Monday in April, 1895, heard by the presiding judge, "who reserved his decision until August 6, 1895, when he overruled said motion for new trial, and passed an order refusing the same on each and all of the grounds therein stated." Immediately succeeding the words just quoted, the following language occurs: "And now, as the facts aforesaid do not appear of record, said John B. Williams comes now, within thirty days from the rendition of the judgment refusing a new trial, and in the time prescribed by law, and presents this, his bill of exceptions, and prays that the same may be signed and certified, that the errors alleged to have been committed may be considered and corrected." The bill of exceptions then concludes by specifying the material portions of the record to be transmitted to this court. It is manifest that this bill of exceptions contains no assignment of error alleged to have been com-

mitted by the trial judge, and consequently nothing is presented for adjudication by this court. Writ of error dismissed.

(98 Ga. 384.)

**FARMERS' ALLIANCE WAREHOUSE & COMMISSION CO. v. McELHANNON.**

(Supreme Court of Georgia. May 4, 1896.)

**BAIL, TROVER—PLEADING—DESCRIPTION—AMENDMENT—VERIFICATION—BOND BY DEFENDANT—EFFECT.**

The plaintiff's original declaration in bail trover for the recovery of "three thousand five hundred dollars lawful money of the United States" having been amended so as to describe the property sued for as "lawful money of the United States, consisting of one hundred silver certificates of five dollars each, one hundred and fifty national bank notes, known as national currency, each for ten dollars, and seventy-five treasury notes of the United States, each for the sum of twenty dollars," and it also now for the first time appearing to this court that the defendant had given bond in terms of the law for the forthcoming of the property sued for, it was error, although the amendment was not verified by affidavit, to sustain a demurrer to the declaration as amended, and dismiss the plaintiff's action.

(Syllabus by the Court.)

Error from city court of Clarke; Howell Cobb, Judge.

Bail trover by the Farmers' Alliance Warehouse & Commission Company against W. A. McElhannon. From a judgment for defendant, plaintiff brings error. Reversed.

T. S. Mell, J. D. Mell, and John J. Strickland, for plaintiff in error. Lumpkin & Burnett, for defendant in error.

**SIMMONS, C. J.** The plaintiff's original declaration described the property sued for as "three thousand five hundred dollars lawful money of the United States." This, we held, was too vague and indefinite in its description of the property. 95 Ga. 670, 22 S. E. 686. The plaintiff afterwards amended the declaration so as to describe the property as "lawful money of the United States, consisting of one hundred silver certificates of five dollars each, one hundred and fifty national bank notes, known as national currency, each for ten dollars, and seventy-five treasury notes of the United States, each for the sum of twenty dollars." The declaration as amended was demurred to on the ground that the description of the property sued for was insufficient, and upon the ground that the amendment was not sworn to, and the court sustained the demurrer, and dismissed the declaration. We think the court erred in sustaining the demurrer. The description is sufficient to identify the property if found in the defendant's possession. Each particular class of bills or notes is described, the denomination of each class is given, and the number of bills or notes of each denomination. If this description is not sufficient, it would be a rare case in which money could be recovered in an action of trover; for few people who handle money remember the par-

ticular bank which issued it or the number of each particular bill or note. Indeed, few persons ever look at the name of the bank or the number of the bill or note; and in these busy days of commerce few persons keep their money in bags, so that it can be identified in that manner. If the sheriff, upon attempting to make a seizure of the property described in the writ, should find in the defendant's possession 100 silver certificates of \$5 each, 150 national bank notes of \$10 each, and 75 treasury notes of \$20 each, lawful money of the United States, he would be justified in taking possession of the same. See, on this subject, 28 Am. & Eng. Enc. Law, "Trover," pp. 804-806; *Graves v. Dudley*, 20 N. Y. 79; *Dows v. Bignall*, Lator, Supp. 407; *Receivers of Bank of New Brunswick v. Neilson*, 29 Am. Dec. 691; *Bac. Abr. "Trover," F*; *Bull. N. P.* 37. Moreover, by giving bond for the forthcoming of the money, the defendant admitted that he had in his possession money answering to the description. As to the objection that the amendment was not verified, there is no law in this state which requires a petition in an action of trover to be verified by the oath of the plaintiff, and there was none at the time this amendment was filed which required such an amendment to be verified. Judgment reversed.

(98 Ga. 400)

**WHITE COUNTY v. BELL.**

(Supreme Court of Georgia. May 11, 1896.)

**ORDINARY—CLAIM FOR EXTRA SERVICES—SET-OFF.**

If, in any event, an ordinary can plead as a set-off to an action brought against him by the county a demand in his favor against the plaintiff for extra compensation, arising under section 3697 of the Code, he cannot file such plea until his claim for such compensation has been passed upon and allowed by the grand jury.

(Syllabus by the Court.)

Error from superior court, White county; J. J. Kimsey, Judge.

Action by White county against W. B. Bell. From the judgment rendered, plaintiff brings error. Reversed.

J. W. H. Underwood and H. H. Dean, for plaintiff in error. Boyd & Lilly, for defendant in error.

**LUMPKIN, J.** Section 3697 of the Code prescribes the manner in which ordinaries and other county officers may obtain compensation for certain services, for the payment of which no other provision is made by law. It requires these officers to submit their claims to the grand juries of their respective counties at the spring term of the superior court, and it is within the power of a grand jury to allow the whole of the sum claimed, or so much thereof as they may deem right and proper. When a claim is so allowed the necessary amount to pay it must be raised by taxation, and, when collected, paid over by the county treasurer to the par-

ty or parties entitled to the same. Until a given claim has been allowed by the grand jury, it cannot be treated as a demand against the county, entitled to payment; and, even after allowance, it does not become due until its payment is provided for by special taxation. It follows inevitably that, where a county has brought an action against the ordinary, he cannot set off against the same a demand for extra compensation, arising under the above-cited section of the Code, which has not even been passed upon by the grand jury. The ruling here made is directly supported by the decision of this court in the case of Lumpkin Co. v. Williams, 94 Ga. 657, 21 S. E. 849.

Judgment reversed.

(98 Ga. 423)

**KECK v. CITY OF GAINESVILLE.  
McUTCHEON v. SAME.**

(Supreme Court of Georgia. May 11, 1896.)

**MUNICIPAL ORDINANCE—DISORDERLY CONDUCT—  
WORKING ON SABBATH.**

A municipal ordinance making it penal to "act in a disorderly manner," or "make any unnecessary noise within the corporate limits, \* \* \* calculated to disturb the peace, quiet, or good order of the city," or to "be guilty of disorderly conduct," is not violated by quietly working in a closed church, on the Sabbath day, upon the benches therein; the work in question not being itself of such a character, or causing such noise, as would ordinarily disturb any citizen, and the only "disturbance" occasioned by it arising from the fact that it was done on the Sabbath. The design of such an ordinance is to insure the peace, tranquillity, and repose of the community, and not to prevent acts otherwise unobjectionable, but which, from the fact that they are done on that day, are shocking to the religious or moral sensibilities of a portion of the citizens.

(Syllabus by the Court.)

Error from superior court, Hall county; J. J. Kimsey, Judge.

El. C. Keck and W. A. McCutcheon were separately convicted of violating a municipal ordinance, and respectively bring error. Reversed.

H. H. Dean, for plaintiffs in error. Perry & Craig and Howard Thompson, Sol. Gen., for defendant in error.

**SIMMONS, C. J.** It will be seen that the ordinance alleged to have been violated applies to every day in the week, and not especially to Sunday. It prohibits disorderly acts, or the making of unnecessary noise, calculated to disturb the peace, quiet, or good order of the community; but there is no indication that its purpose is also to prevent acts which disturb the religious feeling of the community, but which are not otherwise objectionable. The conduct which it was alleged constituted a violation of the ordinance was the making of benches inside of a meetinghouse on Sunday, and the noise was that made by the use of a saw, hammer, and other tools in doing this work. The witnesses for the prosecution testified that they were disturbed by the work

because it was being done on Sunday, and that they would not have been disturbed if it had been done on any other day. It was done quietly, and would not have attracted any special attention but for the fact that the day was Sunday. We think the court erred in holding that the conduct in question amounted to a violation of the ordinance. To constitute a violation of the ordinance the act must be such as would be disorderly, and the noise such as would be unnecessary, and calculated to disturb the peace, quiet, and good order of the community on other days of the week as well as on Sunday. It does not follow that, because one does an act which shocks the religious feeling of another, his conduct is "disorderly." See *Kahn v. City of Macon*, 95 Ga. 419, 22 S. E. 641. People of different religious beliefs have very different views in regard to the observance of the Sabbath, or as to what constitutes a violation of the sanctity of that day. What would shock the religious feeling of one would not be considered objectionable by another. Taking a carriage drive for pleasure on Sunday disturbs the religious feeling of some, while by others it is regarded as an innocent recreation. Bull-fighting on Sunday would disturb the religious feeling of most people in this country, yet in some countries it is a customary mode of recreation, and doubtless is not regarded as a violation of the Sabbath. If the plaintiffs in error, on the occasion in question, were carrying on the work of their ordinary callings, and not a work of charity or necessity, they were violating a law of the state (Code, § 4579), and ought to have been indicted under that law. A municipal corporation has no power to impose a punishment for an act made penal by the law of the state, unless expressly authorized by the legislature to do so. *Kahn v. City of Macon*, supra, and cases cited. The statute above referred to is ample to protect the public from the carrying on by any person of the work of his ordinary calling on Sunday, whatever may be his religious belief. It is a police regulation, which the state had a right to adopt; and its purpose is not to force people to observe Sunday in a religious way, or according to the religious views of any portion of the community, but to require that it be observed as a day of rest and cessation from labor,—the legislature doubtless regarding this as necessary to the health and well-being of the people. The legislature could have appointed Monday for this purpose, as well as it did Sunday, and the law would have been equally binding. See *Hennington v. State*, 90 Ga. 393, 17 S. E. 1009; *Hennington v. Georgia*, 16 Sup. Ct. 1083. Judgments reversed.

(98 Ga. 454)

**WOOD v. EVANS.**

(Supreme Court of Georgia. May 19, 1896.)

**CONDITIONAL SALE—RECORDATION—BONA FIDE  
MORTGAGEE.**

Where the purchaser of personalty took possession of the same, giving to the seller a

promissory note for the price, which was signed by a third person as surety, upon a parol agreement between himself and the purchaser that the title to the property should be in the surety until the note was paid, one who sold and delivered goods to the purchaser upon the faith of the property being his, with an understanding that the debt thus created was to be secured by a mortgage upon the property, which was subsequently given, was entitled to enforce the collection of the mortgage by a sale of the property, as against a claim filed by the surety, though the latter had been compelled to pay the original purchase-money note. This is true although the mortgage was not actually given until after knowledge by the mortgagee of the contract between the mortgagor and the surety, the mortgagee having extended the credit, and having parted with his goods upon the understanding mentioned, before receiving such knowledge.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Execution, in favor of J. W. Wood against one Gunter to foreclose a chattel mortgage, was levied upon property to which a claim was interposed by Lewis Evans. From a judgment for claimant, plaintiff brings error. Reversed.

Maddox & Starr, for plaintiff in error. Jesse A. Glenn and Geo. Q. Glenn, for defendant in error.

**LUMPKIN, J.** An execution issued upon the foreclosure of a mortgage in favor of Wood against Gunter was levied upon the mortgaged property, the same being a mule, which was claimed by Evans. Upon the trial of the case, it appeared that the mule had been sold and delivered by one Morris to Gunter, who gave to Morris his promissory note for the price of the mule, with Evans as surety thereon. There was a contemporaneous parol agreement between Evans and Gunter that the title to the mule should be in Evans until the note was paid. Evans paid the note to Morris, and was never reimbursed, in whole or in part, by Gunter. Wood sold and delivered goods to Gunter upon the faith that the mule belonged to him, and with an agreement that the debt thus created was to be secured by a mortgage upon the mule, which was subsequently given; Wood, in the meantime, becoming informed of the parol agreement between Gunter and Evans, but having no knowledge or notice of the same at the time he extended credit to Gunter, and parted with his goods.

These being the facts, the question was whether or not Wood was entitled to enforce the collection of his mortgage by a sale of the mule, as against the claim filed by Evans. The court charged the jury that if Evans went Gunter's security for the purchase money of the mule, with the understanding that the title to the mule should be in Evans till the mule was paid for, and under this agreement Gunter took possession of the mule, and while thus in possession Wood extended to him credit on the faith of the property being his, and without notice of Evans' claim, but

took the mortgage after he had notice of that claim, they should find the property not subject. The trial resulted in a verdict for the claimant.

We think this charge was not entirely accurate, and that the verdict was wrong. Evans either did or did not obtain title to the property. If he can be treated as having acquired the title, then the transaction amounted to a sale by Evans to Gunter, with a reservation of title in the former; and as the contract was not reduced to writing and recorded, as required by section 1955a of the Code, the reservation of title was not valid as against Wood. This section of the Code does not declare that third persons must acquire a lien in order to be protected. If they honestly, and without notice of any want of title in the vendee, extend to him credit, and part with property upon the faith of his apparent ownership, the parol reservation of title will not affect them at all. It appears here that Wood had actually sold and delivered his goods to Gunter, and obtained his agreement to execute the mortgage subsequently given, in entire ignorance of the parol understanding between him and Evans. The trial judge evidently entertained the opinion that, because Wood knew of this understanding at the time of taking the mortgage, he would not be protected; but we cannot concur in this view. If the title never passed into Evans at all,—which really seems to be the better view of the case,—what occurred between him and Gunter amounted to no more than an effort to create a lien by parol in Evans' favor; and this, of course, would amount to nothing, as against the lien of Wood's mortgage. Judgment reversed.

(98 Ga. 464)

#### ORIENT INS. CO. v. WILLIAMSON.

(Supreme Court of Georgia. May 19, 1896.)

INSURANCE—CONDITION AS TO TITLE—BREACH—MORTGAGE.

It being stipulated in a policy of fire insurance issued to a woman, covering a building described in the policy as "her one-story frame, shingle-roof dwelling," that the policy should be void "if the interest of the insured in the property be not truly stated therein," or "if the interest of the insured be other than unconditional and sole ownership," it was error, upon the trial of an action brought upon the policy by the insured, to reject a plea, offered in due time, alleging that when the policy was issued the plaintiff was not the owner of the property, because she had previously conveyed the same to another by a fee-simple deed, and that if the defendant had known this fact it would not have issued the policy. This is true although the deed in question may have been made to secure a debt, its effect being to pass the title.

(Syllabus by the Court.)

Error from city court, Floyd county; G. A. H. Harris, Judge.

Action by Janie R. Williamson against the Orient Insurance Company. From a judgment for plaintiff, defendant brings error. Reversed.

Fouché & Fouché and Glenn, Slaton & Phillips, for plaintiff in error. McHenry, Nunnally & Neel, for defendant in error.

SIMMONS, O. J. Mrs. Williamson sued the Orient Insurance Company for loss by fire, upon a policy of insurance covering a building described in the policy as "her one-story frame, shingle-roof dwelling." The policy contained a stipulation that it should be void "if the interest of the insured in the property be not truly stated therein," or "if the interest of the insured be other than unconditional and sole ownership." On the trial of the case, and at the close of the testimony for the plaintiff, the defendant offered to amend its plea by alleging that "at the time of procuring the policy sued on the plaintiff represented that she was the owner in fee of the property insured, and that her interest was that of unconditional and sole owner thereof; and the defendant has just discovered that at that time she was not the owner thereof, but on the 1st day of August, 1892, she conveyed said property to the Security Investment Company of Bridgeport, Connecticut, by deed in fee simple, and that at the date of the destruction of the property she was not the owner thereof," and that "said policy was void by reason thereof," and that "if it had known that said property had been so deeded, or that it was incumbered, no policy would have been issued on the same." The court refused to allow the amendment, on the ground that it came too late, and on the further ground that it set up no sufficient defense. We think the court erred in refusing to allow the amendment. The acceptance by the insured of a policy containing the stipulation above quoted amounted to a representation on her part that she had truly stated therein her interest in the property insured, and that her interest was that of unconditional and sole ownership; and if at that time the title of the property was in another, to whom she had conveyed it by deed in fee simple, the representation was untrue, and according to the terms of the contract the policy was void. In reply to the argument that the stipulation referred to would not render the policy void, unless inquiry as to the title was made of the insured, we quote from an opinion of the United States circuit court of appeals, delivered by Sanborn, J., in the case of *Insurance Co. v. Bohn*, 12 O. C. A. 531, 65 Fed. 166, where it is said, in discussing this question: "It is contended that the contracts in these policies, which exclude the Bohns from fire insurance under them upon any interest but that of unconditional ownership, are without binding force, because no inquiry respecting their title was made by the companies, and no statement concerning it was made by the Bohns when these policies were issued. But neither inquiry nor statement before the issue of the policies was requisite to the validity of these contracts. The policies themselves, containing as they

did the contracts that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional ownership, and a description of it was not indorsed on the policy, were pointed inquiries of the assured whether their interest was the sole and unconditional ownership of the property described, and their silence and acceptance of the policies was the answer. The policies themselves were notice to the Bohns that the companies deemed their interest that of unconditional ownership, that they insured them against loss to that interest only, and that they expressly excluded every other interest from the insurance, unless the Bohns immediately notified them that they held a different interest, and caused a true description of it to be written into, or indorsed upon, the policies. The silent acceptance of the policies by the Bohns closed these contracts, and bound them to the agreement tendered by the policies,—that every interest of theirs but that of unconditional ownership was excluded from the promised indemnity." See, also, the opinion of this court in *Mechanics' & Traders' Ins. Co. v. Mutual Real-Estate & Building Ass'n*, 25 S. E. 457, and authorities cited, *supra*.

The deed referred to in the amendment was offered in evidence by the defendant, but was ruled out by the court. It appeared that the deed was made to secure a debt, and it was recorded August 10, 1892, and was canceled December 18, 1894. The policy was dated November 2, 1893. It was contended on the part of the plaintiff that the deed, being of record at the time the policy was issued, was notice to the world of the true state of the title, and, the company having issued the policy with this notice, it thereby waived the benefit of the stipulation above referred to. It is true that, where an insurance company issues a policy with knowledge of the true state of the title, it cannot avail itself of the defense which the company in this case was seeking to set up by the amendment to its answer; such knowledge being held to amount to a waiver. *Mechanics' & Traders' Ins. Co. v. Mutual Real-Estate & Building Ass'n*, *supra*. But the knowledge here referred to is actual knowledge. If the insurance company had taken a deed to the land when the conveyance in question was of record, and a contest had arisen between it and the grantee in that conveyance as to their respective rights in the premises, the insurance company would, as between it and such grantee, be held affected with constructive notice of the prior conveyance; but the doctrine of constructive notice does not apply as between it and the person to whom it issued this policy. It was entitled to rely upon the representations of the insured, and was not chargeable with knowledge of what was on the records. See 1 Bld. Ins. § 671; *Insurance Co. v. Deale*, 18 Md. 28.

It was further contended that the deed in

question, having been made as security for a debt, was merely an incumbrance on the property, and not such an alienation as would render the interest of the insured "other than unconditional and sole ownership." We do not concur in this view. The effect of an ordinary deed in fee simple, although given as security for a debt, is to convey the legal title to the property, and the grantee would have a right to maintain ejectment thereon against the grantor. See *Lackey v. Bostwick*, 54 Ga. 45; *Biggers v. Bird*, 55 Ga. 653, 655; *Braswell v. Suber*, 61 Ga. 398; *Oellrich v. Railroad*, 73 Ga. 389, and cases cited; *Roland v. Coleman*, 76 Ga. 654. This being so, the interest of a person who has parted with his title under such a deed cannot be said to be "unconditional and sole ownership." The case is controlled, in principle, by the decision in *Insurance Co. v. Asberry*, 95 Ga. 792, 22 S. E. 717.

As the law stood prior to the pleading act of 1895, parties could at any stage of the cause, as a matter of right, amend their pleadings, if there was enough in the pleadings to amend by. Code, § 3479. The court erred, therefore, in holding that the amendment came too late. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 482)

MORRIS et al. v. WINN et al.

(Supreme Court of Georgia. May 23, 1896.)

SALE—DELIVERY—EVIDENCE.

The evidence being materially different from that appearing in the record when this case was before this court at the March term, 1894 (20 S. E. 339, 94 Ga. 452), and there being in the present record testimony which, if true, tended to show that the contract of sale was complete, and the mule delivered to the purchaser at the place where the contract was made, followed by a supplemental and distinct contract on the part of the seller to send the animal, for the purchaser, to another place, it was error to direct a verdict for the plaintiff, upon the theory that no conclusion could be drawn from the evidence except that the contract of sale included delivery at the latter place, and nowhere else. The case should have been submitted to the jury.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by J. H. Winn against Morris & Cathcart on a contract of purchase. On plaintiff's death, H. O. Winn and others, administrators, were substituted. From a judgment for plaintiffs, defendants bring error. Reversed.

Geo. P. Roberts and J. J. Northcutt, for plaintiffs in error. Bartlett & Washington and J. W. Moore, for defendants in error.

LUMPKIN, J. This case was before this court at the March term, 1894. It appears that Winn bought a mule from Morris & Cathcart, in Atlanta, paid them for it \$70,

and also \$1.80 more to deliver the mule at Watson's stable, in Douglasville, which they agreed to do. The mule was never delivered at that stable, but at another in the same town, where it died without ever having been received by Winn. He brought his action against the sellers for the money paid. A verdict was rendered in their favor, and this court reversed the judgment of the trial court, denying the plaintiff a new trial. 94 Ga. 452, 20 S. E. 339. The official report there appearing does not fully set forth the evidence; but the record then before us showed plainly and unequivocally that the contract between Winn and Morris & Cathcart embraced as a part thereof an express stipulation for the delivery of the mule at Watson's stable, in Douglasville, and that this was a vital and essential feature of that contract. With that evidence before the court, we held, in effect, that the sellers ought to have been adjudged liable to the purchaser for the breach of their contract. The case was tried again, and the judge below directed a verdict for the plaintiff. Had the evidence been the same as on the former trial, this action by the judge would have been sustained; but the evidence introduced upon the last trial, and which comes up to us in the present record, is essentially different from that offered at the first trial. In the brief of evidence now before us, there was evidence for the defense which (if true) tended to show that the contract of sale was complete, and the mule was actually delivered to Winn in Atlanta, and that this complete and distinct contract was followed by a supplemental agreement on the part of Morris & Cathcart to send the mule, for Winn, to Douglasville. There was also evidence in behalf of Winn tending to prove what we have already stated unequivocally appeared at the first trial. We do not, of course, undertake to say what the real truth of the matter is; but we feel sure it was not a case for the direction of a verdict, and should have been submitted to the jury for determination. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 484)

KIRKLEY v. SHARP.

(Supreme Court of Georgia. May 23, 1896.)

LIMITATION OF ACTIONS—EXCEPTION FOR FRAUD—DILIGENCE OF PLAINTIFF.

1. As a general rule, section 2931 of the Code, which provides that, if the defendant "has been guilty of a fraud by which the plaintiff has been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud," does not apply, unless the plaintiff has exercised at least ordinary diligence to discover the fraud; but failure to employ the necessary means to discover such fraud may be excused, when the plaintiff has been lulled into a sense of security by reason of a relation of trust and confidence between himself and the defendant, rendering it the duty of

the latter to disclose the truth, and when it also appears that, because of this confidence, the plaintiff was actually deterred from sooner discovering the fraud, or even suspecting that any fraud had been perpetrated upon him.

2. In view of the allegations of the plaintiff's declaration, it was error to dismiss the same upon a demurrer based on the ground that the plaintiff's cause of action was barred by the statute of limitations.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by E. G. Kirkley against B. A. Sharp to recover damages for a deficiency in the quantity of land sold plaintiff by defendant. From a judgment for defendant, plaintiff brings error. Reversed.

The following is the official report:

To the petition of Mrs. Kirkley against Sharp, the defendant demurred orally, on the ground that, from the allegations of the petition, the cause of action appeared to have arisen more than four years prior to the filing of the declaration. The declaration was amended, but the demurrer was sustained, to which ruling plaintiff excepted, upon the ground that, according to the allegation of the petition, the suit was brought within four years from plaintiff's discovery of the facts; and the plaintiff was debarred and deterred from making earlier discoveries by the fraud of defendant, and under the facts the statute did not begin to run until plaintiff discovered the alleged fraudulent conduct. The petition alleged: Defendant is indebted to petitioner \$210, with interest since August 1, 1887. On said day defendant executed to her a warranty deed to 35 acres, more or less, describing it, for \$500. When she bought the land and took the deed, a relation of trust and confidence existed between her and defendant. In the life of her late husband, he and defendant were friends, and after her husband's death defendant professed great friendship for her interests, and voluntarily became her trusted friend and adviser, and she, reposing entire confidence in his fidelity and honesty, consulted him about all business, and trusted him in all things. Pending said relations he offered to sell her the land, saying that there were 35 acres, which at \$15 per acre would be worth \$525, but that he would give her the \$25 and take \$500 for the land, assuring her that he could get and had been offered more than that for it, and that one man in town would give \$700 for it. Being a widow, with little experience or judgment, and trusting defendant fully, she told him that she knew nothing about it, but would trust him in the matter. If he thought it a good investment for her, she would trade entirely on his representations and judgment, and told him to have the deed drawn accordingly. He executed the deed in her absence, and brought it to her. With perfect confidence in him, she supposed the deed was all right, and in accordance with his representations and contract, and put it away without having it examined. Being her

sole adviser, she relied on him both as to the amount of the land and the language of the deed. She did not immediately improve the land, and had no reason or notice to suspect the quantity of the land. Some time afterwards defendant and W. W. Root located the west line between said land and land of Root. She was not present. Defendant came to her afterwards, and told her they had located Root's line, and found her land two acres short, there being only 33 acres instead of 35, and asked her if \$15 per acre for the two acres deficiency would satisfy her. Still relying on his fidelity and honesty, and knowing nothing of the quantity of the land except what he told her, she accepted \$30 for the alleged deficiency. Afterwards, desiring to sell the land, she went to the man who defendant had told her would give \$700, and learned from him that he would not give but \$15 per acre, and he had never offered but that price for it to defendant. In attempting to negotiate a sale of the land, her attention was by others called to the quantity of the land, and by survey then made it was found that the tract contained but 19 acres. She immediately notified defendant, and demanded that he repay the price of the deficiency, or lay off enough of his own similar land, lying broadside on an adjoining lot, to make up the 33 acres. He refused to do either, and hence she is forced to bring this suit for the recovery of the purchase price of the difference between 19 real, and 33 alleged, acres of land, at \$15 an acre, with interest. In addition to the facts alleged, she alleges that the deficiency is so gross as to justify the suspicion of willful deception or mistake amounting to fraud, and defendant should refund the price of the deficiency. In this matter defendant has acted in bad faith, and been stubbornly litigious, and has caused her unnecessary trouble and expense, to wit, \$50 lawyer's fees, and whatever her other costs of litigation may be, when he had full information and opportunity and importunity to settle without suit. And she prayed that she might recover expenses of litigation. The suit was brought to the October term, 1891, of Carroll superior court. By amendment she alleged that the statement made by Sharp and the payment for the two acres occurred within the last four years before the filing of this suit, and that by the conduct and statement of Sharp, as set out in the original declaration, she was kept in ignorance and prevented from discovering the mistake until within four years preceding the filing of the suit; that all of the conduct and sayings of Sharp, after the execution of the deed, occurred within four years prior to the filing of the suit; that the continued relations of trust and confidence between them, and all of said statements and conduct of Sharp, were used to continue to defraud her and were so intended, and deterred and prevented her from discovering the facts and bringing her action. The discovery of the fraud was within four years before this suit, and its earlier discovery

was prevented by defendant's fraud, as set out in the original declaration.

Adamson & Jackson, for plaintiff in error.  
S. E. Grow and W. F. Brown, for defendant in error.

**LUMPKIN, J.** This was an action by Mrs. Kirkley against Sharp. The substance of her declaration, and of an amendment to the same, are stated by the reporter. The trial judge, upon an oral demurrer made by the defendant, dismissed the case, on the ground that the declaration showed upon its face that the plaintiff's cause of action, not having been brought within four years from the time the right accrued, was barred by the statute of limitations. The case is not entirely free from difficulty, but, after some reflection, we have concluded that the better holding is that, under the facts alleged, the plaintiff was not barred. As a general rule, fraud, until discovered, prevents the statutory bar from attaching; but it is now well settled in this state that there must be reasonable diligence to detect the fraud. *Marler v. Simmons*, 81 Ga. 613, 8 S. E. 190, and cases cited. It seems, however, that the rule just stated is subject to some degree of modification or relaxation in cases where the plaintiff has been lulled into a sense of security by reason of a relation of trust and confidence between himself and the defendant, rendering it the moral duty of the latter to disclose the truth, and where, because of this confidence, the plaintiff has been actually deterred from sooner discovering the fraud, or even suspecting its perpetration. In such cases, the failure to employ the necessary means to discover the fraud is sometimes held to be excusable. In the case of *Gibbs v. Guild* (1882) 9 Q. B. Div. 59, it was held that, in an action to recover, by way of damages, money lost by the fraudulent representations of the defendant, it was a good reply to a defense of the statute of limitations that the existence of the defendant's fraud was fraudulently concealed by him for more than six years before the action was brought, and that consequently the plaintiff did not discover, and had no reasonable means for discovering, the fraud within the six years. Among the cases relied on in support of the judgment of Field, J., which was affirmed by the court of appeal, was that of *Bree v. Holbech*, 2 Doug. 655, in which we find certain dicta of Lord Mansfield in accord with the conclusion announced. In 13 Am. & Eng. Enc. Law, 727, 728, it is stated that "in equity a fraudulent concealment of a cause of action on the part of the defendant may keep the statute from running. It is held that the defendant forfeits his right to set up the statute of limitations where he has concealed his own fraud during the term of the statute, and that, having himself, by fraud, made the statute run in his own favor, he cannot take advantage of it." The text then proceeds to lay down that it has been held that the term set by the statute of limitations is absolute as to cases arising

at common law, and that in such cases the operation of the statute cannot be delayed, except by express statutory provisions. Attention, in this connection, is called to the fact that in Georgia, evidently referring to the act of March 6, 1856 (Acts 1855-56, p. 236; Code, § 2831), and some other states, such provisions are incorporated in the statutes; and it is further said that, "even in their absence, there is a general tendency to hold that, since the statutes of limitations are designed to suppress fraud, they should not be so construed as to encourage fraud, if they admit of any other reasonable interpretation." It is also remarked (13 Am. & Eng. Enc. Law, p. 729) that "it is well to remember that the fraud in question is not that which gives, but that which conceals, a cause of action,"—citing the case of *Gibbs v. Guild*, supra, which, it is said, reviews all the English authorities, and holds that, even since the judicature act of 1873, "by which common law and equity, in a certain sense, were both abolished," a fraudulent concealment of a cause of action will delay the operation of the statute.

The question now under consideration was also touched upon by Judge Lumpkin in the case of *Conyers v. Kenan*, 4 Ga. 306. On page 315, he refers to the case of *Bree v. Holbech*, cited above. In Maryland, the statute provides that usual and ordinary diligence must be used to discover the fraud; and under this statute it was held, in *Wear v. Skinner*, 46 Md. 257, that concealment of the original fraud was enough, without the perpetration of another and independent fraud, to excuse the adverse party for remaining in ignorance. See, also, 2 Wood, Lim. Act. 701-712, and cases cited in note 2 on the latter page, all of which are more or less in point, among them being the case of *Wear v. Skinner*, supra, and also that of *Vigus v. O'Bannon*, 118 Ill. 534, 8 N. E. 778. From the opinion of Magruder, J., we take the following pertinent extract, to be found on page 346 of the report last cited (page 782, 8 N. E.): "The rule that, in cases of fraud, the statute of limitations begins to run only from the time of the discovery of the fraud, will not apply where the party affected by the fraud might, with ordinary diligence, have discovered it. But the failure to use such diligence may be excused where there exists some relation of trust and confidence, as principal and agent, client and attorney, cestui que trust and trustee, between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and where it appears that it was through confidence in the acts of the party who committed the fraud that the other was prevented from discovering it." In *Norris v. Haggin*, 136 U. S. 886, 10 Sup. Ct. 942, it was held that the plaintiff was guilty of laches in failing sooner to discover the alleged fraud from the consequences of which he sought relief; but Mr. Justice Miller seems to recognize the principle for which we are contending, as will appear from a dictum

on page 392, 136 U. S., and page 945, 10 Sup. Ct., in the following language: "It is a part of this general doctrine that, to avoid the lapse of time or statute of limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment." On the whole, therefore, we conclude that the court erred in dismissing the plaintiff's action. In view of the allegations contained in the declaration, it was not, in our opinion, barred by the statute of limitations. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 495)

**GEORGIA RAILROAD & BANKING CO.  
v. RICHMOND.**

(Supreme Court of Georgia. May 23, 1896.)

**RAILROAD COMPANIES—LIABILITY FOR ASSAULT BY  
SERVANT—JUSTIFICATION—INSTRUCTIONS  
—PASSENGERS—WHO ARE.**

1. If one who had purchased a railroad ticket, intending to take a train about to arrive, but who failed to do so because he did not succeed in getting his baggage checked in time to be placed on that train, left the premises of the railroad company, and registered at an hotel, intending to take a train to his destination the next morning, and afterwards, on the day he purchased the ticket, returned to the station to make inquiries about, or arrange for the storage or checking of, his baggage, he was not at that time a "passenger," but nevertheless had the right to go to the station for the purpose stated, and, if he conducted himself properly, was entitled to respectful treatment from, and immunity from an unlawful assault by, the agent while engaged in transacting with him the business mentioned; and such an assault would, under such circumstances, give a right of action against the company.

2. If, however, the real purpose in returning to the station was not to look after or arrange for the checking of baggage, or to attend to other legitimate business with the agent, but merely to upbraid him for a real or supposed breach of duty occurring at an earlier hour of the day, and a difficulty thereupon ensued, the two met as ordinary citizens, and the railroad company had no concern in what passed between them.

3. Where, on the trial of an action against a railroad company for an alleged assault and battery by its station agent upon the plaintiff, one of the defenses was that the plaintiff had, without sufficient provocation, used to the agent opprobrious and insulting language, accompanied with sneers and contemptuous gestures, and there was evidence to support this defense, it was error to charge, without qualification: "Sneers, looks, or contemptuous gestures will not justify an assault by an agent of a railroad company upon one who has a ticket, and has become entitled, under the contract, to courteous treatment until the contract was fully carried out by the railroad company or its agents." A similar charge was held not to be erroneous in *Railway Co. v. Fleetwood*, 15 S. E. 778, 90 Ga. 23; but in that case the plaintiff below was a passenger actually riding upon the defendant's train, and entitled to protection at the hands of the conductor who assaulted him, and the facts were, in other respects, wholly different from those of the present case.

(Syllabus by the Court.)

Error from superior court, Morgan county; H. T. Lewis, Judge pro hac.

Action by John F. Richmond against the Georgia Railroad & Banking Company to recover damages for an assault and battery. From a judgment for plaintiff, defendant brings error. Reversed.

The following is the official report:

Richmond sued the railroad company, alleging: On April 13, 1892, petitioner purchased from defendant, through its agent, Guest, at its depot in Madison, a ticket (paying the full charges therefor) for his passage over its line of railway from Madison to Augusta; thereby becoming a passenger of defendant, and entitled to its care and protection. At the time of the purchase of the ticket, petitioner requested said agent to check petitioner's baggage for the train then next going to Augusta, upon which train petitioner intended himself to embark, and which was then in a very few minutes due at Madison, which just and reasonable request the agent refused; thereby compelling petitioner to miss the train, and lie over several hours in Madison, or go on to Augusta without his baggage, which he was unwilling to do, and did not do. After the train had passed, desiring to avoid any future trouble and delay, he again requested the agent to check his baggage for the next morning's train (that being the next day train going to Augusta), stating to the agent that he had been badly treated about his baggage, and would not soon forget it, or words to that effect, when said agent, without provocation and without notice or warning, made a malicious and violent assault upon petitioner in the depot building. Said agent, with two small dogs joining him in the assault, threw petitioner violently to the floor, breaking his left collar bone, thereby inflicting a permanent and serious injury upon him, and struck, kicked, wounded, and cruelly beat and maltreated petitioner, etc. All of which was done while petitioner was a passenger of defendant, holding its ticket, and entitled to its protection, and done by said agent while he was in the prosecution of the business of defendant, and acting within the scope of his authority. There was a verdict for plaintiff for \$365, and, defendant's motion for a new trial being overruled, it excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because it was contrary to certain specified portions of the charge. Further, because the court erred in charging: "If, therefore, in this case, you believe from the testimony that the agent of the railroad company, Mr. Guest, committed an unlawful assault and battery upon plaintiff while in the depot, while plaintiff was then transacting business with the agent pertaining to his agency, then the defendant would be liable for such wrongful act." Alleged to be error because the evidence did not reasonably sustain the hypothesis which the court submitted to the jury. Error in charging: "Sneers, looks, or contemptuous gestures will not jus-

tify an assault by an agent of a railroad company upon one who has a ticket, and has become entitled, under a contract, to courteous treatment until the contract was fully carried out by the railroad company and its agents." Alleged to be error because it instructed the jury, as a matter of law, that sneers, etc., would not justify an assault, whereas this question should have been left to the jury. Further, the agent's conduct must be courteous, whatever might be the conduct of the passenger. Further, because it neutralized the instructions favorable to defendant, set out below, and in that part of the charge in which the court read to the jury section 4694 of the Code as the law applicable to the case. Said instructions favorable to defendant (to which it was alleged, also, the verdict was contrary) were as follows: "The relation of carrier and passenger does not, on the one hand, give the passenger any license which he would not have if he were not a passenger. Nor does it, on the other hand, deprive the agent of the carrier of the right he would have, as a man, to resent and repel abuse. If the injuries inflicted by Mr. Guest upon the plaintiff were inflicted under circumstances which would have justified him as a man, and if no damages could be recovered in a suit against him, then the railroad company is not liable."

Jos. B. & Bryan Cumming and J. A. Bilups, for plaintiff in error. Foster & Butler, for defendant in error.

LUMPKIN, J. The facts are stated by the reporter.

1, 2. We do not think Richmond was a "passenger" when he returned to the railroad station the last time on the day he claims to have been unlawfully assaulted and beaten by the company's agent. He had no purpose of taking a train that day, having decided to resume his journey on the following morning. However, he undoubtedly had the right to go to the station for the purpose of looking after his baggage, and arranging to have it checked or safely stored until the next day. If he went there to attend to this business, and conducted himself properly, he was entitled to respectful treatment from the agent; and if the latter, under these circumstances, unlawfully assaulted and beat him, it was his right to hold the company responsible in damages. The law on this subject is too well settled to require the citation of authority. It may, in this connection, be proper to add, however, that even if Richmond went to the station for the lawful purpose of attending to the business above mentioned, it was nevertheless incumbent on him to treat the agent with the same respect due to him by the agent. Therefore, if, instead of so doing, he, without provocation, used insulting or opprobrious language to the agent, which naturally enough resulted in a difficulty, the company should not be held responsible. In other

words, if Richmond, by his own improper behavior, unfitted the agent from exercising the care and prudence which were essential to his performing in a proper manner his duty to the company and to the plaintiff, the latter should not complain. The case would then stand somewhat like that of *Peavy v. Railroad Co.*, 81 Ga. 485, 8 S. E. 70, in which Judge Bleckley remarked that "the plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the [company's servant] was out of tune." If, however, the truth be that Richmond went to the station, not really for the purpose of transacting any legitimate business with the agent, but simply to upbraid or reproach him because of a real or supposed grievance occurring at an earlier hour of the day, and a difficulty then arose between these men, it was one in which the company had no concern whatever, and should be treated as any other fight occurring between ordinary citizens. In connection with what is said above, see the opinion of Atkinson, J., in the case of *Railway Co. v. Christian*, 97 Ga. —, 25 S. E. 411.

3. The court charged the jury as stated in the third headnote. We do not think this instruction was adapted to the facts and circumstances of this particular case. It is true that in the case of *Railway Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778, a similar charge was held not to be erroneous. But that was a totally different case upon its facts. It there distinctly appeared that the plaintiff was a passenger riding upon the defendant's train, and accordingly was entitled to protection at the hands of the conductor who assaulted him. The charge in question was perhaps appropriate with reference to the facts of that particular case, but should not be taken as expressing a general principle applicable alike to all cases of a somewhat similar nature. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 492)

### JONES v. HOUGH.

(Supreme Court of Georgia. May 23, 1896.)

#### WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT — EVIDENCE.

1. Upon the trial of a proceeding instituted against a husband and wife by the executrix of a deceased mortgagee to foreclose a mortgage executed by the defendants to secure their joint and several promissory note, dated January 22, 1885, and payable to the deceased, the wife was not a competent witness to testify in her own behalf that the note and mortgage were given for the husband's debt, and that she signed these instruments as surety for him.

2. It appearing from an inspection of certain books of account kept by the deceased in his own handwriting, and covering a considerable period of time prior to the date of the note, that they contained no charges against the wife, but

did contain an account made out against the husband alone, upon which was an entry in these words, "Jan. 22, 1885, rec'd payment by note," these books, and an account made out upon a separate piece of paper against the husband by the deceased, upon which was a receipt in the following words, "Rec'd payment by note, Jan. 22, 1885," signed by the deceased, were admissible in evidence in behalf of the wife; they being offered to show that the note was the debt of the husband alone, and it appearing that the principal of the note was exactly the same as to amount as would be due upon the account after computing interest thereon to the date of the note.

8. Whether or not the evidence thus offered was sufficient to establish the wife's defense, was a question for the jury; and the court erred in rejecting this evidence, and in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Morgan county; John C. Hart, Judge.

Action by M. F. Hough, administratrix, against Rachel Jones and another. From a judgment for plaintiff, defendant Jones brings error. Reversed.

Calvin George, for plaintiff in error. Foster & Butler, for defendant in error.

LUMPKIN, J. 1. The wife was incompetent to testify that the note and mortgage were given for the husband's debt, and that she signed the same only as surety for him, for the reason that she was a party to the action, interested in its result, and the testimony in question necessarily related to a transaction between herself and the deceased mortgagee. In view of the provisions of the evidence act of 1889, the trial judge properly refused to allow her to testify as to the matters mentioned.

2, 3. The defense set up by the wife being as above indicated, the books of the deceased, and the account referred to in the second headnote, ought to have been admitted in evidence. They certainly contained evidence tending to support the wife's theory that the note was given for the debt of the husband alone.

As the case is to be tried again, we will not now express any opinion as to whether or not this evidence was sufficient to establish the fact sought to be proved by it, but it certainly ought to have been passed upon by the jury. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 503)

MILLEDGEVILLE BANKING CO. et al. v. MCINTYRE ALLIANCE STORE et al.

(Supreme Court of Georgia. May 23, 1896.)

CORPORATIONS—PREFERENCE OF DEBTS—VALIDITY.

Under the law announced by this court in the case of *Wehl, Probasco & Co. v. Atlanta Furniture Manuf'g Co.*, 15 S. E. 282, 89 Ga. 297, and in view of the evidence, the court erred in directing the jury to return a verdict finding the mortgages of the plaintiffs in error void. This case is distinguishable from that of *Lowry*

*Banking Co. v. Empire Lumber Co.*, 17 S. E. 968, 91 Ga. 624.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John C. Hart, Judge.

Petition by certain creditors of the McIntyre Alliance Store, a corporation, against said corporation and other of its creditors, for injunction and the appointment of a receiver, and the setting aside of certain mortgages given by the corporation to certain of the defendant creditors. From a judgment setting aside the mortgages, defendants the Milledgeville Banking Company and S. Waxelbaum & Sons bring error. Reversed.

D. B. Sanford, Roberts & Pottle, and F. Chambers, for plaintiffs in error. J. W. Lindsey and Dessau & Hodges, for defendants in error.

LUMPKIN, J. Certain creditors of the McIntyre Alliance Store, a mercantile corporation, brought against it an equitable petition for injunction and the appointment of a receiver, to which the directors of the corporation, and several preferred creditors, in whose favor mortgages had been executed, were also made parties defendant. The petition attacked these mortgages upon two grounds: (1) Because given by the president without authority legally conferred upon him by the board of directors or stockholders of the corporation; and (2) because the execution and delivery of the same were unjust and fraudulent acts of discrimination against petitioners, intended to hinder, delay, and defraud them in the collection of their legal and just claims against the defendant corporation, which was insolvent. The court directed a verdict finding the mortgages void. To this the Milledgeville Banking Company and S. Waxelbaum & Sons, mortgagees, excepted. The record shows that the mortgages given to these parties were duly authorized by a quorum of the directors at a lawful meeting, and that they were given to secure bona fide debts of the corporation. So it seems clear that the plaintiffs entirely failed to sustain the first of the two above-stated grounds. It is therefore evident that the trial judge based his direction to the jury upon the second ground of attack made upon these mortgages, viz. that the execution and delivery of the same constituted an illegal and unjust discrimination against petitioners, though the record fails to disclose the precise theory upon which the judge's conclusion was reached. The evidence shows that, prior to the execution of the mortgage in favor of the banking company, it had accepted certain promissory notes of the corporation, which were indorsed by certain of its directors. The original indebtedness to Waxelbaum & Sons was about \$2,500, and at their request some of the directors executed their joint promissory note for the sum of \$3,000, and delivered the same to Waxelbaum & Sons, to be held as collateral security for the

payment of their demand against the corporation. Subsequently they were given a mortgage for \$851.78, to secure a note contemporaneously executed for that amount, which represented the balance due upon the original indebtedness, but whether or not Waxelbaum & Sons surrendered the \$3,000 note held by them as collateral security does not appear. In the light of the briefs submitted by counsel, we presume that the trial judge rested his decision upon the ground that the directors of the defendant had no power or authority to execute the mortgages in question, because the giving of them necessarily resulted in the directors deriving an incidental benefit thereunder; their effect being to relieve the directors, to a greater or less extent, of the individual liability incurred by them. Such, indeed, is the only theory, so far as we have been able to discover, upon which these mortgages could be attacked as void. We shall therefore deal with the case upon the assumption that this was the question passed upon by the court below.

As to the mortgage given to the Milledgeville Banking Company, we have no difficulty in reaching the conclusion that it cannot properly be held inoperative because of the fact that it was given to secure the payment of notes which had previously been indorsed by directors of the corporation. This precise question arose in the case of *Wehl, Probasco & Co. v. Atlanta Furniture Manuf'g Co.*, 89 Ga. 297, 15 S. E. 282, wherein this court held: "A creditor of a corporation, by promissory note on which some of the stockholders or directors are indorsers, may, as further security for the debt, take bona fide from the corporation a mortgage upon some of the corporate property, even if the corporation be insolvent at the time of its execution. \* \* \* And that the indorsers may incidentally be benefited by enforcing the mortgage constitutes no valid reason why the mortgagee should be enjoined, or why the mortgaged property should be placed in the hands of a receiver." We now confidently adhere to the ruling then made. In *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624, 17 S. E. 968, it was held that: "On principles of general law, the directors of an insolvent corporation cannot, to the prejudice of any of its creditors, indemnify by mortgage upon its assets one or more of their own body against loss by reason of his or their suretyship for the corporation upon liabilities already incurred; such indemnity not being made in the execution or performance of any agreement or undertaking entered into at or prior to the time when the liabilities were incurred. Nor can they, in a like case, indemnify a co-surety of one or more of the directors, inasmuch as the indemnity of one surety inures by operation of law to the benefit of the others." That case, however, is clearly distinguishable from the case at bar, and in no wise conflicts with the decision rendered in the case first above cited.

It is a principle recognized in equity from time immemorial, that a trustee can derive no personal benefit to himself from the exercise of powers conferred upon him under the trust; and, as the directors of an insolvent corporation hold its assets as a trust fund for the benefit of creditors, equity will not allow such directors to secure themselves from loss, to the injury of the creditors whom they represent in the capacity of trustees. In the case cited from 91 Ga. and 17 S. E., it plainly appeared that the action taken by the directors had but a single purpose, viz. to protect and secure themselves at the expense of all other creditors. They were simply taking care of themselves, having no other object in view, and what they did in seeking to accomplish their end was directly antagonistic to the rights and interests of creditors for whom they were really fiduciary agents. Leaving themselves out of consideration, these directors might have preferred one or more creditors to other creditors, but they could not prefer themselves to any creditor. Had they in good faith been endeavoring to secure creditors who were asking to be preferred, it would, as in the present case, and in the case cited from 89 Ga. and 15 S. E., have been a different matter; for where directors, in behalf of the corporation, have simply undertaken to prefer certain of its bona fide creditors, at their instance and upon their demand, the case presented is one in which a court of equity has no power to interpose or interfere, for the directors have done no more than they were expressly authorized by law to do. Section 1953 of the Code declares that "a debtor may prefer one creditor to another, and to that end he may bona fide give a lien by mortgage or other legal means." A corporation has an equal right with an individual in this regard, and when it acts regularly, through its legally appointed agents, no court has the power to question their authority, save only when they attempt to abuse such authority by exercising the same unjustly and inequitably, in furtherance of their own personal interest and gain. As ruled in the case cited from 89 Ga. and 15 S. E., the right of the debtor corporation to prefer a creditor, and the right of the creditor to be preferred, cannot be lost simply because, as a mere incident to the transaction by which the preference is effected, the directors may themselves gain some benefit. It is one thing to restrain a trustee from abusing powers conferred upon him, by using the same for his individual benefit and advantage alone, and quite another to deprive a bona fide creditor of the benefit of a mortgage which he in entire good faith accepted, and had a legal right to accept, from his debtor. In the latter case the effect of setting aside the mortgage would be to deprive the preferred creditor of an advantage over less diligent or less fortunate creditors which he had honestly and legally gained, and which the law recognized as perfectly legitimate and just. In the present

case it distinctly appeared that both the mortgages in question were given at the instance and demand of the mortgagees, who, so far as appears, were justly entitled to the preference they thus obtained over other creditors. It cannot be contended that the directors had not the legal power, in behalf of the corporation, to prefer creditors, and there is not the slightest suggestion that they failed to exercise this power in a perfectly lawful and proper manner.

We think the mortgage in favor of Waxelbaum & Sons stands upon as good a footing as does that executed in favor of the banking company. It is true that the directors, or some of them, had given to Waxelbaum & Sons a joint promissory note, binding upon each individually, as collateral security for the payment of the debt incurred by the corporation; but, if Waxelbaum & Sons became dissatisfied with the security thus given them, we see no reason why they could not very properly request that their claim be secured by mortgage, or why, upon getting the same, they are not entitled to hold it, and reap the benefit to be derived from it. They certainly thereby gained no advantage over the complaining creditors, other than the law expressly allows; and, having kept strictly within the bounds of their legal rights in securing their preference, even a court exercising equitable jurisdiction has no power to restrain them from enforcing their mortgage, or to declare the same inoperative or void in their hands, as against unsecured creditors. For the reasons above expressed, we cannot concur in the opinion entertained by the court below with reference to the validity of the mortgages held by the plaintiffs in error, and to this extent hold that error was committed in directing a verdict finding the same void. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(38 Ga. 512)

### JACKSON v. MILES et al.

(Supreme Court of Georgia. June 1, 1896.)

PROCEEDINGS BELOW AFTER APPEAL — JUDGMENT  
—POWER TO SET ASIDE—PRACTICE.

1. Where an ordinary action upon an open account in a city court against certain persons, described as trustees of a named church (there being in the declaration no description of or reference to any realty), resulted in a general verdict for the plaintiff, upon which a judgment was entered against "the defendants, as trustees, as aforesaid," and also against a specified parcel of realty, and where, upon a proper petition, filed in behalf of the church by its deacons and members, alleging that this realty belonged to the church, the judge of the superior court passed an order granting an interlocutory injunction restraining the sale of such realty under an execution based upon the judgment rendered by the city court, and this order was affirmed by the supreme court, *held* that, upon the return of the remittitur from this court, there was no error in refusing to pass an order in effect vacating the verdict and judgment ren-

dered in the city court, and reinstating the original action for another trial in that court.

2. Nor was there any error in entering a judgment perpetually enjoining the execution in question from proceeding against the realty above mentioned, there being no issue of fact to be tried, and such injunction being the only lawful and proper result of the proceedings, so far as related to the sale of this realty.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Mollie Jackson against M. Miles and others, trustees of the Shady Grove Baptist Church, in the city court. There was a judgment for plaintiff, on which an execution issued, which was declared void on appeal to the supreme court because of the partial invalidity of the judgment; and from an order of the superior court, upon a return of the remittitur, refusing to vacate the judgment and reinstate the original action for trial in the city court, plaintiff brings error. Affirmed.

D. L. Farmer and Blandford & Grimes, for plaintiff in error. Wm. A. Wimblish and J. H. Worrell, for defendants in error.

SIMMONS, O. J. When this case was here before (94 Ga. 484, 19 S. E. 708) it was held that the city court had "no power to adjudge or decree that the debt recovered should be collected out of specific realty," and that the judge of the superior court did not err in granting a restraining order against the plaintiff in execution and the sheriff, preventing them from selling the realty levied upon. When the remittitur from this court was returned to the superior court, counsel for the plaintiff in execution made a motion to enter an order to the effect that, the case having been carried to the supreme court, and the decision of the superior court having been affirmed, it was ordered and decreed that the verdict and judgment in favor of Mollie Jackson, and against the trustees of Shady Grove Baptist Church (naming them), be set aside, and the execution thereon be quashed, and the case in which the verdict and judgment were entered, stand as if no verdict and judgment had been rendered therein. This motion was overruled, and Mollie Jackson excepted. There was no error in refusing to grant this motion. The verdict and judgment were had in the city court, and not in the superior court; and the judgment was declared to be void only in so far as it adjudged or decreed that the debt should be levied and collected out of specific realty. The declaration in the original suit contained no averment that the realty was chargeable with the payment of the plaintiff's debt. It made no reference to it at all, but was an action on an open account against certain persons as trustees of Shady Grove Church, and the verdict was in favor of the plaintiff for the amount sued for. On this verdict the plaintiff entered up the judgment complained of, creating a lien on the realty belonging to the church, and this, we held,

she had no right to do. We think, therefore, that the judge was right in refusing to pass an order setting aside the judgment in toto, quashing the execution, and, in effect, reinstating the case in the city court. The judgment being void only in part, the plaintiff could move in the city court to amend or vacate it as she might see proper. After the court had refused to grant the motion above referred to, counsel for the plaintiffs in the equitable petition moved to make the interlocutory injunction permanent, and this motion was granted, over the objection of counsel for the defendant therein. In this we think the court was right. It appearing that there was no issue of fact involved, it was the only lawful and proper result of the proceedings, so far as related to the sale of the realty. It having been decided that the judgment, in so far as it undertook to establish a lien on the realty, was a nullity, nothing remained to be done but to perpetually enjoin the levy and sale under the execution. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 514)

#### BERGAN v. MAGNUS et al.

(Supreme Court of Georgia. June 1, 1896.)

##### CONDITIONAL SALE—WHEN TITLE PASSES.

1. Where goods were sold for cash, to be paid for on delivery, the prepayment of the price being a condition precedent of the sale, the mere fact that the buyer obtained possession did not operate to pass the title to him; and, notwithstanding such possession, the title remained in the seller, the purchase money not having been paid.

2. The evidence was amply sufficient to warrant the judge, who tried the case without a jury, in finding for the claimant; and, irrespective of the various rulings complained of, the judgment was manifestly right, and will not be disturbed.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Attachment by M. T. Bergan against one Allen, in which a claim to the property seized was interposed by J. A. Magnus & Co. From a judgment for claimants, plaintiff brings error. Affirmed.

Miller, Wynn & Miller, for plaintiff in error. Carson & Williams, for defendants in error.

LUMPKIN, J. An attachment in favor of Bergan against Allen was levied upon a barrel of whisky, a claim to which was interposed by Magnus & Co. The plaintiff's theory was that the whisky had been sold by the claimants to Allen, and that the title had passed into the latter before the attachment was levied. On the other hand, the contention of the claimants was that, under the terms of the contract between themselves and Allen, the sale had never become complete, and that he had never

acquired title. There was some question as to whether or not Allen had ever obtained possession of the whisky, the claimants insisting that they had exercised their right of stoppage in transitu, and the plaintiff denying that this was true. In the view we take of the case, however, this question is immaterial; for, even upon the assumption that Allen actually obtained possession, we are of the opinion that the judge, who tried the case without a jury, rightly found for the claimants. The evidence fully and amply warranted him in reaching the conclusion that the sale from Magnus & Co. to Allen was for cash, which the latter was to pay upon delivery of the whisky, and that prepayment of the price was a condition precedent to the sale.

There was no pretense that Allen had paid the price. This being so, even if Allen had in fact obtained possession, the title did not pass to him under the contract, for the reason that he failed to comply with the condition upon which the sale depended. "If the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee." The foregoing is an extract from the opinion of Washington, J., delivered in the case of Copland v. Bosquet, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, cited in 1 Benj. Sales, § 336. To the same effect, see Tied. Sales, § 206. In Dows v. Dennistoun, 28 Barb. 393, it appeared that certain flour had been sold for cash on delivery; that is, the cash was to be paid within 10 days. Upon these facts, Davies, P. J., remarked: "The very terms and import of this arrangement are that there was to be a qualified delivery, which was to precede the payment; and it is apparent from the facts in this case that the possession of the goods was intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide means for the payment of the price. Such an understanding, arrangement, or custom cannot, we think, be construed into an absolute transfer of the title to the property, as between the original parties to it or those who have no greater equities than the original parties." The same doctrine was recognized in Harding v. Metz, 1 Tenn. Ch. 610, in which it was held that "if personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer." And see Armour v. Pecker, 123 Mass. 143; Salomon v. Hathaway, 126 Mass. 482; Mathewson v. Mills Co., 76 Ga. 357. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 516)

**COLUMBUS IRON-WORKS CO. v. POU**  
et al.

(Supreme Court of Georgia. June 1, 1896.)

**GARNISHMENT—VALIDITY—PROCEDURE.**

1. Where a garnishment upon a judgment was sued out, under section 3538 of the Code, in a county other than that in which the judgment was rendered, and the requirements of that section as to making out, certifying, and returning copies of the garnishment affidavit and bond were not complied with, there could be no lawful judgment upon the garnishment in favor of the plaintiff, either against a surety upon a bond given to dissolve the garnishment, or against the garnishee.

2. Irrespective of many of the questions presented by the bill of exceptions, the judgment rendered was manifestly unauthorized by law.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Pou Bros. against one Bagley, in which the Columbus Iron-Works Company was summoned as garnishee. From a judgment against the garnishee, it brings error. Reversed.

Miller, Wynn & Miller and Brannon, Hatcher & Martin, for plaintiff in error. H. V. Hargett and Wimbish, Worrill & McMichael, for defendants in error.

**LUMPKIN, J.** A judgment was rendered in favor of Pou Bros. against Bagley in a justice's court in Chattahoochee county, and the plaintiffs sued out a garnishment in Muscogee county, which was directed to the Columbus Iron-Works Company, a corporation of the latter county, and made returnable to a justice's court therein. The case finally reached the superior court of Muscogee county, and resulted in a judgment against the garnishee, which has been brought to this court for review, by a bill of exceptions containing numerous assignments of error. Irrespective of many of the questions which it presents, the judgment below was manifestly unauthorized by law, for the reason that the plaintiffs failed to comply with those essential requirements of section 3538 of the Code which are indicated in the headnote; and, as the garnishment was sued out under this section, the plaintiffs' failure to observe its directions was fatal to the validity of the garnishment proceedings, and consequently no lawful judgment based thereon could be rendered in their favor. There was nothing to connect the garnishment proceedings with the judgment rendered in Chattahoochee county, and according to the decision of this court in *West v. Harvey*, 81 Ga. 711, 8 S. E. 449, something of this sort was indispensable to the validity of the garnishment. There being no attempt to follow the provisions of section 3537 of the Code, it has no application to this case. Judgment reversed.

**ATKINSON, J.**, providentially absent, and not presiding.

(98 Ga. 506)

**R. C. WILDER'S SONS CO. v. WALKER.**

(Supreme Court of Georgia. May 23, 1896.)

**STATUTES—REPEAL—MECHANICS' LIENS—ENFORCEMENT—PARTIES—NOTICE OF CLAIM.**

1. The act of October 19, 1891, "to provide additional security to material men and laborers," etc. (Acts 1891, vol. 1, p. 233), was not repealed by the act of December 18, 1893, amending section 1979 of the Code (Acts 1893, p. 84).

2. It is not essential to the validity of an action brought by a material man under the former act that the contractor should be sued jointly with the owner of the realty improved, nor that the declaration should allege that notice of the plaintiff's claim had been given to such owner before he settled with the contractor. What should be the measure of the plaintiff's recovery in such a case is not now for decision.

(Syllabus by the Court.)

Error from superior court, Baldwin county; John C. Hart, Judge.

Action by R. C. Wilder's Sons Company against W. A. Walker. From a judgment for defendant, plaintiffs bring error. Reversed.

Roberts & Pottle, for plaintiffs in error. Whitfield & Allen, for defendant in error.

**SIMMONS, C. J.** R. C. Wilder's Sons Company brought their action against Walker under the act of October 19, 1891, entitled "An act to provide additional security to material men and laborers," etc. (Acts 1891, vol. 1, p. 233); and, in their declaration, they alleged, in substance, that one Hogan contracted to build a house for Walker; that Hogan and Walker ordered the materials from them with which to build the house; that the materials were furnished by the plaintiffs, and were used in erecting the house; that Walker paid to Hogan the entire contract price of the house before receiving from him an affidavit that all the debts incurred for material and labor in building the house had been paid; that the plaintiffs had not consented to the payment of the whole of the contract price to the contractor; that, under the act of 1891, it was the duty of the defendant to retain 25 per cent. of the contract price until he had received from Hogan an affidavit that all the debts had been paid; that the contract for the building of the house was for the sum of \$5,000; and that the defendant was liable to the petitioners for the full amount of the claim as sued for. The defendant demurred to the declaration, on the ground that there was no cause of action; that the act of 1891 had been repealed by the act of December 18, 1893 (Acts 1893, p. 84); that the plaintiffs ought to have joined Hogan as a party defendant in the suit; that there was no allegation that the contractor had ever completed his contract; that the plaintiffs failed to give notice to Walker in writing that he had furnished the material to Hogan; that the plaintiffs sued for 25 per cent. of the contract price, whereas, if he had any cause of action, he could only sue for 25 per cent. of the value of the material he furnished to Hogan. The

court sustained the demurrer, and dismissed the action, and to this the plaintiffs excepted.

We think the court erred in sustaining the demurrer. The act of 1891 was not repealed or rendered inoperative by the passage of the act of 1893. The latter was an act to amend section 1979 of the Code. The former did not purport to amend that section, but was an act "to provide additional security to material men and laborers, to provide a penalty for making false affidavits, and for other purposes." It gave new and distinct rights to material men and laborers. It did not attempt to create any lien in their favor, as section 1979 does. It provides, in substance, that every person who gives out a contract for the building of a house, store, or mill, etc., shall retain 25 per cent. of the contract price thereof until the contractor shall submit to such person an affidavit that all debts incurred for material and labor in building such house have been paid, or that the persons to whom such debts for labor and material are owed have consented to the payment of said 25 per cent.; and that any person who shall pay over to the contractor the said 25 per cent. of the contract price without requiring the affidavit as aforesaid shall be liable to the extent of 25 per cent. of said contract price to any material man or laborer for materials furnished or work done for said contractor in building or constructing said house, etc. It adds that "nothing in this act shall be construed to impair any rights now given by law to material men and laborers." The act of 1893 is an amendment of section 1979 of the Code, and gives a lien to material men of 25 per cent. of the contract price of the work done or material furnished, upon notice by the material man, to the owner, of the amount of work done or material furnished. This was not an action to foreclose a lien under section 1979, as amended by this act, but was an action for a violation of the act of 1891. That act created a duty on the part of Walker to the plaintiff, and the action was brought for a breach of that duty, and not to foreclose a lien. The two acts are not inconsistent. The first gives a right of action for a breach of a statutory duty. The second gives a lien on the property of the owner to a certain extent mentioned therein. We think, therefore, that the latter act does not repeal the former, or render it inoperative.

2. It was not necessary that the plaintiffs should join in their action against the owner of the house the contractor who had built it. The act of 1891 does not create any duty or obligation on the part of the contractor in favor of the material man. The only person made liable under the act is the person who gives out the contract, and it therefore could not be necessary that the contractor should be joined in the same action with him. The cases of *Lombard v. Trustees*, 73 Ga. 322, *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772, and *Royal v. McPhail* (last term) 25 N.

E. 512, are not applicable here. They were cases in which the material man sought to foreclose a lien.

Nor was it necessary that the declaration should allege that the plaintiffs had given Walker notice, as prescribed by section 1979 of the Code, before he settled with the contractor. The act of 1891 does not require that such notice shall be given. It seems to contemplate that the owner or person giving out the contract will look out for himself, and not pay over the 25 per cent. required to be reserved, unless he receives an affidavit from the contractor or the consent of the material men. For the same reason, it was not necessary to allege that the contractor had completed his work.

As the court below did not pass upon the question as to the amount the plaintiffs should recover, we make no ruling thereon. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 518)

#### PATTERSON v. BLANCHARD.

(Supreme Court of Georgia. June 1, 1896.)

ABATEMENT—EFFECT—ADMINISTRATORS—CERTIFICATE OF DEPOSIT—DEMAND—ACCRUAL OF CAUSE OF ACTION.

1. Although, as held by this court in *Isbell v. Blanchard*, 94 Ga. 678, 21 S. E. 720, a foreign administrator *de bonis non* could not be made a party plaintiff to an action brought in a court in this state by his predecessor in the trust, whose letters had abated, and thus keep that case in court, it does not follow that the original right of action was lost. While the particular action abated, the cause of action remained of force, and could be asserted in a new and independent suit by the administrator *de bonis non*.

2. The action being by an administrator for money deposited by his intestate, a nonresident of this state, with a partnership of which the defendant was the survivor, and based upon a "writing obligatory," acknowledging the receipt from the intestate, for her account, of a specified sum, and concluding with the words, "We are to allow you 8 pr. ct. on the amt.," but specifying no time for payment; and the declaration alleging that the intestate died in 1884, without having demanded payment of the sum so deposited, and that there had been no representation upon her estate until 1891, when for the first time her administrator demanded payment, and the same was refused,—it was error to dismiss the action on the ground that the same was barred by the statute of limitations. There was no liability to pay until after demand; and, consequently, the statute of limitations did not begin to run in favor of the debtor until after demand had been duly made and payment refused.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by M. L. Patterson, Jr., administrator, against T. E. Blanchard, surviving partner. From a judgment for defendant, plaintiff brings error. Reversed.

Goetchius & Chappell, Blandford & Grimes, Tol Y. Crawford, and L. F. Garrard, for plain-

tiff in error. Brannon, Hatcher & Martin and Wm. A. Little, for defendant in error.

**LUMPKIN, J.** The foregoing syllabus renders the nature of this case sufficiently apparent.

1. There is nothing in the decision pronounced by this court in the case of *Isbell v. Blanchard*, 94 Ga. 678, 21 S. E. 720, which could fairly be construed into a holding that the cause of action set out in Isbell's declaration was lost. Following the case there cited, we simply held that, when his letters of administration abated, his successor in the trust (he being, as Isbell was, a foreign administrator) could not be substituted for him as a party plaintiff, so as to keep that action in court. We surely did not intend to rule in that case that a foreign administrator of Mrs. Orr could not institute an original and independent suit in a court of this state upon the identical cause of action set forth in the declaration with which we were then dealing; and no reason occurs to us why such new action cannot be brought, and, if meritorious, maintained. In the absence of administration in this state upon the estate of a person who was domiciled in another state, and died there, his executor or administrator, appointed in the foreign state, "may institute his suit in any court in this state to enforce any right of action or recover any property belonging to the deceased, or accruing to his representative as such." Code, § 2614.

2. The receipt given by Blanchard & Burrus to Mrs. Orr in her lifetime, and upon which the present action was brought against Blanchard, as survivor, specified no time for repaying to her the money which she deposited with them; and we are therefore of the opinion that they were not liable to pay her except upon demand. This being so, the statute of limitations would not commence to run in their favor until after due demand and refusal to pay. Applied to a bank, the correctness of this doctrine was recognized by this court in *Munnerlyn v. Bank*, 88 Ga. 333, 14 S. E. 554, and is also distinctly stated in 1 Wood, Lim. § 142. We are unable to perceive why there should be any difference, so far as the running of the statute of limitations is concerned, whether the deposit be placed in bank or with an individual. In this connection, see *Sullivan v. Fosdick*, 10 Hun, 173. In that case it was held that "where money is deposited with any individual, not a banker, trustee, or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts, payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the debt, until it is shown that drafts drawn against the said person, in pursuance of the agreement, have been presented and dishonored." The declaration filed in the present case alleges that Mrs. Orr died in 1884, without ever having demanded repayment of her money which had been deposited with Blanchard & Burrus, and that her estate was unrepresented until 1891, when for the first

time her administrator demanded payment, and the same was refused. The present action was begun February 9, 1895, which was, of course, within less than six years after such demand and refusal. It was therefore error to dismiss the plaintiff's action, on the ground that it was barred by the statute of limitations. Judgment reversed.

**ATKINSON, J.**, providentially absent, and not presiding.

(98 Ga. 521)

# JONES v. PITTS et al.

(Supreme Court of Georgia. June 1, 1896.)

**PLEADING—RULINGS ON DEMURRER—APPEAL—ASSIGNMENTS OF ERROR.**

1. Where, after sustaining a demurrer to a particular paragraph of a plea, the plea was amended, and the court then "set aside said demurrer," the defendant had no cause of complaint.

2. Striking on demurrer one paragraph of a plea is not cause for reversal, when it appears that another paragraph, containing substantially the same averments, which was neither demurred to nor stricken, was afterwards voluntarily withdrawn by the defendant.

3. Alleged error in the amount of a verdict cannot be corrected by direct exceptions to the verdict in a bill of exceptions.

4. The bill of exceptions in the present case contains no clear and distinct assignment of error.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by I. H. Pitts & Son against Fannie E. Jones. From a judgment for plaintiffs, defendant brings error. Affirmed.

Henry Persons & Son and Bull & Perryman, for plaintiff in error. J. H. McGehee and Brannon, Hatcher & Martin, for defendants in error.

**LUMPKIN, J.** This was a proceeding by Pitts & Son against Mrs. Jones to foreclose a mortgage on realty, and resulted in a judgment in favor of the plaintiffs. She brought the case to this court for review by a bill of exceptions which contains no clear and distinct assignment of error. One thing complained of is that the court sustained a demurrer "to the sixth paragraph and second plea of defendant." The pleas, as sent up in the record, are not numbered; but, as only one of them has a "sixth" paragraph, we presume this to be the plea referred to. It appears, however, that after an amendment to the defendant's plea the court "set aside said demurrer." The effect of this was to reinstate the sixth paragraph alluded to, so this action of the court left the defendant, as to this matter, without cause for complaint.

Again, the bill of exceptions complains that "the court sustained a demurrer to the seventh paragraph and third plea of defendant." As there is only one seventh paragraph in any of the pleas sent up in the rec-

ord, we will assume that is the one intended. Whether or not it was error to strike this portion of the defense is immaterial, for the reason that another plea, which was neither demurred to nor stricken, contains substantially the same averments, and this latter plea was voluntarily withdrawn by the defendant after the other had been stricken. Had the defendant allowed the plea thus withdrawn to have remained, she could have obtained under it every possible right and advantage which she could have derived from the plea which was stricken.

There was no motion for a new trial, but the bill of exceptions undertakes to complain directly that the amount of the verdict was too large. It is well settled that an error of this kind in a verdict cannot be thus reviewed. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 527)

**CORTLAND WAGON CO. et al. v. GORDY et al.**

(Supreme Court of Georgia. June 8, 1896.)  
**CREDITORS' BILL — FRAUDULENT CONVEYANCES — PLEADING.**

There was no error in dismissing on demurrer a creditors' petition against an insolvent debtor and certain of his creditors to whom he had given mortgages, there being no valid attack upon one of them, the attack upon the others not being direct and unequivocal, but of a "fishing," uncertain, and doubtful nature, and the petition as a whole not showing affirmatively that, even if the mortgages thus attacked should be set aside, the plaintiffs would realize anything from the insolvent debtor's estate.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by the Cortland Wagon Company and others against C. L. Gordy and others. From a judgment for defendants, plaintiffs bring error. Affirmed.

C. J. Thornton and A. E. Thornton, for plaintiffs in error. C. E. Battle and Brannon, Hatcher & Martin, for defendants in error.

**LUMPKIN, J.** It appears that Gordy, an insolvent trader, had executed mortgages to the Fourth National Bank of Columbus, to Peabody, Brannon, Hatcher & Martin, to O. C. Bulloch, and to L. A. Scarborough. The Cortland Wagon Company and others, creditors of Gordy, filed an equitable petition against him and all of the above-mentioned mortgagees, except Scarborough, for the purpose of having the assets of Gordy administered under the insolvent traders' act. The petition also contained certain allegations and prayers for discovery, the apparent purpose of which was to attack the validity of the mortgages held by the three mortgagees who were parties to the proceeding. The attack upon the mortgage given to Peabody, Brannon, Hatcher & Martin, who were a

firm of practicing attorneys, really amounted to nothing, the only charge against their mortgage being, in effect, that it was given to secure them a fee for their services to be rendered in the litigation which Gordy anticipated would arise over the winding up of his affairs, the debtor's anticipation of which appears to have been realized. It was certainly his right to employ attorneys, and we can conceive of no reason why it was not perfectly legitimate and proper for him to secure to them adequate compensation for their services in this manner. See *Drucker v. Wellhouse*, 82 Ga. 129, 8 S. E. 40. The attacks upon the mortgages given to the bank and to Bulloch were not direct and unequivocal. The petition nowhere distinctly averred that these mortgages were without adequate consideration. It merely charged, in general terms, and upon information and belief, certain things which, if true, would show that Gordy was not really ever originally indebted to these parties the full amounts set forth in their respective mortgages, or, if so, that the same had been discharged. The special interrogatories by which the discovery above-mentioned was sought were of a "fishing" nature, and on the whole it seems clear that the petitioners really knew nothing against the validity of these mortgages, and were merely casting about in a vague and uncertain way to ascertain something which would discredit them. We do not mean to be understood as holding that the complaining creditors would have no right to attack mortgages which they believed were not just liens upon their debtor's property, without having positive knowledge of their invalidity, or that they could not resort alone to the consciences of the mortgagees for the purpose of showing that their alleged liens were invalid. We merely hold that, in order to entitle unsecured creditors to avail themselves of this remedy, it is incumbent upon them to make it appear to the court that they have a substantial interest in the subject-matter, and that the relief sought will have the effect of protecting that interest. In other words, a court of equity will not compel discovery unless the party seeking it alleges at least enough to show that he may derive some benefit from forcing his adversary to disclose the truth. We have not referred to the looseness of the plaintiffs' allegations and prayers for discovery for the purpose of showing that their imperfections would alone be sufficient to authorize a dismissal of their petition, but simply as illustrative of its incompleteness as a whole. Its radical defect lies in the fact that, taking it all together, it does not show affirmatively that, even if the mortgages to the bank and to Bulloch should be set aside, the plaintiffs would realize anything from the insolvent debtor's property. It utterly fails to disclose the amount and value of Gordy's estate, and, as will have been seen, no attack whatever is made upon the mortgage held by Scarborough, while, as to the

attack made upon the mortgage given to the attorneys, it has been shown that the grounds upon which this mortgage is alleged to be invalid are not well founded. For aught that the petition discloses, these two mortgages would exhaust the debtor's entire assets. It therefore is not made to appear that any benefit whatever would result to the plaintiffs, either from obtaining the discovery sought, or from an equitable administration of Gordy's property. The remedy invoked by the petition is, at best, a harsh one, and consequently one of which the plaintiffs should not be permitted to avail themselves without showing clearly an equitable right to insist upon it as necessary to their protection. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(38 Ga. 533)

**HARTFORD FIRE INS. CO. v. AMOS.**

**AMOS v. HARTFORD FIRE INS. CO.**

(Supreme Court of Georgia. June 8, 1896.)

**INSURANCE—ASSIGNMENT OF POLICY—PLEADING—LIMITATION—WAIVER—EVIDENCE.**

1. Where an action was brought upon a policy of fire insurance by one other than the person to whom the policy was issued, the declaration alleging that the latter had, "for a valuable consideration, transferred and assigned and delivered said policy of insurance to petitioner," and also setting forth a copy of the policy, upon which, however, there was no copy of any assignment or transfer to the plaintiff, grounds of demurrer alleging that "it does not appear that the alleged transfer and assignment of said contract was in writing," and that "said alleged transfer and assignment is not set forth and declared on," ought, in the absence of an offer to amend by averring that the assignment was in fact in writing, and by setting forth the writing itself, to have been sustained.

2. Although such policy contained a contractual limitation to the effect that suit must be brought thereon within 12 months next after the fire, yet where, in an action upon the policy, the declaration alleged that after the fire the insurance company, having been garnished by creditors of the insured, "represented and promised to adjust and pay the loss by said fire as named in said declaration when said garnishment could and should be disposed of, and that, by reason thereof, the plaintiff avers that he did not file and commence said action within one year after said fire," a ground of demurrer alleging that the action could not be maintained because brought after the 12 months had expired was not well taken; it being, under these circumstances, a question for the jury whether or not the plaintiff, in consequence of the above-mentioned promise, was induced not to bring suit within the year, and whether or not the conduct of the company, under the circumstances, amounted to a waiver of its right to insist upon the limitation stipulated for in the policy.

3. The question presented by the cross bill of exceptions is disposed of by the decisions of this court in *Melson v. Insurance Co.*, 25 S. E. 189, *Marl v. Insurance Co., Id.*, and *Williams v. Insurance Co.* (this term) *Id.* 31.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Samuel Amos against the Hartford Fire Insurance Company. From the

judgment rendered, defendant and plaintiff bring error and cross error, respectively. Reversed on the main bill, and affirmed on the cross bill.

Goetchius & Chappell, for plaintiff. O. J. Thornton, for defendant.

SIMMONS, C. J. It appears from the record that Mrs. A. Amos insured a certain house with the Hartford Fire Insurance Company, and that, during the term for which the property was insured, the house was burned. Samuel Amos brought an action on the policy, in which he alleged, among other things, that, after the fire, Mrs. Amos, for a valuable consideration, "transferred and assigned and delivered" the policy to the petitioner. A copy of the policy was attached to the petition. The defendant filed several special demurrers to the petition, one of them being that "it does not appear that the alleged transfer and assignment of the policy was in writing, and that said alleged transfer and assignment is not set forth and declared on." The court overruled the demurrer, and the defendant excepted. Under our Code (section 2244), all choses in action are assignable; but, as construed by the decisions of this court, the assignment must not rest in parol, but must be in writing. *Turk v. Cook*, 63 Ga. 681; *Daniel v. Tarver*, 70 Ga. 206; *Hatcher v. Bank*, 79 Ga. 547, 5 S. E. 111; *Riley v. Hicks*, 81 Ga. 273, 7 S. E. 173; *First Nat. Bank v. Hartman Steel Co.*, 87 Ga. 438, 13 S. E. 586. If the assignment is not in writing, the assignee cannot bring an action thereon in his own name, but must necessarily use the name of the assignor, as suing for his use. The words "transferred and assigned" do not necessarily mean that the transfer was in writing; and the defendant had a right to know whether the purpose was to allege and prove an assignment in writing or not; and, to obtain this knowledge, it filed this special demurrer. We have examined the copy of the policy attached to the declaration as sent up in the record, and we do not find any assignment thereon. If a written assignment had appeared on the policy attached to the declaration, the ruling of the court would have been correct; but inasmuch as the declaration does not allege that the assignment was in writing, and it does not appear on the policy, we think the court ought to have sustained this special demurrer, there being no offer to amend by setting out an assignment in writing.

2. The policy sued on contained a stipulation that no suit should be sustainable thereon "unless commenced within twelve months next after the fire." It appears that more than 12 months had elapsed after the fire before this action was commenced, and the defendant demurred also on this ground. The court having intimated that it would sustain the demurrer on this ground, the

plaintiff amended by alleging that after the fire the defendant was garnished by two creditors of Mrs. Amos, and defendant represented and promised to adjust and pay the loss, by the fire when the garnishment could and should be disposed of, and, by reason thereof, plaintiff did not commence the action within one year after the fire and proof of loss. The defendant renewed its demurrer, and the demurrer was overruled, and to this ruling the defendant excepted. We think the court was right in overruling this demurrer. If the defendant promised to adjust and pay the loss when the garnishment should be disposed of, this was calculated to throw the plaintiff off his guard, and lull him into a false security; and it was a question for the jury whether or not the plaintiff, in consequence of the promise, was induced not to bring suit within the year, and whether or not the conduct of the company, under the circumstances, amounted to a waiver of its right to insist upon the limitation stipulated for in the policy. See *Telegraph Co. v. Hines*, 98 Ga. 692, 23 S. E. 845; 2 May, Ins. § 498, and cases cited; *Insurance Co. v. Brodie* (Ark.) 11 S. W. 1016, and cases cited; *Curtis v. Insurance Co.*, 1 Bliss. 485, Fed. Cas. No. 3,506; *Insurance Co. v. Chesnut*, 50 Ill. 117; *Grant v. Insurance Co.*, 5 Ind. 23; *Ames v. Insurance Co.*, 14 N. Y. 254, 266; *Smith v. Insurance Co.*, 62 N. Y. 86.

3. The plaintiff excepted by cross bill to the ruling of the court that the 12-months limitation was valid and binding. This exception is disposed of by the decisions of this court in *Melson v. Insurance Co.*, 25 S. E. 189, *Maril v. Insurance Co.*, Id., and *Williams v. Insurance Co.* (at the present term) Id. 31. Judgment on the main bill of exceptions reversed; on the cross bill affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 537)

KIMBROUGH et al. v. ORR SHOE CO. et al.  
(Supreme Court of Georgia. June 8, 1896.)

GARNISHMENT—APPOINTMENT OF RECEIVER—FRAUD—NOTICE OF APPLICATION.

1. It is competent for the plaintiff, in a garnishment proceeding based upon a pending suit, to file, in connection with and in aid of the same, an appropriate equitable petition for the purpose of subjecting to the payment of his claim against his debtor any surplus which may be left of the proceeds of personal property previously pledged by the debtor to another creditor, after the debt due to the latter has been satisfied.

2. When, in such case, it appeared that the property so pledged consisted of stock in incorporated companies, that the debt thereby secured was past due, that the common debtor was insolvent, and that the creditor secured by the collaterals, he being the garnishee, consented to the sale of the stock, the judge of the superior court, in the exercise of his equity jurisdiction, was authorized, at the term at which the garnishee had been required to answer, and at which his answer had in fact been filed, to

appoint a receiver of the property, and order its sale, for the purpose of paying the debt due the garnishee, and impounding the surplus to await the result of the plaintiff's original action against the debtor. That the receiver was in the order denominated "commissioner" is immaterial.

3. While the better practice would have been to serve the debtor with a copy of the equitable petition, and give him notice of the hearing thereof, yet, where it was heard and determined without such service and notice, and during the same term he appeared and moved to set aside the order which had been passed, the failure to serve him in the first instance was not fatal, and, as his motion to set aside showed no valid reason for rescinding the order, it will be permitted to stand, the more especially when it appears that his attorneys of record were present when it was passed, and made no objection.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by the J. K. Orr Shoe Company against Kimbrough Bros., in which the Fourth National Bank of Columbus was summoned as garnishee. From an order appointing a temporary receiver, defendants bring error. Affirmed.

J. H. Worrell and O. J. Thornton, for plaintiffs in error. Brannon, Hatcher & Martin and C. E. Battle, for defendants in error.

SIMMONS, C. J. 1, 2. The J. K. Orr Shoe Company sued Kimbrough Bros. in Talbot county, and had process of garnishment issued and served on the Fourth National Bank of Columbus. The bank answered, and in its answer stated that Kimbrough Bros. were indebted to it \$2,000, besides interest, on a promissory note, and that it held as collateral security certain stock in several incorporated companies. The plaintiff filed what it called an "equitable traverse," in which it alleged that the collateral held by the bank was more than sufficient to pay the debt of the defendant to the bank, the same being worth between \$3,000 and \$4,000, and prayed that the court pass an interlocutory order appointing a commissioner to take charge of and sell the stock held by the bank, and apply the proceeds of the sale first to the payment of the indebtedness to the bank, and hold the balance of the money until the determination of the suit which the bank had brought against Kimbrough Bros. The court granted the order prayed for, and appointed the president of the bank as commissioner to sell the stock, with direction to pay from the proceeds the debt to the bank, and costs of suit, and to hold the balance until the litigation should be disposed of. Kimbrough Bros. moved to set aside the order, on various grounds, which are set out in the record. The motion was overruled, and to this ruling they excepted. Under the law of this state the superior court has both legal and equitable jurisdiction, and can administer both legal and equitable remedies in the same case. It was, therefore, within its jurisdiction, under the facts of this case, to grant the plaintiff in the garnish-

ment proceeding the equitable relief prayed for. The bank held collateral more than sufficient to pay its debts. Kimbrough Bros., who had pledged the collateral to the bank, were insolvent. If the bank had sold the collateral, and there had been a balance, it would have belonged to Kimbrough Bros.; and without some judicial interference the bank would have had a right to pay that balance to them. While, perhaps, the bank would have had a right to sell the collateral on the terms agreed upon with the pledgors, if any had been agreed on, yet it did not object to this proceeding, but consented thereto. The court, therefore, did not err in appointing a receiver, and ordering him to sell the property, and impound the surplus to await the result of the plaintiff's action against Kimbrough Bros. That the order denominated the receiver as "commissioner" is immaterial.

3. One of the grounds of the motion to set aside the order was that Kimbrough Bros. had not been served with notice of the application. When one of the parties to a pending case applies for any special order therein, it is the better practice to give the other side notice of the application; yet, where such an application is made in open court, and all the parties are in court, either personally or by counsel, and no objection is then made, and the court grants the order, it is a valid one, unless the party who was not served can show a good reason why it should be set aside. Here was a case against Kimbrough Bros., and a garnishment issued thereon against the bank, and the bank answered within the time in which it was by law required to answer. The plaintiff had a right to traverse the answer without any notice to the defendants, and could apply for equitable relief on this traverse, if it needed such relief, and the court could grant it. When the court passed the order which it was subsequently sought to set aside, the defendants' attorneys were present, and made no objection. This being so, and no valid reason being shown for rescinding the order, this court will not reverse the trial court for refusing to set it aside. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 538)

MILLER et al. v. GAY et al.

(Supreme Court of Georgia. June 8, 1896.)

CONTEMPT—WHEAT CONSTITUTES.

The plaintiff in a judgment obtained in a justice's court, which has been carried by certiorari to the superior court, does not place himself in contempt of the latter court by suing out a garnishment upon that judgment during the pendency of the certiorari.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

v.258.E.no.11—37

Action by J. M. Miller and others against D. O. Gay and others in justice court. From a judgment for plaintiffs, defendants brought certiorari to the superior court, and from a judgment of that court committing plaintiffs for contempt they bring error. Reversed.

Miller, Wynn & Miller, for plaintiffs in error. J. L. Owen and C. J. Thornton, for defendants in error.

LUMPKIN, J. In the case of Herrington v. Block (decided at the present term) 25 S. E. 426, this court held that, where the validity of a judgment for money rendered in a lower court was directly involved in a certiorari pending in the superior court, it was within the power of the judge of the latter court to pass an order directing the sheriff to suspend all further proceedings upon an execution issued upon the judgment under review. A disregard by the sheriff of such order would, of course, put him in contempt of the superior court. The case now in hand is of an altogether different character. In it, it appears that the plaintiffs in an action brought in a justice's court obtained a judgment, which the defendants in that action carried to the superior court by certiorari. While the certiorari was pending, the plaintiffs in the original action sued out a garnishment based upon the judgment they had obtained in the justice's court; and thereupon the plaintiffs in certiorari obtained from the judge of the superior court a summary attachment for contempt against the justice of the peace who issued the garnishment, and against the parties at whose instance this process was sued out. At the hearing the judge of the superior court discharged the justice, but ordered the other respondent committed to jail. We can find neither law nor precedent to sustain such a proceeding. It does not appear that any execution was issued upon the judgment rendered in the justice's court, or that any effort to proceed with that judgment was made. The mere suing out of a garnishment was no violation of the supersedeas resulting from the issuing of the writ of certiorari. Indeed, a garnishment may be sued out upon a pending action in which no judgment at all has been rendered, and in any event the garnishment bond affords sufficient protection to the opposite party. The proceeding for contempt was totally unauthorized. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 540)

JARRETT v. WALLACE.

(Supreme Court of Georgia. June 8, 1896.)

TRUSTS—ESTABLISHMENT BY PAROL—PLEADING—HARMLESS ERROR.

1. In the absence of proper pleadings and parties, parol evidence is inadmissible to ingraft a trust upon an absolute and unconditional deed.

2. Under the pleadings in this case, the sole issue for determination by the jury was whether or not a deed executed by the plaintiff's ward, an alleged lunatic, was void because of his mental incapacity, at the time it was signed, to make a binding contract.

3. This being so, and the jury, upon a fair submission of this issue, having found for the plaintiff, on evidence fully warranting the verdict, the same will not be set aside, even though, upon immaterial matters, certain charges complained of, but which are not now passed upon, may have been incorrect.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Flora Wallace, guardian of Sterling Irvin, against Robert Jarrett, individually and as guardian. From a judgment for plaintiff, defendant brings error. Affirmed.

H. C. Cameron, C. J. Thornton, and J. L. Owen, for plaintiff in error. Goetchius & Chappell and A. W. Cozart, for defendant in error.

**LUMPKIN, J.** This was an action by Flora Wallace, as the guardian of Sterling Irvin, an alleged lunatic, against Robert Jarrett and his minor daughter, Minnie L. Jarrett, for the cancellation of a deed made to the latter by the plaintiff's ward. The petition was based mainly upon the ground that Sterling Irvin, at the time of the execution of the deed, was of unsound mind, and not possessed of sufficient mental capacity to make a binding contract. The answer of the defendants, among other things, alleged that, long prior to the making of the deed in question, one Kittle Williams had purchased the land therein described from Catherine M. Meeler, had paid the latter all the purchase money for the same, and that, in order for Irvin to act as trustee for Kittle Williams, his name was embraced in the deed, though he had no interest in the land. There was, however, no prayer for a reformation of the deed from Mrs. Meeler, which on its face purported to be a conveyance of the land to Irvin and Kittle Williams, nor was Mrs. Meeler made a party to this action. It appears that Kittle Williams died before the execution of the deed from Irvin to Minnie L. Jarrett. It can be gathered from the record that the plaintiff's theory was that Kittle Williams, before her death, had intermarried with Irvin, and that after her death he became the sole owner of the property in dispute, having derived title to an undivided half of the same through the Meeler deed, and to the other half as the sole heir of his deceased wife. On the other hand, the defendants seem to have insisted that there was never any lawful marriage between Kittle Williams and Irvin, and that he had no interest in the land under the Meeler deed, for the reasons above indicated. They also claimed title in Minnie L. Jarrett under a parol gift from Kittle Williams, alleged to have been made while she was in life. The foregoing statement contains enough of the

facts disclosed by the record to illustrate our rulings in this case.

1. The trial judge very properly excluded parol evidence tending to show that Irvin took no interest in the land under the Meeler deed. Upon its face, that deed conveyed to him an undivided half of the property as a tenant in common with Kittle Williams, and the defendants sought to ingraft upon this absolute and unconditional conveyance a parol trust. It is well settled that, in the absence of proper pleadings and proper parties, such a thing cannot be done. The mere naked allegations as to the purpose for which the name of Irvin was inserted in the deed were entirely insufficient to authorize even a court exercising equity powers to grant the relief which we suppose the defendants were seeking to obtain. There ought to have been at least a prayer for a reformation of the deed, and Mrs. Meeler and the legal representative of Kittle Williams should have been made parties to the proceedings.

2, 3. The truth is that, under the pleadings and evidence in this case, there was really but one issue to be passed upon by the jury, viz. whether or not Irvin, at the time he executed the deed for the cancellation of which this petition was brought, was mentally capable of contracting. This question was fairly submitted to the jury, and there was abundant evidence to warrant them in finding that Irvin was not thus capable. Accordingly, there is no legal cause for setting the verdict aside. We have not undertaken to determine whether or not there was any error in some of the charges complained of, for the reason that they relate to immaterial matters not affecting the real merits of the case. Judgment affirmed.

**ATKINSON, J.**, providentially absent, and not presiding.

(38 Ga. 567)

**MILLER et al. v. WILSON.**

(Supreme Court of Georgia. June 12, 1896.)

**CONVERSION—AGENCY—WHEN A DEFENSE.**

1. An agent who, for and in behalf of his principal, takes the property of another without the latter's consent, is as to him guilty of a conversion, although, being ignorant of the true owner's title, the agent may have acted in perfect good faith; and such agent may be sued in trover for the property, even after his delivery of it to his principal.

2. Under the evidence disclosed by the record, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

Trover by Miller & Miller against M. M. Wilson. From a judgment of nonsuit, plaintiffs bring error. Reversed.

The following is the official report:

Miller & Miller, on June 23, 1894, brought their action in the county court of Stewart

county against M. M. Wilson for a black mare mule, named Mollie. Defendant pleaded not guilty, and, further, that he did not have the property in his possession at the time of the bringing of the suit, and never had it in his possession. There was a judgment for plaintiffs, and defendant took the case by appeal to the superior court. In that court a nonsuit was granted, and to this ruling plaintiff excepted. B. S. Miller, one of plaintiffs, testified: They owned a plantation in Chatahoochee county, about 1½ miles east of Cusseta, and in the year they employed W. D. Berry as their foreman or overseer on said plantation. That he lived there, and was their agent to run the farm. That witness had heard defendant, M. M. Wilson, testify in this case in the county court of Stewart county. That, some time during the month of November of that year, he (the defendant) went to see W. D. Berry, at the request of the Richland Guano Company, to collect a debt which W. D. Berry owed the Richland Guano Company. That W. D. Berry proposed to settle the debt by delivering to him for the guano company two mules. That they finally agreed on the price at which one of the mules should be taken, whereupon Berry delivered to Wilson one of the mules for the Richland Guano Company. That Wilson carried away the mule to Richland, Ga., where he delivered the same to the Richland Guano Company as a payment on the debt agreed upon by him and Berry. That at the time the mule was delivered to him by Berry, and at the time he carried it and delivered it to the Richland Guano Company, he was merely acting in this transaction as the attorney at law and agent for the Richland Guano Company to collect the debt due it by Berry. That he was not sent specially to Berry's house for the mule, but to collect the debt, and after he got there the trade was brought up and made, without any knowledge, until it happened, that such would be done. That Berry offered the mule at an agreed price as a payment on the debt. That he (Wilson), for the guano company, accepted it. That he was authorized by the guano company to make such a settlement. Miller further testified: That the mule was the property of the plaintiffs, belonged to them at that time, and they had owned it ever since March, 1892. That he did not know the age of the mule, but it was a black mare mule, named Mollie. That he had seen her a few days before she was carried away, and she was worth a minimum of \$75. That no demand had ever been made upon Wilson for the mule before suit was brought against him. That he had heard Wilson testify, on the trial in the county court, that he (Wilson) was not in possession of the mule when the suit was brought, and never had possession of it any longer than it took him to carry it from where Berry delivered it to him, to Richland, and turn it over to the guano company; that he never claimed any interest in the mule or any

right to its possession; that while he had it he thought Berry owned it, and had a right to sell it; that he had no notice of plaintiffs' title till after he had delivered it to the guano company; that since then he had never seen it, nor had anything to do with it, nor asserted any right of title or possession to it; and that, after he had delivered it to the guano company, and before the guano company had disposed of it, the officers of the guano company informed him that they had received a letter from B. S. Miller notifying the guano company that the mule was the property of plaintiffs.

E. T. Hickey and Miller, Wynn & Miller, for plaintiffs in error. J. B. Hudson, for defendant in error.

SIMMONS, C. J. This was an action of trover for a mule. The facts are set out by the reporter. Under these facts we think the court erred in granting a nonsuit. The defendant was not relieved from liability by the fact that, in receiving the mule from Berry, he acted as the agent of the guano company, and without notice of the plaintiffs' title, and under the belief that Berry owned the mule and had a right to sell it. Whoever meddles with another's property, whether as principal or agent, does so at his peril; and it makes no difference that in doing so he acts in good faith, nor, in the case of an agent, that he delivers the property to his principal before receiving notice of the claim of the owner. If an agent takes the property of another without his consent, and delivers it to the principal, it is a conversion, and trover will lie for the recovery of the property, or for damages as the plaintiff may elect. This is well settled. *Mechem, Ag. §§ 571, 574, and citations; Cooley, Torts, \*452; Ewell's Evans, Ag. \*75; Stephens v. Ellwall, 4 Maule & S. 259; Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 496. And see Rushin v. Tharpe, 88 Ga. 782, 15 S. E. 830.* Where an actual conversion is shown, no demand is necessary; evidence of demand and refusal being required only as evidence of a conversion. *Rushin v. Tharpe, supra.* Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 574)

HOBBS et al. v. DOUGHERTY COUNTY.  
(Supreme Court of Georgia. June 12, 1896.)

BANKS—REFUSAL TO PAY OVER COUNTY FUNDS—  
REMEDY OF COUNTY—CONSTITUTIONAL  
LAW—JURY TRIAL.

1. Upon the refusal of a banker to pay over money which had been "collected for any county purpose whatever," and deposited with him by the county treasurer or tax collector, the ordinary or other proper county authorities may, under the provisions of sections 523, 524, and 526 of the Code, issue execution against the banker for the purpose of collecting from him the amount thus placed in his hands.

2. The above-cited sections, in view of the remedy provided by section 525, which allows

the defendant in execution to file an affidavit of illegality, and have the same passed upon by a jury, are not unconstitutional.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Rule sued out by Dougherty county against Hobbs & Tucker, upon which execution issued. From a judgment striking their affidavit of illegality, defendants bring error. Affirmed.

Wooten & Wooten, W. T. Jones, and Jesse W. Walters, for plaintiffs in error. D. H. Pope, for defendant in error.

**SIMMONS, C. J.** The county commissioners of Dougherty county issued a rule against Hobbs & Tucker, bankers, calling upon them to pay over to the county certain money which had been collected for county purposes, and which had been deposited with them by the treasurer and tax collector of the county. Hobbs & Tucker failed to appear at the time they were called upon to appear, and the county commissioners issued an execution against them for the amount claimed to be due the county. They filed an affidavit of illegality to the execution, setting up therein that the commissioners had no power to issue an execution against them, because they were not officers of the county, and that the statute under which the execution was issued was unconstitutional, because no provision was made therein for a trial by jury before the issuance of the execution. These grounds of illegality were stricken on demurrer, and a verdict was rendered for the plaintiff, and against the illegality. The defendants made a motion for a new trial, which was overruled, and they excepted.

Section 523 of the Code provides that the ordinaries shall have authority "to compel all persons, their heirs, executors or administrators, who have or may have in their hands any county money collected for any county purpose whatever, to pay over the same." Section 524 provides that, "on failure to pay the same, such ordinaries shall issue executions against such persons and their securities, if any, for the full amount appearing to be due, as the comptroller general issues executions against defaulting tax collectors." Section 525 provides that "if such execution shall issue for too much, or if defendant denies on oath owing any part thereof, he may, by filing an affidavit of illegality, according to the rules governing other illegalities, cause an issue to be formed thereon, which shall be tried by a special jury at the first term of the superior court thereafter." Section 526 declares that "the provisions of the foregoing four sections are applicable to all persons and their sureties who may borrow, or pretendedly borrow, any county money from any person having custody thereof, and shall be, in all respects, held as holders of county funds." The powers thus conferred upon the ordinaries were by subsequent legislation vested in

the county commissioners of Dougherty county. Under these sections, the commissioners could issue execution against any person holding county funds. It is not necessary that the person holding such funds shall be an officer of the county. If Hobbs & Tucker, as bankers, received this money on deposit from the treasurer and tax collector of the county, they became holders of county funds, whether the deposit was special or general; and they stood on the same footing as these officers, upon refusal to pay the funds to the county when demanded of them.

2. It was not essential to the constitutionality of the sections of the Code above referred to that provision should be made for a trial by jury before the issuance of the execution. It is sufficient if provision is made for a jury trial at some stage of the proceedings, and the defendant allowed to make all his defenses before the liability becomes fixed and final. Under section 525, he can make any defense which could be made in an ordinary suit. He is therefore fully protected in his constitutional rights.

The court did not err in sustaining the demurrer, and in overruling the motion for a new trial. Judgment affirmed.

**ATKINSON, J.**, providentially absent, and not presiding.

(38 Ga. 522)

#### SNIPES v. PARKER et al.

(Supreme Court of Georgia. June 8, 1896.)

**EJECTMENT—ACTIONS OF COMPLAINT—DEFENSES—ADMISSION OF POSSESSION—TITLE OF PLAINTIFF—RULES OF COURT—AMENDMENT—DESCENT—RIGHTS OF WIDOW.**

1. The twenty-fifth rule of the superior courts, in force prior to June 25, 1879, providing that no party should be permitted to defend an ejectment cause without admitting that he was in possession of the premises in dispute at the commencement of the action, was, in the month above mentioned, so amended by the judges in convention as to render it applicable to statutory actions of complaint for land. It was within the power of the judges to thus amend this rule, and it is still of force as amended, not having been changed by the convention of 1893.

2. When a man dies intestate, leaving a widow and children, the title to his realty vests in the latter, subject only to the former's right to take a child's part, or have dower assigned therein; and unless it affirmatively appears that, within the time prescribed by law, she elected to take a child's part, no presumption will arise that she ever had any vested estate in fee in such realty.

3. Prior to the act of September 27, 1833, amending paragraph 6 of section 2484 of the Code, a mother, unless a widow, did not inherit with the brothers and sisters of her deceased child.

4. A man whose deceased wife's father died in possession of land, could, as her sole heir (she having, before her death, inherited all the interests of her co-heirs in the premises), recover the land, upon the strength of her ancestor's possession, from one who did not show a better title; and in such case the plaintiff's right to recover, though he married before 1893, would in no way be affected by the question whether he did or did not, in the exercise of his

marital rights, reduce the land to possession, as his own, during the lifetime of his wife.  
(Syllabus by the Court.)

Error from superior court, Baldwin county; Hart, Judge.

Action by John Snipes against J. and C. Parker and others to recover land. From a judgment for defendants, plaintiff brings error. Reversed.

C. P. Crawford, for plaintiff in error.  
Whitfield & Allen, for defendants in error.

**LUMPKIN, J.** 1. The twenty-fifth rule of the superior courts, as it stood prior to June 25, 1879, was by its terms confined to actions of ejectment; that is, to suits for land brought in the fictitious form. Accordingly, this court, in the case of *Gabbett v. Sparks*, 60 Ga. 582, held that the rule in question was not applicable to statutory actions for the recovery of land. The convention of judges in 1879 amended the rule so as to make it also apply to actions of the latter kind, and the rule as thus amended was not changed by the convention of judges which assembled in 1893. It was contended in the present case, however, that the judges had no power or authority to make the amendment above mentioned. We are utterly unable to perceive why they could not. Code, § 3246. The truth is, there is no good reason why such a rule should not apply as well to one class of these actions as to the other. Why should any person not in possession of the premises in dispute, either in person or by tenant, care to defend an action for their recovery; and, as to him, what difference could it make as to the form of the action? It would seem, in either event, he had no interest in the matter. We do not understand that the trial judge ruled contrary to the views above expressed. The somewhat confused record sent up in this case seems to indicate that he did not, and we are quite confident that this is the truth of the matter; for it is not at all probable that so clear-headed a judge as we know him to be would make a mistake about a question of practice so free from doubt or difficulty. The question, however, appears to have been discussed at the trial below, and we have ruled upon it simply to set it at rest.

2. When a man dies intestate, leaving a widow and children, the title to his realty vests in the latter, subject only to the former's right to take a child's part, or have dower assigned therein. The widow may elect to take either, but cannot have both. If, within the time prescribed by law, the widow does neither, the title to the realty of the deceased vests absolutely in his children. Until barred of her right to make her election between dower and a child's part, the widow is free to take whichever she chooses. The right to take a child's part expires after the lapse of twelve months from the granting of letters testamentary or of administration on the husband's estate, whereas the right to

dower is barred by a failure to apply for the same within seven years from the death of the husband. Code, § 1784, pars. 3, 4. After the right to take a child's part has become barred, she may still have dower, within the seven years limited. There is never a presumption that she will take a child's part. See *Truett v. Funderburk*, 98 Ga. 686, 20 S. E. 260, and cases cited. Consequently, unless in a given case it affirmatively appears that within the twelve months allowed by law she actually elected to take a child's part, there is no presumption that she ever had any vested estate in fee in the land of the deceased.

3. As the law stood prior to the act of September 27, 1883 (Acts 1882-83, p. 66), amending the sixth paragraph of section 2484 of the Code, a mother, unless a widow at the time of the death of one of her children intestate, did not inherit with the brothers and sisters of such deceased child, or take any interest in the estate left by the latter.

4. It was shown by the plaintiff in the present case that his wife's father, John Norr, died in possession of the premises in dispute about the year 1846 or 1847, claiming the same under a deed thereto. He left a widow, two sons, and a daughter. His widow married one Grimes in 1855, and his daughter married the plaintiff in December, 1860, and died in 1873. Neither of the sons ever married. Both entered the Confederate service. One was killed in 1862, and the other was reputed dead, never having been heard from since the war. In 1861, when plaintiff himself entered the Confederate service, he carried his wife back to her home on the disputed premises, where she remained till plaintiff's return at the close of the war. He "cropped" the premises in 1865, and again in 1875, living on the place, and then gave possession of it to Mrs. Grimes, his mother-in-law, who, with his consent and permission, continued to occupy the premises until her death, about eight years before the trial. The defendants introduced no evidence whatever. The question, therefore, is whether or not the plaintiff was entitled to recover the premises upon the state of facts proved by him. The trial judge instructed the jury that, "unless plaintiff reduced the premises to his possession in his wife's lifetime, his marital right would not attach to her interest therein, and they should find for the defendants." If the plaintiff is the sole heir of his deceased wife, this charge did not apply the proper test to his right to recover; for, in that capacity, he could recover independently of the question as to whether or not he had, by virtue of his marital rights, reduced the property to possession, as his own, prior to her death. In the light of the record before us, we have dealt with the case upon the assumption that he is her sole heir. This may not be the real truth of the case, and, if not, the next hearing can be shaped in accordance with the facts as they then appear; but our decision must be un-

derstood as having been made upon the idea that the plaintiff inherited his wife's entire estate. Treating him as her sole heir, his right to recover seems clear. From this point of view, how stands the case? Under the law as announced in the second division of this opinion, the conclusion to be drawn from the facts proved by the plaintiff is that the widow of John Norr never had any vested estate in fee in the premises; and if, indeed, she ever exercised her right to take dower therein, such dower estate necessarily terminated at her death, some eight years before the trial. Therefore it would appear that the plaintiff's wife and her two brothers each took an equal share in this land at the death of their father. Upon the death of these two brothers,—neither having ever married, and, so far as appears, both having died intestate,—she inherited the entire interest of both in the land, their mother having previously again married; for such was the law of descent prior to 1833, as is shown in the third division of this opinion. Thus, prior to the death of the plaintiff's wife, it would seem that the entire fee in the land became vested in her, and the plaintiff claims the premises by virtue of this apparently perfect right and title in his wife at the time of her death. In view of the repeated rulings of this court, it cannot be questioned that she would, independently of any possession of her own, have a perfect right, were she in life, to recover the premises upon the strength of her father's possession at the time of his death, as against one who failed to show a better title or right of possession. And in her right, and as her only heir at law, the plaintiff could do likewise. As above hinted, we fear that the record does not disclose the whole truth of this case as it appeared at the trial below. We do not see how the charge on the subject of the plaintiff's marital rights could have been given, unless it had some application to the issues then presented by the evidence. The judge would hardly have given this charge if it was totally inapplicable, as must have been apparent if the plaintiff's right to have his deceased wife's entire estate, as her only heir, was perfect and complete without regard to the question of his marital rights. Be this as it may, we have done the best we could with the record before us. As there is to be another trial, the whole case can be brought out, and doubtless the correct result will be reached. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 564)

#### RAWLS v. MOYE et al.

(Supreme Court of Georgia. June 12, 1896.)  
LANDLORD AND TENANT—LIEN FOR ADVANCES—  
ASSIGNMENT.

A tenant executed and delivered to his landlord a contract embracing a promise to pay a specified amount of cotton as rent, and creating

a lien in the landlord's favor to secure to him payment for whatever advances he might make to aid the tenant in making crops on the rented premises during the next ensuing year. On the day this contract was executed, an entry was written thereon, which the landlord signed, reciting that, "for value received, the within rent note is hereby transferred and assigned to" a named person, to whom the landlord was indebted upon a promissory note for the purchase money of the land so rented. The assignment was made as a collateral security for the payment of this note. In the contract of sale it was stipulated that, if this note was not paid when due, the land was to remain the property of the vendor, and the tenant was to be his tenant. The purchase money was, however, paid before its maturity. Upon this state of facts, *held*, that the assignment in question did not operate to pass to the assignee the special lien created by the contract in the landlord's favor for advances, nor authorize the assignee to furnish the tenant with supplies, and then collect the price of the same by a foreclosure of this lien.

(Syllabus by the Court.)

Error from superior court, Randolph county; J. L. Hardeman, Judge.

Action by A. J. Moye and others against J. M. Rawls. From a judgment for plaintiffs, defendant brings error. Reversed.

Jas. H. Guerry and W. O. Worrill, for plaintiff in error. W. D. Kiddoo, for defendants in error.

LUMPKIN, J. Under the facts recited, the assignee took nothing except the tenant's obligation to pay rent. An express assignment was indispensably necessary to pass the landlord's lien for supplies, provided for in the contract. The mere transfer of "the within rent note" was not an assignment of any lien. See *Lathrop v. Clewis*, 63 Ga. 282. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 570)

#### STORY v. BROWN.

(Supreme Court of Georgia. June 12, 1896.)

APPEAL—QUESTIONS OPEN TO REVIEW—WEIGHT OF EVIDENCE—TRIAL—OFFER OF EVIDENCE.

1. Where exceptions pendente lite were filed by a defendant to the allowance of an amendment to the plaintiff's declaration, and, after a verdict for the latter, a judgment of the trial court granting a new trial was brought to this court by the plaintiff, the defendant filing no cross bill of exceptions, which judgment was affirmed, with direction that the case be tried again upon a single issue of fact, it was too late, after another trial had in compliance with this direction, and resulting in another verdict for the plaintiff, which the trial judge refused to set aside, for the defendant to bring to this court for review the questions made in the original exceptions pendente lite.

2. This court will not grant a new trial upon the ground that the court below refused to allow a witness to answer certain questions, it not being stated nor otherwise appearing what the party by whom the questions were asked expected to prove in answer to the same.

3. There was evidence sufficient to warrant the verdict rendered by the jury upon the sole question of fact submitted to them under the direction heretofore given by this court in this case,

and there was no abuse of discretion in refusing to set the verdict aside.

4. At the end of the opinion delivered in this case at the March term, 1894 (21 S. E. 522, 94 Ga. 289), an error was inadvertently committed in stating the reason why the judgment granting a former new trial was upheld. That judgment was affirmed because this court was unwilling to interfere with the discretion of the trial judge in granting even a second new trial upon doubtful and uncertain evidence.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

Action by J. L. S. Brown, administrator, against E. J. Story, to recover land. From a judgment for plaintiff, defendant brings error. Affirmed.

J. H. Martin, for plaintiff in error. Busbee, Crum & Busbee, for defendant in error.

SIMMONS, C. J. This suit was filed at the March term, 1891, of Dooly superior court. At the September term, 1892, the plaintiff amended the declaration. The defendant demurred to the amendment, and the demurrer was overruled, and he then filed exceptions *pendente lite* to the overruling of the demurrer. The case was tried at the September term, 1893, and a verdict was rendered in favor of the plaintiff. Upon a motion for a new trial by the defendant, the court set the verdict aside, and the plaintiff excepted and brought the case to this court. This court affirmed the judgment, and directed that the case be tried again upon a single issue of fact; that is, whether there was a sufficient delivery of the deed from Brown to Bedgood. 94 Ga. 283, 21 S. E. 522. The case was again tried at the November term, 1894, the jury returned another verdict for the plaintiff, and the defendant made a motion for a new trial, which was overruled, and he excepted. In the bill of exceptions he assigned error upon the exceptions *pendente lite* taken by him at the September term, 1891. The defendant in error contended in his argument before this court that this assignment of error was too late. We think the contention was well taken. Section 4250 of the Code declares that "no cause shall be carried to the supreme court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause. But at any stage of the cause, either party may file his exceptions to any decision, sentence or decree of the superior court; and if the same is certified and allowed, it shall be entered of record in the cause; and should the case, at its final termination, be carried by writ of error to the supreme court by either party, error may be assigned upon such bills of exception, and a reversal and new trial may be allowed thereon when it is manifest that such erroneous decision of the court has or may have

affected the final result of the case." Speaking for myself, I think that, when a verdict and judgment have been rendered, that is a final disposition of the case in the superior court, and if a motion for a new trial is granted and the case is brought to this court, the party filing exceptions *pendente lite* ought to bring them at the same time, even though the court has granted him a new trial on other grounds of error taken in his motion. But whether this is so or not, when the case is brought here, and all the questions of law made in the record are decided by this court, and direction is given that it be tried again upon a single issue of fact, we think it is too late, when the party who has filed exceptions *pendente lite* on a former trial loses his case, to then assign error thereon.

2. It is complained that the trial judge erred in refusing to allow a witness to answer certain questions propounded to him by counsel for the defendant, but it does not appear what the defendant expected to prove in answer to the questions. We are therefore unable to say whether the refusal to allow these questions answered was so far harmful to the defendant as to require the grant of a new trial.

3. When the case was here before it was held that the controlling and decisive question was whether there was an actual and complete delivery by the plaintiff's intestate of the deed which purported to convey the land to the defendant's vendor, and it was directed that this question alone be tried and determined by the jury at the next trial. It seems, from the evidence on the last trial, that the parties to the transaction met and Brown signed the deed in the presence of two witnesses. They had agreed at that meeting that, inasmuch as Bedgood had sold the land to Story, he (Bedgood) should give Brown the notes of Story in lieu of his own. In other words, instead of executing any notes himself, he should get Story to give his notes, and he (Bedgood) would deliver them to Brown, with his indorsement thereon. How Bedgood got the deed from Brown does not appear, but the understanding and agreement between them was that they were to meet the next day at the house of a certain justice of the peace, where Bedgood was to deliver Story's notes to Brown, and Brown was to acknowledge the deed. Brown went to the house of the justice of the peace at the time appointed, but Bedgood failed to appear, and did not deliver the notes as agreed, and Brown did not acknowledge the deed. "The question of the delivery of a deed is always one of intention, and the mere fact that an instrument of conveyance has passed from the hands of the owner of the property to the party named therein as grantee does not in itself constitute or establish a delivery." "The crucial test in all cases is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done; and this intent is to be gath-

ered from the conduct of the parties, particularly of the grantor, and all the surrounding circumstances." 1 Warv. Vend. 503, and cases cited. There was sufficient evidence in this case to warrant the jury in finding that there was no actual and complete delivery of the deed to Bedgood, and the trial judge did not err in refusing to grant a second new trial.

4. The writer of this opinion wrote the opinion of the court when the case was here before, and at the conclusion of the opinion stated inadvertently that the court below did not err in granting a new trial on the ground that the verdict was contrary to law and the evidence. It is true that the grounds of the motion for a new trial with which we were then dealing were simply that the verdict was contrary to law and the evidence and the judge granted a new trial generally. We meant simply to hold, however, that in our opinion the evidence was of a doubtful, uncertain character, and should have stated that we affirmed the judgment because we were unwilling to interfere with the discretion of the trial judge in granting even a second new trial where the evidence, as it appeared to us, was of this character. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 576)

**HOBBS et al. v. CHICAGO PACKING & PROVISION CO.**

(Supreme Court of Georgia. June 12, 1896.)

**CONVERSION — WHAT CONSTITUTES — DEFENSES — PARTNERSHIP — POWER OF PARTNER.**

1. Where the owner of goods shipped them upon a bill of lading whereby they were consigned to his own order, at the same time drawing in favor of a banking partnership, "for collection," a draft upon the person to whom the goods were intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading, so indorsed as to give the partnership control of the possession of the goods, a delivery of them by this firm to the drawee of the draft, without requiring its payment, was, as against the owner, a conversion, subjecting the firm to an action of trover.

2. The rule above announced is not altered by the fact that the owner, not knowing that the goods had already been delivered, agreed to make a like shipment of other goods, on condition that the partnership would guaranty the payment of the former draft within a given time; it appearing that the real purpose of this agreement was simply to expedite the delivery of the goods first shipped and the collection of the price of the same.

3. The wrongful delivery of the goods being an act done in a matter within the scope of the partnership business, such delivery, though made or caused to be made by a single member of the firm, without the knowledge or consent of the other and only remaining member, rendered the latter liable.

4. The controlling questions in the present case are covered by the foregoing notes. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Ball trover by the Chicago Packing & Provision Company against Hobbs & Tucker. From a judgment for plaintiff, defendants bring error. Affirmed.

The following is the official report:

The Chicago Packing & Provision Company brought ball trover against Hobbs & Tucker for certain meat. The defenses were, in brief, that defendants had committed no tort for which this action would lie, and, if they were liable at all, it was only upon a contract of guaranty; and that Hobbs, although a member of the firm of Hobbs & Tucker for the purpose of doing a banking business (collections, deposits, loans, and nothing else), really had no interest in the firm, and had no connection with or knowledge of the transactions involved in this case. The jury found for the plaintiff, and defendants' motion for a new trial was overruled.

It appears from the evidence that the meat in question was shipped by the plaintiff, upon orders of N. L. Ragan, from Chicago, Ill., to Albany, Ga., on April 11, May 10, and June 3, 1893. To the bills of lading were attached drafts of plaintiff on Ragan, payable to the order of Hobbs & Tucker, for the price of the meat. The bills of lading were issued to plaintiff, contained a direction to notify Ragan, and were indorsed: "Deliver to Hobbs & Tucker, or order, for collection." The drafts, with bills of lading attached, were forwarded by plaintiff, on making the shipments, to Hobbs & Tucker for collection. The meat was delivered to Ragan by the terminal carrier upon written requests signed by A. W. Tucker (who was the active partner and manager of the firm of Hobbs & Tucker), in which he stated that he would be responsible for the bill of lading. Ragan did not pay for the meat before he got it. The first of the three shipments was subsequently paid for, and the carrier received the bill of lading for it from Ragan. The other two bills of lading and drafts remained in the possession of defendants. Tucker had no dealings individually with plaintiff, but its dealings were with the firm of Hobbs & Tucker. The following correspondence, by mail and telegraph, was in evidence: February 27, 1893, plaintiff wrote to defendants: "We wrote to Mr. Ragan the day before yesterday, explaining fully the reason why we could not ship the last car of ribs ordered. The manner in which Mr. Ragan does business seems to us rather strange. The meat is shipped to our order, and, of course, cannot be delivered to him until he has taken up the bill of lading. It would seem, therefore, that some of this meat lies a long time on the track, or in some manner in possession of the railroad company. The meat might as well be in our house here as on the track or warehouse in Albany. There are other risks about this manner of doing business, which we have explained to Mr. Ragan, and which we do not feel justified in taking. Mr. Ragan seems to be

a man of great energy, and it is very unfortunate that he lacks sufficient capital. We should like very well to do business with him, provided he would take up the draft on arrival of the car of meat. If your firm would guaranty the payment of all drafts in this manner, we would not hesitate to ship as many cars of meat as he might order." June 1, 1893, Ragan to plaintiff: "Have not been able to discount any paper lately; cause my delay both times; here few days; assist me this time; ship to-morrow," etc. Same date, defendants to plaintiff: "If you will ship Ragan car meat to-morrow, we will guaranty payment oldest draft on twelve June." June 2, 1893, plaintiff to defendants: "If guaranty payment of oldest draft on twelfth, and other on twentieth, will ship another car; otherwise, will send instructions in reference to taking possession of both cars for our account." Same date, defendants to plaintiff: "All right; we accept your terms, if ship car ordered to-day." June 3, 1893, plaintiff to defendants: "We wrote you last night, confirming the telegrams which passed between us, in which you guaranty the payment of Mr. Ragan's drafts. \* \* \* We were rather reluctant to extend the time of payment of these drafts, because we fear that in case of failure the delay might be hurtful to the meat; and, when we come to turn it over to some one else, a complaint might be made to us about its condition. \* \* \* There was testimony by Tucker that he always understood the giving of his orders to the carrier to deliver the meat to Ragan, and thought the carrier's agent understood it to be a personal transaction between them and Ragan; that he gave the orders because the agent declined to accommodate Ragan without some guaranty. The agent testified that he understood that the orders given by Tucker were binding on the bank, though nothing was said about it; and that, if he had thought they bound only Tucker, he would not have let Ragan have the meat. He never had any talk with Hobbs about it, or any business transacted with the bank. In 1892, and soon after Ragan commenced business with the plaintiff, he gave it a bond, with his brother as security, for \$1,500, conditioned generally to protect plaintiff from losses. Afterwards, a lot of meat having been shipped out, and plaintiff becoming dissatisfied, the bond was increased to \$5,000. Ragan generally sold meat in small quantities out of the cars, which would sometimes stay on the track quite a while. Hobbs & Tucker failed in business on or about June 10, 1893, and the last two bills of lading were turned over to plaintiff's counsel. The meat remaining on hand was taken charge of, and sold to persons in Albany, by the assistant secretary of plaintiff, who had come to Albany, and who, while there, stated to a witness that his house had taken a bond from Ragan to indemnify them against loss on account of Ragan not paying for the meat; that it was their understanding with Ragan that he could pay for the meat in 10 or 15 days, so that he could have time to turn round, and they

took the bond to indemnify them against loss while he was making the turn.

The motion for a new trial alleges: That the verdict is contrary to law and evidence; and that the court erred in refusing to grant a nonsuit (1) generally, and (2) as to Hobbs, and in refusing to charge the jury the following propositions, as requested: "If the plaintiff made any arrangements by which they consented that N. L. Ragan should get possession of the meat before he paid the drafts, then the defendants are not liable." "It is not necessary there should be a joint conversion in fact in order to implicate all the partners, as such conversion may arise by construction of law. An assent by some of the partners to a conversion by the others will make them wrongdoers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have commanded the conversion originally." "If the jury believe from the evidence that it was intended by both parties that the contract on the first and second of June, as shown by the telegrams, should express the whole liability of Hobbs & Tucker to the plaintiff, and should stand instead of all other liabilities, then the remedy of the plaintiff is on that contract, and not in this action, and in that case you will find for the defendants." "The jury must look to all the evidence to determine what knowledge plaintiff had of Ragan having gotten the meat when they sent the telegram of June 2d, and wrote the letter of June 3d; and, if the evidence shows you that the plaintiff knew the facts in relation to the meat when they accepted the guaranty of Hobbs & Tucker, then they are presumed to have entered into this new contract with reference to said facts, and to have accepted the guaranty of Hobbs & Tucker as a substitution for all liabilities on the part of Hobbs & Tucker in relation to said meat." Also, that the jury found contrary to the following charge: "It is contended by the defendants that if the meat was not to be delivered to Ragan under the agreement with the plaintiff without the money being paid for it, even if it was delivered without the money being paid, and, after being delivered, that the plaintiff accepted as a substitute, and in lieu of the liability in trover, after having delivered the meat wrongfully, a guaranty, that would relieve the action of trover, and the plaintiff would have to sue on the guaranty. I charge you, this is good law, if Hobbs & Tucker delivered the meat without any order from the plaintiff to deliver it; and if, after having done wrong, they made it up with the plaintiff, and the plaintiff agreed to accept their guaranty in lieu of that liability, to change the contract themselves, and to make a new contract about it,—a contract of guarantyship, instead of holding their right to sue in trover,—they would have to sue on the guaranty. You will look to the evidence, as I said before, and see whether

that is done." Also, that the court erred in giving the following instructions in charge: "The only dispute in this case that the defendants make is as to the conversion. The defendants insist that they did not convert the meat, under the law. It might be better to eliminate one or two questions from the case, and lay them aside, so that you will not be bothered with them, and enable you to address yourselves more particularly to the questions at issue. One is as to the liability of the railroad or the liability of Ragan; and on that subject I charge you that whether the railroad is liable or not, or whether Ragan is liable or not, would not affect this case at all; for it would be possible for the defendants in this case, the railroads, and Ragan, all to be liable, and, if they were all liable, it would be a strange doctrine that the liability of one would extinguish the liability of the others. That would not be good law, and therefore does not affect this case. So you need not consider that branch of it. Another view of it is that Tucker is individually liable, but Hobbs not liable with him. On that subject I charge you that if Hobbs & Tucker received the bills of lading with drafts attached, for the purpose of holding the meat until the drafts should be paid, and Tucker was the managing partner of Hobbs & Tucker, it does not matter by what act he got the meat out from Hobbs & Tucker's possession, and placed it beyond the reach of plaintiff, whether by an individual instrument or an individual act, it would bind Hobbs & Tucker. So, if he was the managing partner of Hobbs & Tucker, and Hobbs had no knowledge whatever of what was going on, but intrusted the management of the business to him, and Hobbs & Tucker received the bills of lading and drafts to collect, but not to deliver the meat until they were collected, and Tucker ordered the railroad to turn the meat over to Ragan, whether it was verbal or in writing, signed by Hobbs & Tucker, or whether signed by Tucker alone, whether it was a mere request, or whether he gave an instrument or individual guaranty against loss by the railroad, it would be impossible to separate his action as an individual from his action as a member of the firm in getting the meat out of the possession of the firm that he had control of as managing partner. So, under the evidence in this case, there is nothing in that to embarrass you. After it has been shown to you that the meat has been shipped regularly to Hobbs & Tucker to hold, and not deliver until the drafts are paid, the case is made out ready for recovery by the plaintiff, unless the defendants can clearly show you by clear and satisfactory evidence, that that was afterwards changed, and the plaintiff consented to the new arrangement for the meat being delivered to Ragan without its being paid for by him; otherwise, you could not find in favor of the defendants. You must find it on the evidence, and sufficient

evidence to show that satisfactorily to your minds. If there is an absence on that point, you are not responsible for it. You merely go by the evidence that is before you. If one side of the case is made out fully, strongly, and satisfactorily, and the other side of the case is not made out, the defense is not made out, and you will find for the plaintiff. If the plaintiff's case is made out fully and satisfactorily up to a certain point, and the defendants show you fully and satisfactorily that a new arrangement was made, and consent given to deliver the meat to Ragan, you will find for the defendants. I believe there is no dispute about the dates as to when the meat was delivered; that it was all delivered except the last car load prior to the guaranty being made. The plaintiff contends that they did not know anything at all about the meat being delivered; that they had a uniform arrangement of shipping it here, and letting it stand on the tracks, and the bill of lading and drafts remain in the hands of Hobbs & Tucker until paid; and that they had no other business arrangement at all, and never consented for any of it to be delivered until the drafts were paid; and that when they were applied to, to ship another car load, and consented, if Hobbs & Tucker would make the guaranty, they merely meant the guaranty to cover any loss from the meat standing on the tracks; that there was no loss incident to the meat standing a long time on the tracks. The plaintiff contends that the loss was depreciation in quality, diminution in weight, risk of being stolen, and deterioration in the meat spoiling, fire, and other risks that they did not like to run in their business; and if Ragan wanted two car loads to stand on the track unpaid for, and another to be shipped, that they would not ship the other one unless Hobbs & Tucker would guaranty payment of the two cars on the track; and, if they would not do that, they would ship the last, but would send instructions to take charge of the two on the tracks. If you believe that is what they meant, find in favor of the plaintiff; for that guaranty would not be substituted for their right to sue in trover for the meat delivered before the guaranty was made, but would be additional security to cover any damage that might come to the meat during the time of its being paid for."

Wooten & Wooten, W. I. Jones, and J. W. Walters, for plaintiffs in error. D. H. Pope, for defendant in error.

**LUMPKIN, J.** The material facts are stated by the reporter. The questions of law involved in this case are indicated by the syllabus.

1. A wrong delivery of goods, either negligently or willfully made, by one who had been intrusted with the custody of them, is in law a conversion by the latter. This rule

has been applied to carriers of goods. *Railway Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219. In principle, it is alike applicable to the defendants in the present case. There was ample evidence to warrant the jury in finding that the meat of the Chicago Packing & Provision Company was, by its indorsement of the bills of lading, in effect delivered to Hobbs & Tucker, to be by them delivered to Ragan upon his paying for the same, and not otherwise. According to the verdict, the defendants violated the trust reposed in them; and, this being so, they ought to make good the loss sustained by the plaintiff on account of their unauthorized and unlawful conduct.

2. There was some evidence tending to show that the plaintiff had accepted a guaranty from Hobbs & Tucker that some of the meat which had already been delivered would be paid for, and that, therefore, the plaintiff's action should have been brought upon the defendants' breach of contract, and not in tort. We think, however, that, taking the evidence as a whole, it establishes the fact that, when this guaranty was accepted, the plaintiff was in utter ignorance of the fact that the meat to the price of which the guaranty related had been actually delivered to Ragan. The plaintiff was evidently under the impression at the time this guaranty was accepted that the meat still remained in the cars or in the railroad depot under the control of Hobbs & Tucker; and it is apparent that, in agreeing to ship more meat upon Hobbs & Tucker guarantying payment of that already shipped, the plaintiff simply intended to expedite the delivery of the latter and the collection of the money due them for the same, they supposing that Hobbs & Tucker would see to it that Ragan came up with the cash within the time limited in the guaranty, but never contemplating that he should get the meat without paying for it.

3. It seems that the meat was delivered to Ragan upon orders signed by Tucker alone, and it was therefore urged that Hobbs was not liable. Under the facts, the act of Tucker in giving these orders was really an act of the partnership. It was the same, in effect, as if he had gone to the station agent, and personally directed him to let Ragan have the meat; and it is evident that the agent thus treated and regarded the orders sent by Tucker. It can hardly be doubted that the act of Tucker in causing the delivery to be made to Ragan was within the scope of the partnership business; and consequently, whether it was done with the knowledge and consent of Hobbs or not, he was in law liable. "Each partner being the agent of the firm, the firm is liable for his torts committed within the scope of his agency, on the principle of respondeat superior, in the same way that a master is responsible for his servant's torts, and for the same reason [that] the firm is liable for the

torts of its agents or servants." 1 Bates, Partn. § 461. "Where one partner, in a matter connected with the business of the partnership, does an act to the injury of a third person, which is a tort by construction or inference of law merely, his co-partner is equally liable with him for the consequences of the act." *Myers v. Gilbert*, 18 Ala. 467. See, also, *Witcher v. Brewer*, 49 Ala. 119. "Partners may be sued in an action of trover, although there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the acts of his co-partners." *Bane v. Detrick*, 52 Ill. 20. "Where a partner, in the course of partnership business, commits a fraud, or does acts prohibited by law, the firm is liable, although the other partners have no knowledge of such fraud or illegal act." *Tenney v. Foote*, 95 Ill. 100. "The appropriation or misapplication by one partner of moneys or other property in the custody of the firm, within the scope of its business, or in the custody of such partner as a representative of the firm, renders each partner liable to the true owner for such conversion; and, when thus in the custody of one partner, it is immaterial whether the other partners know anything about it or not." 17 Am. & Eng. Enc. Law, 1070. See, also, *Alexander v. State*, 56 Ga. 478.

4. We find no reason for setting aside the verdict in this case. It was fully warranted by the evidence, and no material error of law was committed on the trial. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 545)

#### LIGHTFOOT et al. v. WEST.

(Supreme Court of Georgia. June 8, 1898.)

LANDLORD AND TENANT—DUTY TO REPAIR—DAMAGES—PROSPECTIVE PROFITS—PLEADING—AMENDMENT.

1. In a written contract for the lease of a warehouse for a term to begin upon a day named in the future, it was stipulated that the specified rental, for which contemporaneous promissory notes were given, should not abate by reason of the destruction or injury of the property by fire, but that the lessor, in such event, should rebuild in a reasonable time; that the lessees were "to keep said property in as good repair as it is when turned over to them, and to turn it back to the lessor in as good repair as it is now"; and that the lessees were to pay for, and not remove at the end of the lease, all extra improvements they might put upon the premises. *Held* that, where a shed attached to and constituting a valuable and useful part of the warehouse fell before the term of the lease began, and before the lessees took possession, it was the duty of the lessor, and not of the lessees, to rebuild the same.

2. *Held*, also, that on the trial of an action upon one of the rent notes the court erred in refusing to allow the defendants to amend a plea of partial failure of consideration, already filed, in which it was alleged that, in consequence of the plaintiff's failure to rebuild the shed, the rental value of the premises had been

reduced in an amount stated, by further alleging that the defendants were induced to hold onto the lease, and to take possession at the beginning of the term, because of a verbal promise to rebuild made by the lessor, with which he subsequently refused to comply, and but for which they would have declined to carry out the contract. This plea, as thus amended, should have been passed upon by the jury, in connection with such evidence as might have been offered in support of it.

3. *Held*, also, that there was no error in striking pleas setting up against the plaintiff's demand prospective profits that might have been made in the warehouse business if the shed had been duly rebuilt.

(Syllabus by the Court.)

Error from superior court, Clay county; J. M. Griggs, Judge.

Action by J. B. West against W. E. and B. F. Lightfoot for rent. From a judgment for plaintiff, defendants bring error. Reversed.

John R. Irwin, for plaintiffs in error. J. D. Rambo and Harrison & Peebles, for defendant in error.

**LUMPKIN, J.** On July 25, 1894, a written contract was executed by W. E. Lightfoot and Mrs. B. F. Lightfoot for the lease of a warehouse belonging to West, for a term of one year, which was to begin on the 1st day of August next ensuing. The Lightfoots at the same time executed and delivered to West their promissory notes for the rent, which by their terms were made payable in installments, due, respectively, on the 1st days of October, November, and December, 1894. West brought an action against the Lightfoots upon one of these notes. The stipulations in the lease contract which are now material to be considered, and the nature of the defense to the action, will appear from an examination of the foregoing syllabus.

1. We think it apparent that the parties contemplated that the warehouse was to be delivered to the lessees at the beginning of their term in at least substantially the same condition as it was when the contract was signed. They were under no obligation to look after or keep the property in repair until it was actually turned over to them. The obvious meaning of the contract was that they were to receive the warehouse on the 1st day of August in the condition existing on the 25th of July, and were to keep it in as good repair as it was upon the latter day until the end of their term. When, therefore, the shed fell down before the term of lease began, and before the lessees took possession, it was incumbent upon the lessor to rebuild the same. This was essential in order to put the lessees in a position to perform their undertaking and carry out the evident intention of the parties to the contract.

2. The question whether or not the Lightfoots would have been authorized to rescind the entire contract, because of the failure of West to rebuild the shed, is not made in the present case, for the reason that the former actually took possession of and used the warehouse without the shed. Nevertheless, we

think it was their right to set up as a defense that they were induced to take possession at the beginning of their term, and to hold onto the lease because of a verbal promise made by West to rebuild the shed, but for which they would have declined to enter, and that the consideration of the note sued upon had partially failed because of the subsequent refusal of West to rebuild as agreed. As will have been seen, one of their pleas, in connection with the amendment offered to the same, would have enabled them to present this defense, had not the court rejected the amendment and struck this plea, along with several others which the defendants had filed. We think the amendment should have been allowed, and that the court should then have permitted the jury to pass upon this particular plea as amended.

3. The pleas setting up against the plaintiff's demand prospective profits that might have been made in the warehouse business in case the shed had been duly rebuilt were properly stricken. Damages of this kind are too remote and speculative to be estimated. Judgment reversed.

**ATKINSON, J.**, providentially absent, and not presiding.

(38 Ga. 560)

#### CARTLEDGE v. McCOY.

(Supreme Court of Georgia. June 12, 1896.)

CONTRACTS—RIGHT TO SET UP FRAUD—DEED—EVIDENCE OF CONSIDERATION.

Where the grantee of land, to whom the same had been conveyed for the purpose of defrauding the grantor's creditors, subsequently, in pursuance of their original understanding, reconveyed to the grantor, who had in the meantime retained possession, and the former thereafter instituted against the latter an equitable proceeding based upon the theory that the second conveyance was founded upon a valuable consideration, it was competent for the defendant to plead and prove the facts of the transaction, for the purpose of showing for what reason and upon what consideration the reconveyance was really made.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Sarah M. McCoy against J. A. Cartledge. From a judgment for plaintiff, defendant brings error. Reversed.

Blandford & Grimes, for plaintiff in error. C. J. Thornton and Morgan McMichael, for defendant in error.

**LUMPKIN, J.** It is well settled that the maker of a fraudulent deed, executed for the purpose of delaying or defrauding his creditors, is bound thereby, and cannot set up his own fraud in avoidance of the same. *Parrott v. Baker*, 82 Ga. 384, 9 S. E. 1068, and cases cited. On page 373, 82 Ga., and page 1071, 9 S. E., Chief Justice Bleckley says: "A deed signed, sealed, and delivered, and expressing a valuable consideration on its face, imports a legal consideration; and the maker is estopped from

alleging or proving the contrary to defeat the deed as title, if to do so involves setting up his own turpitude, and convicting himself of a deliberate intent to defraud his creditors." It is quite a different matter, however, when a grantee in such a deed, in pursuance of the original understanding between himself and the grantor, voluntarily reconveys to the latter, he having in the meantime retained possession of the premises. Though such a fraudulent deed is binding as between the parties thereto, it is also true that, as between them, a reconveyance is perfectly proper. Indeed, it is the initial step in undoing the wrong already perpetrated, and its effect is, so far as the question of title is concerned, to restore the parties to their original status. When, therefore, the vendee in such a conveyance, in pursuance of the moral obligation so to do, does reconvey to the grantor, thus again uniting in him both possession and the evidence of ownership, it is the right of the latter, in defense to an equitable petition instituted against him by the grantee, and based upon the theory that the deed of reconveyance was founded upon a valuable consideration, to show the real facts of the transaction. In so doing, the defendant in such case neither invokes nor relies upon the fact that his own deed was founded in turpitude. He simply shows that the plaintiff's deed to him is not a conveyance for value, and why it is not so. We have simply undertaken to state the law governing the present case, without expressing any opinion as to the facts, concerning which the parties appear to be greatly at variance. The court erred in sustaining the plaintiff's demurrer to so much of the defendant's answer as undertook to set up the facts in relation to the nature and purpose of the deed originally executed by the defendant, the effect of such ruling being to cut the defendant off from his main ground of defense. Let the case be heard upon its merits in the light of what is said in this opinion. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 588)

# BARNES v. LEWIS et al.

(Supreme Court of Georgia. June 12, 1896.)

## TAXATION—ASSESSMENT OF TRUST ESTATE—SALE— VALIDITY AGAINST BENEFICIARY.

1. Where a trustee, having the title to realty, returned it for taxation for a particular year in his own name, making no other tax return for that year, and the property was afterwards sold under a tax execution issued against him individually, and based upon the return indicated, and, though not so appearing on the face of the execution, the property tax included therein was in fact the tax on this identical property, the purchaser at the sale, if the same was otherwise free from objection, obtained a good title, as against the cestui que trust represented by the trustee; and this is true although the poll tax of the latter was also included in the tax execution.

2. Irrespective of other questions, this case, upon its facts, is controlled by the law above announced.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Action between Silvey Barnes and Jennie Lewis and others. From a judgment for the latter, the former brings error. Reversed.

Lewis & Moore, for plaintiff in error. T. L. Reese and Hunt & Merritt, for defendants in error.

LUMPKIN, J. A trustee, in whom, as such, the title to certain realty was vested, returned it for taxation in his own name for a particular year, in which he made no other tax return. A tax execution was issued against him individually, and it appeared on the trial of the case now under review that the property tax included in this execution was in fact the tax on the identical property returned by the trustee, as above stated, although the execution also included the poll tax of the latter. The property was sold under this tax execution, and, assuming that the sale was otherwise free from objection, the question is, did the purchaser obtain a good title, as against the cestui que trust represented by the trustee? We frankly confess that, if we regarded this question an open one, we would entertain very grave doubt as to its proper solution; but, in our judgment, it was settled by the decision of this court in the case of *State v. Hancock*, 79 Ga. 799, 5 S. E. 248. Applying to the facts of the present case the reasoning employed by Justice (now Chief Justice) Simmons in the case just cited, the conclusion seems to follow that the sale under the tax execution in question was good as against the beneficiaries of the trust. The case of *Burns v. Lewis*, 96 Ga. 591, 13 S. E. 123, is not to the contrary, nor are any of the cases there cited by Chief Justice Bleckley. He mentions the case in 79 Ga. 799, 5 S. E. 248, but does not question its correctness. The case at bar also differs from that of *McLeod v. Lumber Co.* (decided at the present term) 26 S. E. —. There the defendant in the tax execution, which was issued against him in personam, was not shown ever to have had title of any kind, or possession, either actual or constructive. Here the title to the property sold under the tax *fi. fa.* was in the trustee, and the only irregularity was that the process was issued against him individually. Under the doctrine of the *Hancock* Case, *supra*, this was not fatal to the validity of the sale, because, in point of fact, the execution was actually issued—at least, in part—for the tax on the identical land which was sold under the execution. The collection of the trustee's poll tax by virtue of this sale was not, of course, proper; but as to this matter he is certainly liable to the beneficiaries, and can be made to account to them for the benefit he thus derived from

the sale. Consequently they will be protected. Judgment reversed.

ATKINSON, J., not presiding.

(98 Ga. 552)

JONES et al. v. GROGAN et al.

(Supreme Court of Georgia. June 12, 1896.)

WILLS—GROUNDS OF CONTEST—MISTAKE—INCAPACITY—UNDUE INFLUENCE—EVIDENCE—DECLARATIONS—INSTRUCTIONS—HARMLESS ERROR.

1. There was no error in striking a ground of caveat to the probate of a will, alleging that it "was executed by [the testator] under a mistake of fact as to the conduct of [a brother and heir at law] towards [the testator], he having expressed himself as being unwilling to provide for his brother, who is old and feeble and poor, as the condition of [the testator's] estate would warrant, because he claimed that [this brother] had had a difficulty with him, when in truth and in fact there had been no difficulty." Especially is this so when an annuity, not merely nominal, was bequeathed to the brother alluded to in this ground of caveat.

2. Nor was there any error in striking this ground of caveat after the same had been amended by alleging that the testator believed the brother in question owned property to the amount of \$3,000, when in fact the brother owned only \$300. An heir at law cannot, in any event, caveat the probate of a will on the ground that at the time of its execution the testator was misinformed or mistaken as to the amount or value of the property owned by such heir.

3. That the above-mentioned original and amended grounds of caveat were offered "for the purpose of showing that [the testator], at the time of executing said paper, was not of sound and disposing mind and memory," did not add to their validity; it appearing that another and distinct ground of caveat, alleging want of mental capacity to make a will, was voluntarily abandoned by the caveators.

4. Undue influence to procure the execution of a will cannot be proved by the opinion of a witness that such influence was used, unless he testifies to relevant facts upon which his opinion is based.

5. The court properly refused to allow a witness to testify in a general way that there was something in the "manner or conduct" of certain persons named as beneficiaries in the will, and charged with having exercised undue influence in procuring its execution, evidencing that the testator was under their influence; it not being stated, in offering this testimony, what was the "manner" or the "conduct" sought to be shown, or that the same related to matters occurring in the presence of the testator.

6. If, in the present case, there was any error in rejecting evidence of declarations alleged to have been made by such persons as to what they could or would induce the testator to do with respect to matters in no way connected with the testamentary disposal of his estate, it was not error which would require, or even justify, the granting of a new trial; this evidence, if admissible at all, being of little probative value, and the evidence as a whole showing clearly that the execution of the will was the free and voluntary act of the testator.

7. Declarations of the testator, apparently free and voluntary, and not made under the restraint of another, tending to show that the paper propounded as his will was prepared in accordance with his wishes, and that he was satisfied with it, are, when the paper has been attacked on the ground that its execution was procured by undue influence, admissible in evidence to show that it was his true last will and

testament; but his declarations to the contrary, for the purpose of invalidating the paper as a will, are not admissible.

8. In view of the evidence, and of the fact that the general ground of caveat alleging want of testamentary capacity was abandoned, there was no error in charging the jury, "The issue in this case is narrowed to the sole one of undue influence, except so far as mental weakness demonstrates the susceptibility to such influence."

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

Caveat filed by J. B. Jones, Sr., and others, against the probate of a paper purporting to be the last will and testament of George W. Dye, deceased, propounded by John H. Grogan and others, executors. From a judgment in favor of the will, caveators bring error. Affirmed.

Jos. N. Worley, Wm. D. Tutt, H. J. Brewer, and W. M. & M. P. Reese, for plaintiffs in error. J. P. Shannon, W. M. Howard, Geo. O. Grogan, and P. P. Proffitt, for defendants in error.

LUMPKIN, J. A paper purporting to be the last will and testament of George W. Dye was propounded for probate in solemn form, and a caveat was filed by some of his heirs at law. The case was tried on an appeal to the superior court from the court of ordinary, and resulted in a verdict in favor of the will.

1. One of the grounds of the caveat was that the paper was executed under a mistake of fact as to the conduct of Martin Dye, a brother of the testator; the caveat declaring that George W. Dye had "expressed himself as being unwilling to provide for" this brother as the condition of the testator's estate would warrant, "because he claimed that [this brother] had had a difficulty with him, when in truth and in fact there had been no difficulty." By reference to the will, it appears that the testator directed his executors to invest \$1,000, and pay the interest thereon annually to this brother during the natural life of the latter. The caveat fails to declare at what time George W. Dye expressed an unwillingness to provide for his brother, or when he made the "claim" that there had been a difficulty between them. Nor is there any distinct allegation that, but for the testator's belief in the supposed difficulty, any other or further provision than that which the will actually contains would have been made for Martin Dye. For aught that appears, whatever the testator said on this subject might have been months, or even years, before the will was executed. Therefore this ground of caveat hardly comes up to the requirements of section 2403 of the Code, even if that section can be held applicable to a case like this. It provides that "a will executed under a mistake of fact as to the existence or conduct of the heirs at law of the testator is inoperative, so far as such heir at law is concerned, but the testator shall be deemed to have died intestate as to him."

We do not think it was ever contemplated that this section should be invoked to invalidate a will because of an alleged mistake of fact, by a perfectly sane testator, concerning a matter within his own personal knowledge, and of such a nature that he really could not be mistaken about it. Unless he was laboring under some delusion or hallucination, George W. Dye must have known whether or not there had been a "difficulty" between himself and his brother. The positive evidence of his own senses would certainly assure him of what had occurred between himself and his brother. It may be that some trivial disturbance in their relations did occur, which he chose to regard as a "difficulty," but which others would not so regard. Be this as it may, the testator had an undoubted right to his own opinion on this subject; and certainly his will cannot be disturbed, even though he erroneously considered and chose to regard a particular occurrence as a "difficulty," which, properly and accurately speaking, was not one. The point is, he knew the facts and circumstances attending the occurrence to which he referred, could not be mistaken as to what they were, and had the right to construe and act upon them as he chose. Nor would the testator be charged with accurately remembering these facts and circumstances which he, at the time of their occurrence, regarded as equivalent to a "difficulty"; but, in making his will, he would have a perfect right to act upon the impression they had made upon his mind, and which still lingered in his memory. The question of memory is not involved. The testator may have had a difficulty which he forgot, but in that event its occurrence would not have affected his testamentary dispositions. Conceding him to be perfectly sane and free from delusions,—as was practically admitted in this case,—he could not have remembered, discussed, and been influenced by something which never took place at all. While we do not rest our decision on the point now in hand upon the fact that an annuity amounting to about \$70 per annum was bequeathed to Martin Dye, this circumstance is at least entitled to some weight in arriving at the conclusion that this ground of the caveat ought not to be sustained.

2. The amendment to the above-mentioned ground of caveat added nothing to its merits. If a will could be set aside merely because a testator entertained an erroneous belief as to the amount of property owned by one of his heirs at law, for whom, in the latter's opinion, the will had not made an adequate provision, no will would be safe. It would be an exceedingly dangerous precedent, and one not sanctioned by any authority, to hold that a will could be rendered inoperative on such a ground as this, supported only by parol evidence.

3. It was insisted, however, that the court erred in striking the ground of caveat and the amendment to the same above referred to,

when offered for the purpose of showing that at the time of executing the paper propounded as a will the testator was not of sound and disposing mind and memory. We have already dealt with the first question made in this case, upon the assumption that the testator was conceded to be sane and free from any mental defect which would deprive him of testamentary capacity. In order to show that the point now being considered is entirely devoid of merit, it is only necessary to add that there was another and distinct ground of caveat, alleging the want of such capacity on the part of George W. Dye, that this ground was voluntarily abandoned by the caveators, and that the evidence shows beyond cavil or question that he was sane, and thoroughly competent to make a will.

4. It would seem, at least in some instances, that the question whether or not undue influence was used to procure the execution of a will is, under the rules of evidence, a matter of opinion. A witness will not, however, in any case, be permitted to testify to his opinion that such influence was used, without stating the relevant facts upon which his opinion is based. See *Rollwagen v. Rollwagen*, 63 N. Y. 520; *McLean v. Clark*, 47 Ga. 24; *Howell v. Howell*, 59 Ga. 146.

5. The caveators sought to prove generally by a witness that there was "something in the manner or conduct" of certain persons reputed to be the illegitimate children of the testator and one Lucinda Dye, his concubine, which evidenced that he was under their influence or control. The record does not inform us more definitely than as just stated concerning the nature of the evidence sought to be elicited upon this subject. It was manifestly too loose, indefinite, and uncertain to be admitted or considered.

6. The caveators also desired to prove that the children of Lucinda Dye had declared on some occasion that they could or would procure the testator to sell certain land to another person who wished to purchase the same. If evidence of this sort was admissible at all, which we gravely doubt, rejecting it would not, in this case, be cause for a new trial. It bore very remotely indeed upon the questions at issue, was in no way connected with the testamentary disposition of George W. Dye's estate, and, in view of the overwhelming weight of the evidence showing that the will was his free and voluntary act, could have been of but little probative value.

7. One of the grounds of caveat was that the execution of the paper propounded was procured by the undue influence of Lucinda Dye and her children. This being so, the declarations of the testator, not made in the presence of these persons, or while under any restraint or coercion of any kind, tending to show that the paper propounded had been prepared in accordance with his wishes, and that he was satisfied with it, were admissible in evidence. See 2 Whart. Ev. § 1012. On the other hand, declarations to the

contrary, offered for the purpose of invalidating the paper as a will, were not admissible. *Said Thompson, J., in Jackson v. Kniffen, 2 Johns. 31: "To permit wills to be defeated, or in any manner whatever impeached, by the parol declarations of the testator, appears to me repugnant to the very genius and spirit of the statute, and not to be allowed."* And see the authorities cited by Atkinson, J., in *Mallery v. Young, 94 Ga. 308, 22 S. E. 142.*

8. Under the evidence in this case, and in view of the pleadings as they stood when the issue was finally submitted to the jury, the charge complained of (which is quoted in the eighth headnote) contained no substantial error, and affords no cause for a new trial. Indeed, upon the merits, there could have been but one fair and proper result, and it was reached in the verdict rendered. Judgment affirmed.

ATKINSON, J., not presiding.

(98 Ga. 534)

BLECKLEY et al. v. WHITE et al.

(Supreme Court of Georgia. June 18, 1896.)

EJECTMENT—EVIDENCE OF TITLE—DISMISSAL.

1. The defendants in an action of ejectment not having, by plea or otherwise, prayed for any affirmative relief against the plaintiffs, it was the right of the latter, even after a judgment in their favor had been set aside by the supreme court, to dismiss their action at pleasure at any time before the case was again tried.

2. The bare statement of a witness that title to realty "passed" from one person into another is wholly incompetent to show title in the latter.

3. A deed from one who is apparently a stranger to the paramount title, and who is not shown to have ever been in possession of the premises conveyed, is insufficient to make out a prima facie case showing title in the grantee claiming thereunder.

4. The plaintiffs having utterly failed either to prove a joint ownership of the premises in controversy, or to show that either of them had any interest, legal or equitable, therein, the court erred in granting an injunction restraining the defendants from interfering with, or exercising control over, the premises.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. J. Kimsey, Judge.

Petition by Sara E. White and another against John C. Cannon, administrator of H. W. Cannon, deceased, and others, for injunction. From a decree for plaintiffs, defendants bring error. Reversed.

W. S. Paris and H. H. Dean, for plaintiffs in error. J. B. Estes, for defendants in error.

LUMPKIN, J. A controversy as to the ownership of the land involved in the present action arose in 1834, when H. W. Cannon and F. A. Bleckley brought ejectment for its recovery against W. D. Young and Caleb Woodall. After a verdict for the plaintiffs, the defendants moved for a new trial, which was granted, and this judgment was affirmed by this court. See 92 Ga. 164, 17 S. E. 863. Subsequently, after Bleckley had been strick-

en as a party plaintiff, and the administrator of Cannon, who had died, had been made a party in his stead, the plaintiffs' attorney made the following entry on the declaration: "The defendants having abandoned the possession of the premises sued for, and the plaintiff John C. Cannon, as administrator of the estate of H. W. Cannon, having regained his intestate's former possession of the same, this suit is therefore dismissed by the plaintiff in vacation." On August 1, 1895, W. D. Young and Sara E. White, alleging themselves to be the owners of the land, brought their present petition for the purpose of enjoining Cannon, as administrator, James Bleckley, and W. S. Paris, attorney for the plaintiffs in the ejectment suit, from interfering with, cutting timber on, or otherwise exercising any acts of ownership over the land. The trial judge granted the injunction prayed for, which is the error complained of in the present bill of exceptions.

1. One ground of the plaintiffs' petition was that the dismissal of the ejectment suit was unauthorized, and operated prejudicially to their rights in the premises. How this could be true as to one of the plaintiffs, Sara E. White, it is difficult to conceive, as she was not a party to that case. But, even if the parties to both actions were identical, the dismissal of the action in ejectment affords no legal or equitable ground of complaint. From the pleadings in that case, which were introduced in evidence at the hearing of the present action, it appears that the only defense offered was a plea of not guilty. Neither by counter petition, answer, plea, nor otherwise, did the defendants seek any affirmative relief against the original plaintiffs to that action, or the sole remaining plaintiff at the time it was dismissed. Therefore when the case was voluntarily dismissed the defendants gained all the relief they could have claimed under the pleadings filed by them. In dismissing the action in vacation, the plaintiff in ejectment merely exercised a right expressly conferred upon him by law. Code, § 3447. In this connection the case of *Jackson v. Roane, 96 Ga. 40, 23 S. E. 118*, is precisely in point, and cites several other decisions of this court to the same effect.

2. In support of their claim of ownership the plaintiffs in the present action undertook to trace title from Charles F. Betton, alleged to be the original grantee from the state, into Abbott H. Brisbane, under whom they claim. The defendants interposed numerous objections to the evidence offered for this purpose. It is unnecessary, however, to deal with the various questions thus raised; for, conceding that the plaintiffs successfully traced title into Brisbane, they entirely failed to substantiate their claim that such title as he had subsequently became vested in them jointly, or severally in either. W. D. Young, one of the plaintiffs, attempted by affidavit to testify that title to the land in dispute "passed from Abbott H. Brisbane to John Raven Mat-

thews and Edward B. White, and then to Sara E. White," without giving any particulars as to how or when. This affidavit was objected to as inadmissible to show title in the plaintiffs, and error is assigned upon its admission in evidence, the objection being that "titles to land cannot be shown except by writing." This certainly was a novel method of attempting to prove the fact sought to be shown. We apprehend that even if Young were an attorney at law, and had been offered as an expert witness, the question whether or not title did in fact pass, as testified to, would be a matter for determination by the court, and not one for the expression of an opinion by the witness. The statute of frauds declares that "any contract for sale of lands, or any interest in, or concerning them," must be in writing. Code, § 1960, par. 4. If title to land is sought to be transferred by will or deed, certain essential formalities and requirements must be complied with. Whereas, whether or not title passes by descent is a question of law, under the particular facts as to relationship, etc., shown to exist. If the title in question "passed" by writings, the instruments themselves were the best and only competent evidence of the fact, until accounted for, and shown to be lost or destroyed. If title vested under the rules of descent, this could be shown only by proving the facts necessarily bringing about this legal result. The witness gave no information as to the facts upon which he predicated the opinion he expressed; and we are inclined to think he went somewhat beyond the sphere in which a mere witness is permitted to move, in attempting to determine for himself whether, under the facts within his knowledge, but uncommunicated to the court, the title to the property in dispute became legally vested in his co-plaintiff.

3. Again, an effort was made to show title in Young, the other plaintiff, by an extract from the will of John Raven Matthews authorizing his executors to sell and convey the land, and a deed to Young from William R. Matthews, as executor, in pursuance of this power. As the above-mentioned affidavit of Young was incompetent to show that title ever passed out of Brisbane and into John Raven Matthews, and no other evidence on this point was offered, the latter necessarily stands in the attitude of a mere stranger to the title; and moreover, as Matthews was not shown to have ever been in possession of the land, no title, or presumption of title, in him, was shown, derivable from any other source. It is unquestionably true that possession under a claim of right raises a presumption of law, that the occupant has a rightful and legal possession; and proof of this fact makes out a prima facie case of title in him, calling on the defendant to assume the burden of proof. Wolfe v. Baxter, 86 Ga. 705, 13 S. E. 18; McLendon v. Horton, 95 Ga. 54, 22 S. E. 45. But a mere deed from one not shown to have ever been in possession

proves nothing more than the naked fact that the grantor in the deed thereby asserted ownership, without disclosing upon what ground or claim of right,—whether arbitrary and fictitious, or based on a real or mistaken legal or equitable title. Indeed, the grantor's assertion is no better than that of the grantee himself, when utterly unsupported by legal and sufficient proof of a valid right to the possession or ownership of the land. It was said in Parker v. Railroad Co., 81 Ga. 392, 8 S. E. 871, "We know of no authority, however, for the doctrine that one who merely has a deed from another, and is not in possession, can either recover for trespasses committed on the land embraced in the deed, or cast the burden of proof upon his adversary." The law goes quite far enough, in presuming possession rightful. Without the aid of this presumption, a plaintiff who merely shows a deed to himself from an apparent stranger to the title utterly fails to carry the burden imposed upon him by law,—of making out his case upon the strength of his own title, rather than upon the weakness of that of his adversary.

4. From the above it will be seen that the plaintiffs signally failed to show in either of them any ownership or right of possession as to the lands in controversy, legal or equitable; and, without regard to the various rulings of the court complained of, the decision in their favor was unsupported by the evidence, and erroneous. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(93 Va. 584)

#### LONG v. PENCE'S COMMITTEE.

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

#### ACTION—PROCEEDING BY MOTION—JUDGMENT—INFORMALITY—WAIVER OF HOMESTEAD EXEMPTION.

1. Under Code, § 3211, giving to any person entitled to recover money by action on any contract the right to obtain judgment for such money on motion, the assignee of a note, who is authorized by section 2861 to bring an action against a remote assignor, may proceed against such assignor by motion.

2. The fact that a judgment in an action by an assignee of a note against an assignor appears to have been based on the note, instead of on the implied contract made by the assignment, is a mere informality, which does not affect the substantial rights of the parties, and affords no ground for a reversal.

3. Under Code, § 3647, providing that if any person shall declare, in any written instrument by which he is, or may become, liable for the payment of money to another, that he waives, as to such obligation, his right to homestead exemption, such exempt property shall be liable for such obligation, a judgment against an assignor of a note, entered on motion of an assignee, being based on the implied obligation growing out of the assignment, and not on the express obligation of the note, cannot properly declare a waiver by defendant of his homestead rights, though such exemption is waived, by the terms of the note, by the makers and indorsers.

Error to circuit court, Rockingham county; William McLaughlin, Judge.

Proceeding on motion by Emanuel Pence's committee against one Long. From a judgment for plaintiff, defendant brings error. Modified.

Sipe & Harris, for plaintiff in error. W. L. Yancey, for defendant in error.

**BRIELY, J.** This case is before us upon a writ of error to a judgment rendered on a motion by the assignee of a promissory note against a remote assignor. It was contended that the law does not authorize the proceeding by motion in a case of this kind. Section 3211 of the Code provides that "any person entitled to recover money by action on any contract, may, on motion before any court which would have jurisdiction in an action, otherwise than under section thirty-two hundred and fifteen, obtain judgment for such money. \* \* \*" The statute thus authorizes the proceeding by motion whenever a person is entitled to recover money by action on "any contract." The only restriction imposed by the statute as to the nature of the contract upon which the recovery may be by motion is the right to recover money upon it by action. If the contract is such that the person making the motion is entitled to recover money upon it by action, he is entitled to proceed to do so by motion, whether his right is based upon an expressed or implied contract. The remedy extends to all cases in which a person is entitled to recover money by action on contract. Report of Revisers of Code of 1849, vol. 2, p. 832, note; *Hale v. Chamberlain*, 13 Grat. 658; and 4 Minor, Inst. (3d Ed.) pt. 1, p. 633. Prior to the statute authorizing a recovery from an assignor, an assignee had the right, upon the principles of the common law, to recover from his immediate assignor, under the contract implied from the assignment,—that the assignor would repay the consideration he had received for the chose in action assigned, if payment thereof, by the use of due diligence, could not be obtained from the obligor or maker. This implied promise was not considered, however, to extend at law to any other than the immediate assignee, and consequently no assignee could recover at law from a remote assignor. *Mackie's Ex'r v. Davis*, 2 Wash. (Va.) 219; *Caton v. Lenox*, 5 Rand. (Va.) 31, 42; *Mandeville v. Riddle*, 1 Cranch, 290; and *Yeaton v. Bank of Alexandria*, 5 Cranch, 49. But, although not assignable at law, the implied contract was deemed transferable in equity, and a court of equity would enforce it. *Riddle v. Mandeville*, 5 Cranch, 322, and *Bank v. Welsiger*, 2 Pet. 331. The statute (section 2861 of the Code) provides that any assignee may recover from any assignor of such writing as is described in section 2860, but that a remote assignor shall have the benefit of the same de-

fense as if the suit had been instituted by his immediate assignee. The effect of the statute (section 2861) is to extend to a remote assignee the benefit of the promise implied by law from an assignor to his immediate assignee, and to give to the remote assignee, as well as to the immediate assignee, the right to recover upon such implied promise. The right which he previously had in equity, the statute gives to him at law. 2 Rob. New Prac. 283; *Drane v. Scholfeld*, 6 Leigh, 395. The right of recovery is founded in every case upon the implied contract created by the assignment, and the remedy for the enforcement of the right is the action of assumpsit. 3 Rob. New Prac. 396; 3 Minor, Inst. (2d Ed.) 436; *Arnold v. Hickman*, 6 Munf. 15; and *Drane v. Scholfeld*, 6 Leigh, 386. The proceeding by motion in the case at bar is on a contract upon which the plaintiff would be entitled to recover money by action, and therefore comes within the very terms of the statute authorizing a recovery by motion.

It was also assigned as error that, even if the court had the right to give judgment on the motion, it did not have the right to give such a judgment as was entered. The alleged ground of this objection is that the judgment does not conform to the cause of action set out in the notice, and that the entry of the judgment shows that the court considered the note as the ground of the motion, and not the implied liability created by the assignment. This objection is more apparent than real. The note was a necessary piece of evidence in support of the motion, in order to prove the assignment. It was also necessary to enable the court to fix the measure of the recovery, for in the absence of proof to the contrary the law presumes that the assignor received for the note a sum equal to that specified in it. 2 Rob. New. Prac. 274, 457, and 3 Minor, Inst. 372, 437. The motion being heard by the court, it was necessary for it to inspect the note for these purposes; and the statement of the fact of such inspection in the entry of the judgment, which was wholly unnecessary, is doubtless what gave rise to this objection. But, if the court had entered the judgment in the formal manner contended for, it would have been for the very same amount for which it was entered. It is right in substance, if not technically right in form. The informality is a harmless error, and can work no possible injury to the plaintiff in error. The informal entry of a judgment is not a ground for reversing it. Code Va. § 3449.

A further objection was made to the judgment in that it declared, in obedience to the requirement of the statute (Acts 1889-90, p. 117), that the homestead exemption was waived. Waiver of the exemption, prescribed by the constitution, and by chapter 178 of the Code, is provided for in section 3647. It reads, so far as it is necessary to notice it, as follows: "If any person shall declare in a bond, bill, note,

or other instrument, by which he is or may become liable for the payment of money to another, or by a writing thereon or annexed thereto, that he waives, as to such obligation, the exemption from liability of the property or estate which he may be entitled to claim and hold exempt under the provisions of this chapter, the said property or estate, whether previously set apart or not, shall be liable to be subjected for said obligation, under legal process, in like manner and to the same extent as other property or estate of such person.

\* \* \* It thus appears that the waiver is required to be in writing, and must be expressed in the bond, bill, note, or other writing, itself, which is the evidence of the obligation, or by a writing thereon or annexed thereto; and where it is so done the exemption is declared to be waived as to the said obligation. There was such waiver in the body of the note referred to, and it was expressed to be a waiver as to the indorsers as well as to the drawers (makers) of the note. Strictly speaking, the assignors were not indorsers; but the waiver would perhaps be construed to include them, according to the intention of the parties. Yet, if so, the waiver was only as to the particular obligation expressed in the body of the note, and not as to the implied obligation growing out of the assignment, which is the ground of the motion in this case. The latter is a wholly different obligation. The motion was not based upon the note. Neither the note, nor the obligation of which it is the evidence, was the ground of the motion; but it was, as we have seen, the implied obligation created by the assignment. As to this implied obligation there was no waiver of the exemption, and the court erred in so adjudging. Such error is, however, not a ground for reversing the judgment, but it may be amended in this respect; and, being so amended, it must be affirmed.

(93 Va. 542)

# TOWN OF BRIDGEWATER v. ALLEMONG.

(Supreme Court of Appeals of Virginia. Sept. 17, 1896.)

## APPEAL—REVIEW—MOTION FOR NEW TRIAL ESSENTIAL.

A judgment cannot be reviewed for errors assigned on rulings made during the trial in excluding evidence, unless the record shows that after verdict a motion for a new trial was made and overruled, and proper exception was taken thereon.

Error to circuit court, Rockingham county; William McLaughlin, Judge.

Action by Allemong against the town of Bridgewater. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Roller, for appellant. Strayer & Long, for appellee.

KEITH, P. Allemong served notice on the town of Bridgewater that he would on the first day of the October term, 1894, of the cir-

cuit court of Rockingham county, move for a judgment against the town for the sum of \$800, with interest thereon at the rate of 6 per cent. per annum from the 1st of January, 1894, being the aggregate amount of eight several bonds for the sum of \$100, described in said notice. The town of Bridgewater appeared by its counsel, and pleaded nil debet, and filed a statement of the grounds of defense upon which it proposed to rely. A jury was sworn to try the issue, which, after having heard the evidence, returned a verdict for the plaintiff for the full amount claimed by him. During the progress of the trial, the defendant excepted to the rulings of the court in excluding certain evidence offered in its defense, and tendered a bill of exceptions, which was signed by the judge, and made a part of the record. In this bill of exceptions all the evidence adduced on the part of the plaintiff is set out, but the exception itself is directed exclusively to the judgment of the court sustaining the objection made by the plaintiff to certain evidence offered by the defendant. The jury rendered its verdict, and the court proceeded to enter judgment in accordance therewith. There was no motion for a new trial.

In the case of *Newberry v. Williams*, 89 Va. 305, 15 S. E. 868, it is said: "In the present case, it is true, all the facts are certified in the bill of exceptions which was taken to the ruling of the court in regard to the instructions. But, inasmuch as there was no objection to the verdict, the supposition is, whatever the fact may be, that the appellant was satisfied with it. At all events, his failure to object to the verdict at the proper time must be considered as a waiver of his exception taken during the trial." Between the case under consideration and that just cited there is no point of difference except that in the case from 89 Va. and 15 S. E. the bill of exceptions was taken to the ruling of the court in regard to the instructions given or refused, while in the case before us the exception was taken to the ruling of the court excluding the evidence offered by the plaintiff in error. In *Newberry v. Williams*, supra, the authorities in this state, from *Johnson v. Macon*, reported in 1 Wash. (Va.) 4, to the present time, are considered, and the rule is announced as above stated, as the conclusion to be deduced from them. In 2 Bart. Law Prac. (2d Ed.) 1345, it is said: "The party complaining of error cannot reach the appellate court, with a view to the reversal of the judgment of the lower court on the ground of such error, unless he shall have first asked the lower court for a new trial, and his motion shall have been denied; or, to use the language of the decided cases, 'if errors or supposed errors of any sort are committed by a court in its rulings during the trial of a case by a jury, the appellate court cannot review these rulings unless two conditions concur, viz.: First, the rulings must have been objected to when made, and

a bill of exceptions taken, or the point then saved, and the bill of exceptions taken during the term; and, secondly, a new trial must also have been asked and overruled and objected to, and this noted on the record." In the case of *Land Co. v. Obenchain* (Va.) 22 S. E., at page 879, Judge Buchanan, delivering the opinion of the court, referring to the rule established in *Newberry v. Williams*, says: "All that the rule requires is that the record shall show that such a motion was made and overruled, and that this action of the court was excepted to. In this case the judgment complained of shows that such motions were made, overruled, and excepted to. This was sufficient." So, in the case of *Railroad Co. v. Dunnaway's Adm'r* (Va.) 24 S. E., at page 699, the same judge refused to accept the authority of *Railroad Co. v. Scott* (Va.), reported in 20 S. E. 826; and thus established an exception to the rule announced in *Newberry v. Williams*, thereby recognizing the force of the rule itself. The case of *Railroad Co. v. Dunnaway* points out one exception to the rule announced in *Newberry v. Williams*, supra. Experience may convince us of the propriety of recognizing other exceptions, but the case before us cannot be distinguished from *Newberry v. Williams* in any respect, and must therefore be controlled by it. It follows that the errors relied upon in the petition for the writ of error, and so fully discussed at the bar, cannot be considered, and the judgment of the circuit court of Rockingham county must be affirmed.

(93 Va. 546)

**WILSON et al. v. WILSON et al.**  
(Supreme Court of Appeals of Virginia. Sept. 17, 1896.)

**CREDITORS' BILL—AMENDMENT—PARTIES—APPEAL.**

1. In a suit by creditors' bill it is proper to permit the filing of a supplemental bill to bring in new parties whose interest has arisen since the institution of the suit, to introduce new charges, or to put in issue new material facts developed at the trial.

2. Objection to a decree for errors in the report of a commissioner, not appearing on the face of it, cannot avail on appeal unless founded on exceptions to the report taken in the trial court.

3. It is not proper practice, in a creditors' suit to settle an estate, to join as defendants the debtors of the estate, unless some independent ground of equity jurisdiction is made to appear, such as a transfer to them of property in fraud of plaintiff's rights.

4. Where the claim of a party is too small to give him the right of appeal from an adverse decision thereon, the supreme court of appeals is without jurisdiction to review such decision on an appeal by other parties to the suit.

Appeal from circuit court, Augusta county; William McLaughlin, Judge.

Creditors' bill by Nancy H. Wilson and others against the administrator of George A. Wilson, deceased, Howard L. Wilson, and others. Decree for complainants, from which Howard L. Wilson, in his own right and as

administrator of William R. Wilson, deceased, appeals. Affirmed.

Patrick & Gordon, for appellants. A. O. Braxton, for appellees.

**HARRISON, J.** This is a general creditors' bill, asking that the estate of George A. Wilson, deceased, be settled, and applied to the payment of his debts. The bill alleges that deceased, in his lifetime, conveyed to his two sons, Howard L. Wilson and William R. Wilson, his farm in Augusta county, containing 180 acres, in consideration of \$5,400, to be paid in seven equal annual installments, evidenced by the bonds of the purchasers secured by vendor's lien on the land; that these bonds had not been paid, and constituted assets for the payment of decedent's debts. The administrator of George A. Wilson, deceased, and the two sons, Howard L. and William R. Wilson, were made parties defendant. A joint answer was filed by the sons, admitting their purchase of the farm at the price stated in the bill, and the execution of the bonds, but denying that there was anything due to the estate of their father on that account. The cause was duly referred to a commissioner with instructions to report the assets and liabilities of the estate, and especially the amount due from the sons on account of the purchase of this farm from their father.

The record shows that two days after the sale to his sons the deceased transferred and assigned these seven purchase-money bonds to his children.

It further appears that at the time of this transaction deceased was insolvent. The commissioner reported that these assignments were without consideration, and void as to the creditors of the deceased, and, after crediting the purchasers with various sums paid by them in discharge of certain debts against their father's estate, ascertained the balance due to be assets applicable to the payment of debts proved and audited against the estate. This finding was repeated and reaffirmed by the commissioner with some modifications as to the amount due, in five reports, each recommittal being upon exceptions taken by Howard L. and William R. Wilson. The court acted on the fourth report, overruling the exceptions to all the reports, except so far as they had been modified by the commissioner, and recommitted the cause to ascertain finally the balance due from the purchasers. The fifth and last report ascertained that, after applying all proper credits, the defendants still owed on the land the sum of \$5,174.90, but that the sum of \$3,644.40, with costs, would be sufficient to discharge the unpaid debts. This report was confirmed without exception, and a decree was entered in favor of the administrator of George A. Wilson, deceased, against the defendants Howard L. Wilson, in his own right and as administrator of his brother and co-purchaser, William R. Wilson, who had died pending the suit, for the sum ascertained to

be sufficient to pay the unpaid debts and costs.

From this decree Howard L. Wilson, in his own right and as administrator of William R. Wilson, deceased, has appealed.

It is assigned as error that the court erred in permitting a supplemental bill to be filed, making, as alleged, a different case from that stated in the original bill.

After the third report had been filed, the plaintiffs and other creditors filed their supplemental bill, adopting the original bill, and charging, in addition, that the assignment of the bonds by the father to his children, he being insolvent, a fact not known before, but disclosed in the progress of the suit, was without consideration, and in fraud of their rights as creditors, and therefore void.

I perceive no objection to filing this supplemental bill. It was necessary to bring the assignees of these bonds before the court in order to conclude them by any decree affecting their rights. A supplemental bill is proper in order to introduce new parties whose interest has arisen since the institution of the suit, to introduce new charges, or to put in issue a new material fact, such as fraud. 4 Minor, Inst. pt. 2, p. 1263; Story, Eq. Pl. §§ 335, 336. If, however, there was doubt as to the right to file this bill, the appellants could have no remedy on this appeal, because the record shows that they answered the bill without demurrer, or otherwise objecting to its being filed, and joined issue upon it, and they cannot now for the first time make objection.

It is further assigned as error that upon the evidence in the cause the decree against appellants ought not to have been rendered.

The fifth and last report ascertains finally the amount due from the appellants, reducing it below the sum ascertained by any former report. This report was confirmed without exception by any one. The record shows that the only question that concerned the appellants was the amount due from them as purchasers. The last report settled that question, and the appellants failed to except to the findings of the commissioner, and they must, therefore, be held to have waived all further objection, and to have acquiesced in that finding as correct.

Objection to a decree for errors in the report of a commissioner, not appearing on the face of it, cannot avail here, unless founded on exceptions taken to the report in the court below. Shipman v. Fletcher, 91 Va. 490, 22 S. E. 458. It is proper to state that, although appellants are precluded from now reviewing the decree complained of, I have carefully examined the evidence in the cause, and am of opinion that the conclusions reached by the commissioner, and sustained by the decree of the circuit court, are fully warranted by the evidence, and would prevail here had it been necessary to consider the case on its merits.

The original bill in this case was not de-

murred to, and no question has since been raised as to it. This court, however, is not to be understood as approving the practice adopted in the institution of this suit. It is not proper, in a creditors' suit to settle an estate, to unite as defendants the debtors of that estate. As a general rule, the debtors of an estate must be sued alone by the personal representative of the estate. The creditors can only sue the personal representative for settlement, and, if land is to be sold, unite with him those interested in the land, unless some independent source of equity shall be made to appear as to the other parties introduced; as, for example, where there is an allegation of the transfer or alienation to them of some part of the debtor's property in fraud of the plaintiff's rights.

Nancy H. Wilson, one of the appellees, and a creditor whose claim was asserted in the original bill, asks that the decree of the circuit court rejecting her claim as a charge upon the estate of decedent may be reviewed under rule 9 of this court. This claim is for a sum far less than the amount necessary to give this court jurisdiction. Rule 9 was not intended to enlarge and extend the jurisdiction of this court, but only to enable the court to correct errors against appellees in such cases as they would have a right to appeal. As this appellee would have had no right to appeal in her case, involving, as it does, less than \$500, this court has no power to review the decree complained of by her.

Other questions have been suggested in argument, unnecessary to be decided in the view taken of this case, and have, therefore, not been considered.

There is no error in the decree appealed from, and it is affirmed.

(93 Va. 553)

COCHRAN v. LONDON ASSUR. CORP.

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

INSURANCE—EXTENSION OF TIME TO BRING ACTION  
—ACCEPTANCE.

Where, after a loss, an insurance company granted to a creditor of the insured, to whom the loss was payable, at his request, an extension of the time limited by the policy within which suit might be brought thereon, because of difficulty in procuring the signature of the owners to proofs of loss, the acceptance of such extension is presumed; and the fact that the creditor brought a suit within the time limited by the policy, in which he afterwards suffered a nonsuit because of the claim of the company that it was entitled to a certain time after filing in which to examine the proofs of loss, will not bar his right to commence another action after the expiration of such time, and within the limit of the extension.

Error to circuit court, Rockingham county; William McLaughlin, Judge.

Action by James C. Cochran against the London Assurance Corporation. Judgment

for defendant, and plaintiff brings error. Reversed.

Strayer & Liggett and G. M. Cochran, for appellant. Sipe & Harris, for appellee.

CARDWELL, J. This is a writ of error to a judgment of the circuit court of Rockingham county in favor of the defendant, upon a demurrer to evidence, and the facts and circumstances out of which the suit arose may be stated as follows: The plaintiff in error owned a farm in Rockingham county, with a dwelling house thereon, which he agreed to sell to H. M. Bell in 1890 for \$11,280, with the privilege to Bell to turn over his purchase to the Grottoes Company upon its paying \$4,000 in cash, and the residue on time. The property was turned over by Bell to the Grottoes Company upon the terms named. In addition to the specific security of a vendor's lien reserved on the property, Cochran required that the dwelling should be insured for his benefit, which was done by Bell and the Grottoes Company in the London Assurance Corporation, the defendant in error; and the policy, for \$2,000, contained the provision that the loss, if any, was to be payable to Cochran as his interest might appear. On the 3d day of February, 1893, at which time there was due to Cochran eight or nine thousand dollars of the purchase money, the dwelling insured was entirely destroyed by fire. Cochran promptly notified the defendant company of the fire, and of his claim of indemnity under the policy. The defendant company, with promptness, also sent its adjuster to examine the premises, see the parties interested, and ascertain the character and extent of Cochran's interest in the insurance money. This adjuster, J. Tyler Jackson, visited the premises on February 20, 1893, saw Mr. Rumble, the president of the Grottoes Company, and tried to get him to sign the proofs of loss, but he declined to do so until Bell had signed. Jackson then went to the house of Cochran, and spent the night of February 21st, and on the 22d of February, 1893, obtained the signature of Bell to the proofs of loss, and sent them again to Rumble for his signature, with the request that he sign and return them as soon as he could. Rumble retained the proofs of loss, and on March 9, 1893, wrote Jackson that he had been too busy to take up the matter, but would do so early the next week. This he did not do, and Jackson went again to see him in March; but on this occasion Rumble declined to sign the proofs, on the ground that the company had never purchased the property, and therefore had no interest in the insurance. Thus the matter stood, with the exception of several interviews between Jackson and Cochran, till January, 1894, and in the meantime the Grottoes Company went into the hands of receivers of the court. January 19, 1894, Cochran went to the office of Jackson, in Charlottesville, and

suggested to him that something must be done, as the year would soon be out, and asked Jackson to extend the twelfth section of the policy; but Jackson replied that he could not do so, as he had no authority to alter the printed or written conditions of the policy, whereupon Cochran requested Jackson to get the authority from the defendant company to do so, and took the proofs of loss, the same that Bell had signed in the first instance, saying that he would try to get the receivers of the Grottoes Company to sign, and promised Jackson to return the proofs, whether the signatures of the receivers were obtained or not. Jackson immediately (January 19, 1894) wrote to the defendant company, relating this interview with Cochran, and suggesting that the twelfth clause of the policy be extended. To this letter of Jackson the following reply was received:

"New York, Jan'y 22nd, 1894. J. Tyler Jackson, Esq., Adjuster, Charlottesville, Va.—Dear Sir: Claim, H. M. Bell and the Grottoes Co. We have yours of the 19th. In the circumstance, we consider that, so far, at least, as Bell and the Grottoes Co. are concerned, they ought not to expect any waiver of our right in respect of the year limit, and we are not prepared to grant the same to them; but Col. Cochran's position is different, it being the other parties who have delayed settlement of matters, by the ridiculous position they have taken up, and consequently, as far as Col. Cochran is concerned, we are willing to extend the time within which to bring suit for three months from 3rd proximo, in the hopes that some arrangement towards a settlement may be come to before the expiration of that time. Yours, truly, C. L. Case, Manager. J. F. J."

On the next day, January 23d, Jackson inclosed a copy of the letter from Case, manager, with a letter of his own to Cochran, and this letter of Jackson's is as follows:

"Charlottesville, Va., Jan'y 23, 1894. 1½ p. m. Col. J. C. Cochran, Folly Mills, Va.—My Dear Sir: Above is exact copy of letter just received from London Assurance Corporation, and is, I think, extremely liberal. It also shows that you have to deal with a first class, straightforward company, which seems anxious only for a settlement. They, like you, appear fretted at the way in which the Grottoes Company have acted. They are, however, wrong as regards Major Bell, and their coupling his name with the Grottoes Company must be an oversight of clerk who wrote the letter, as they know that he has signed the papers. Please give proofs of loss your early attention, and return them to me as soon as you find you can do nothing with them, or cannot get receivers to sign them. Very truly yours, &c., J. Tyler Jackson, Adjuster."

January 30, 1894, Cochran wrote Jackson the following letter:

"Arista Hoge. W. B. McCheaney. In Return. Received Feb. 2, 1894. Office of Lon-

don Assurance Corporation. Hoge & McChesney, Atlas Insurance Agency. Staunton, Va., Jan'y. 30, 1894. Dear Sir: I return proof of loss signed by Bell and receivers of the Grottoes Co. The waiver of limit as to myself will not be satisfactory to the other parties. Please send before Friday evening to Hoge & McChesney, Staunton, Va., or telegraph the same at my expense, a waiver of sec. 12 of policy for a reasonable time, so the Co. can adjust loss, as I do not want to docket a suit, as the company does not seem to be at any fault. Yr. Respt., J. C. Cochran."

The receivers, instead of signing the proofs of loss as instructed, attached thereto the following:

"Referring to the foregoing affidavit of H. M. Bell of Feb. 22, 1893, touching the loss on the buildings insured by the policy in said affidavit mentioned and described, the undersigned, J. W. Rumble and J. W. Blackburn, receivers of the Grottoes Company, hereby declare that, the best of their information and belief, the facts and circumstances relating to the loss referred to in said affidavit; and they hereby consent and agree that the loss on said property, as it has been or may be adjusted, shall be paid by the insurance corporation, the said London Assurance Corporation of London, England, to James C. Cochran, payment to whom by said insurance corporation shall be a sufficient acquittance for the amount of said loss so far as the Grottoes Company is concerned. But it is distinctly understood and provided that nothing herein stated or agreed to is in any wise to affect the relative and respective rights of said Cochran, N. M. Bell, and the Grottoes Company amongst themselves in respect to the property insured or to the insurance money. Given under our hands this 30th day of January, 1894. J. W. Rumble, Jno. W. Blackburn, Receivers of the Grottoes Company."

"State of Virginia, County of Augusta, to wit: Subscribed and sworn to by J. W. Rumble, one of the receivers of the Grottoes Company, this 30th day of January, in the year 1893, before me, the undersigned. Fitzhugh Elder, Notary Public."

Upon the receipt of the letter of Cochran inclosing the proofs of loss on January 30, 1894, Jackson wrote to Cochran a letter, the substance of which is that he, as adjuster, had much less right than an agent in regard to the conditions of a policy; that an agent has no authority whatever to waive any of the printed conditions, or even his own written conditions, after they have been written, forwarded to the company, and accepted; "therefore, that, as an adjuster, I have no authority whatever to waive any of the conditions (printed or otherwise) of a policy of the London Ass. Corporation, my only connection (and all that ever existed) with them being that of an adjuster." After quoting from the manuscript addition to the printed proofs of loss signed by the receiver of the Grottoes Company that part which states the condi-

tions upon which the receivers signed, Jackson then says: "The last five words ('or, to the insurance money') ought not to be there, because they, just ahead of that, release the company from all claims on account of the loss, and in the last five words upset it by claiming again their right to an interest in the money." He also says: "After carefully considering your letter, all that I can do is to offer you sixteen hundred and fifty (1,650) dollars in settlement of the loss, &c." To the letter is added, as "N. B.": "Of course, all offers of extension, &c., to you are withdrawn and null as soon as suit is docketed or instituted,"—signing the letter as "Adjuster." On February 2, 1894, the day before the 12-months limit stipulated for in the twelfth section of the policy expired, Cochran instituted suit on the policy in the circuit court of Rockingham county, to which the defendant company pleaded in abatement the provision in the policy which gave the company 60 days within which to pay the loss from the time that the proofs of loss were received at the company's office in New York, and that 60 days had not elapsed since the proofs of loss were received by the company, whereupon the plaintiff, Cochran, suffered a nonsuit, and after 60 days from the final delivery of the proofs of loss to Jackson, and on the 23d of April, 1894, brought this action, to which the defendant company filed its special plea that the action had not been brought within 12 months from the date of the loss, February 3, 1893, as stipulated for in the twenty-first section of the policy, and also pleaded the general issue. Upon the issues joined on the special plea, and nonassumpsit, a trial was had, which resulted in a verdict for the plaintiff for the amount of the policy, \$2,000, but on motion of the defendant company the circuit court set it aside and awarded a new trial. At a second trial, after the evidence of both plaintiff and defendant had been submitted to the jury, the defendant company demurred to the plaintiff's evidence, in which the plaintiff joined, and the jury found a verdict for the plaintiff for \$2,000, with interest from April 2, 1894, subject to the decision of the court on the demurrer to evidence. The court sustained the demurrer to the evidence, and gave judgment for the defendant company, with costs.

From what has been stated, it will be observed that section 12 of the policy sued on stipulates that, unless suit is brought on the policy within 12 months next after the loss occurs, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitations to the contrary notwithstanding; and much of the argument of counsel has been spent in the discussion of the rights of the parties to contract for a limitation on the rights of the insured to bring his action to recover the loss, in contravention of the statute of limitations, and whether or not the 12-months limitation began to run from the

date of the fire, February 3, 1893, or from the date that the cause of action accrued; that is, from the expiration of the 60 days next after the proofs of loss were completed, and received by the defendant company. But, in the view we take of the case, if these be open questions in Virginia they are not necessary to be considered here; nor is it necessary to review the several bills of exceptions taken by the plaintiff in error at the two trials. A decision of the case turns, we think, upon whether or not the extension granted by the defendant company to the plaintiff in error, as contained in the letter of Case, manager, of January 22, 1894, and communicated to plaintiff in error by Jackson, adjuster, January 23, 1894, was in force when the suit was brought. According to the plain meaning of the language employed in the letter of January 22d, the plaintiff in error was to have from February 3 to May 3, 1894, "within which to bring suit." It is contended, however, for the defendant company, that Cochran did not accept the extension, as shown by his instituting his suit of February 2, 1894, which was withdrawn, his letter to Jackson of January 30, 1894, and the institution of the present suit on April 23, 1894, or that, if he accepted the extension, it was given on conditions which he violated, and thereby forfeited his right to it. The evidence of the plaintiff in error consists of the letters and papers herein copied or referred to, his own testimony, and that of other witnesses, as to the value of the building destroyed. The only witness examined for the defendant company was Jackson, its adjuster, and, as his testimony is in conflict with the plaintiff's, it is, of course, excluded by the demurrer to evidence.

Plaintiff in error testified that, when he received the letter giving him the extension of 90 days, he filed it away, and rested easy, but afterwards, when he furnished the proofs of loss, and the insurance company refused to pay, he determined to bring the suit of February 2, 1894, and wrote Jackson the letter of January 30, 1894. He further states positively that he accepted the 90-days extension, and relied on it. There is nothing inconsistent with this statement, unless it be the letter to Jackson of January 30, 1894, and the institution of the suit of February 2, 1894. In the letter he does not say that the extension was not satisfactory to him, but that it would not be satisfactory to the other parties. A person is presumed to accept that which is beneficial to him, and it is certain that an extension of time within which to institute the suit was, under the circumstances surrounding the plaintiff in error, a benefit to him. It is true that in the letter of January 30th he asked for a waiver of the twelfth section of the policy, and it may be that the jury would have been justified in inferring from that letter a rejection of the extension of time, unless it was made to embrace the Grottoes Company and H. M. Bell; but it

may also be fairly inferred from that letter that although the 90-days extension was satisfactory to Cochran, and he relied upon it, a complete waiver of the twelfth section was asked for, and that the first suit was brought in order to avoid further trouble between himself and the Grottoes Company. It was the Grottoes Company that had, by refusing to sign the proofs of loss, brought about the difficulties that existed. If a condition of facts is such that the jury may adduce from them more than one inference or conclusion, the court, upon a motion to set aside their verdict, or upon a demurrer to the evidence, has no such discretion, but is bound down to that interpretation of the facts, and is constrained to adopt that conclusion from the evidence, which the jury have sanctioned by their verdict. We do not see enough in the acts of Cochran, or in his letter of January 30, 1894, to justify the conclusion that he did not accept the benefit of the 90-days extension, and rely on it. This being so, the 90-days extension had the effect of making the period within which this suit might be brought 15 months from the date of the loss, instead of 12, as written in the policy. How, then, does the case stand? As has already been pointed out, the letter of Case, manager, of January 22, 1894, after saying, "Under the circumstances, we consider that, so far as Bell and the Grottoes Co. are concerned, they ought not to expect any waiver," etc., and, after attributing all causes of delay to these parties, concludes, "And consequently, as far as Col. Cochran is concerned, we are willing to extend the time within which to bring suit for three months from the 8th proximo, in the hopes that some arrangement towards a settlement may be come to before the expiration of that time." This is communicated at once by Jackson, without a suggestion of a qualification or a condition, and with the request that he return the proofs of loss, whether the signatures of the receivers of the Grottoes Company are gotten or not. The proofs were sent on January 30, 1894, with the signatures of the receivers attached at the foot of the paper, by which they give ample and complete authority to the defendant company to pay Cochran the insurance money; but because they attach some conditions, which by no fair implication could affect the defendant company, being only a reservation as between Cochran, Bell, and the Grottoes Company, Jackson,—who, all through the negotiations, protests that he was not an agent of the defendant company, and, as adjuster, had no authority to waive any of the conditions, or to grant any extension of the limit prescribed in the policy,—for the first time, undertakes to annex conditions to the extension granted by the defendant company itself, and communicated to Cochran a week before. The letter itself, to which he attaches the conditions, the breach of which by Cochran is to forfeit the benefit of the extension, repeats that he (Jackson) has no authority be-

yond that of an adjuster. The defendant company itself could not now withdraw the extension without the consent of Cochran, nor attach conditions to it after it was granted; but, even if Jackson had the right to attach the conditions, the conditions are so inconsistent with the agreement to give the extension that they should not be considered. Cochran has an extension of 90 days from February 3, 1894, granted by the defendant company, and within which time he might bring his suit, yet, a week after it is communicated to him, Jackson, the adjuster, attaches a condition that if suit is brought at any time the extension is to be considered as withdrawn and void. If the 90-days extension was not to be regarded as valid, then there was in fact not one moment of time within which Cochran could have brought his action; and that, too, in face of the facts that the defendant company never questioned its liability for the loss, and never questioned that Cochran was entitled to the whole insurance money. Doubtless, the circuit court sustained the demurrer to evidence on the ground that the 90-days extension was not in force when this suit was brought. In this view we are unable to concur, and its judgment will therefore be reversed and annulled; and this court, proceeding to enter the judgment that the circuit court should have entered, will overrule the demurrer to the evidence of the plaintiff in error, and give judgment in his favor against the defendant in error.

(33 Va. 591)

**KIRACOFÉ v. KIRACOFÉ et al.**

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

**CURTESY—SEPARATE ESTATE OF MARRIED WOMEN.**

1. The authority conferred by Code, § 2513, on a married woman, to devise her separate estate, is equivalent to express power so to devise in the instrument creating the estate, in the absence of any provision therein to the contrary.

2. A conveyance of land by a father to his daughter's husband "in trust, nevertheless, for the sole, separate, and exclusive use and benefit" of said daughter, "and free and discharged from the debts, contracts, liabilities, and marital control" of the husband, creates in her a sole and separate estate, which she can dispose of by will, free from the husband's right of curtesy.

Appeal from circuit court, Augusta county; William McLaughlin, Judge.

Action between B. I. Kiracofé and John W. Kiracofé and others. From the decree an appeal is taken. Reversed.

C. S. W. Barnes, for appellant. J. J. L. & R. Bumgardner, for appellees.

HARRISON, J. By deed dated March 31, 1877, John L. Blakemore settled to the separate use of his daughter, Mary E. Kiracofé, a certain tract of land in Augusta county, by conveying the same, with general warranty of title, to her husband, Benjamin I.

Kiracofé, in trust for her benefit. The grantor uses the following language in prescribing the terms of the settlement:

"In trust, nevertheless, for the sole, separate, and exclusive use and benefit of Mary E. Kiracofé, the wife of Benjamin I. Kiracofé, and free and discharged from the debts, contracts, liabilities, and marital control of said Benjamin I. Kiracofé."

The consideration expressed in the deed for this grant is the natural love and affection which the grantor feels and entertains towards his daughter, and by way and for the purpose of making an advancement to her.

In December, 1879, Mary E. Kiracofé died, leaving a will, in which she devises this tract of land to her children.

The sole question presented by this appeal for our determination is whether Benjamin I. Kiracofé, the husband of the testatrix, has an estate as tenant by the curtesy in this land.

The statute of 1849 (now carried into section 2513 of the Code) expressly confers upon a married woman power to devise her separate estate. This express power under the statute to devise is equivalent to express power in the instrument so to devise. Hence, where a married woman has a separate estate, such as is created by the instrument under consideration, and the instrument creating the estate does not restrain her power of alienation, she has, by virtue of the statute, complete power of alienation by will. It is not necessary that the instrument creating the estate should contain an express power in her to alien. She has that power, under the statute, unless it is restrained or withheld from her by the instrument; and if she exercises her statutory power, and disposes of the estate by will, it deprives the husband of curtesy as effectually as he would have been deprived of it under a similar disposition made by the wife in pursuance of a power vested in her by the settlement. If the married woman has the power to devise, and fails to exercise it, her husband will be entitled to curtesy; but where she disposes of it by will, as she has the right to do unless restrained, the husband's right to curtesy is lost.

This question has been decided by this court in *Chapman v. Price*, 83 Va. 392, 11 S. E. 879, and more recently in the case of *Hutchings v. Bank*, 91 Va. 68, 20 S. E. 950.

It is contended that the decision in the first-named case is obiter dictum; that its decision was not necessary in that case, because the language used in the instrument then before the court excluded the right of the husband to curtesy. If the court so understood the language in that case, it wholly failed to make any allusion to the fact. On the contrary, it placed its decision squarely on the ground that the estate was "a sole and separate estate"; and the wife having, as she had the right to do, devised

the lands in question, the husband had no curtesy.

In the case at bar, the language used in the deed from John L. Blakemore to Benjamin I. Kiracofe, trustee, for Mary E. Kiracofe, creates a sole and separate equitable estate in Mary E. Kiracofe. As already seen, there is in Mary E. Kiracofe, as incident to this estate, complete power of alienation by will, that power not having been restrained by the instrument; and she having exercised that power, and devised the estate by her last will to her children, her husband, Benjamin I. Kiracofe, is not entitled to curtesy therein.

It follows from what has been said that the decree appealed from must be reversed and set aside, and this cause remanded to the court below, to be there proceeded with in accordance with the views expressed in this opinion.

(93 Va. 578)

**PATTERSON v. GROTTOS CO. et al.**

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

**VENDOR'S LIEN—CONVEYANCE OF SEPARATE INTERESTS BY ONE DEED.**

Where a vendee makes separate contracts with two persons, owning separate interests in a tract of land, for the purchase of their respective portions, but the land is subsequently conveyed to him by one deed, in which the vendors warrant generally the title to the whole tract (a gross sum being named as consideration), a recital in the instrument that "the vendor's lien is hereby expressly retained upon the land conveyed, to secure the payment of four bonds \* \* \* given for deferred payments of purchase money" (two of the bonds being payable to one vendor, and two to the other), subjects to the payment of the debt due each vendor the entire tract, and not merely his interest therein.

Appeal from circuit court, Augusta county; William McLaughlin, Judge.

Action by Fulton & Crawford against the Grottoes Company and others to subject land belonging to said company to the payment of purchase-money bonds assigned to complainants by defendant L. D. Patterson, one of the vendors. From a decree adjudging that the debt sued on was a lien only on that portion of the land originally owned by said Patterson, he appeals. Reversed.

Sipe & Harris, for appellant. Elder & Elder and W. L. Yancey, for appellees.

BUCHANAN, J. In the year 1890, James A. Patterson and L. D. Patterson conveyed a tract of 432 acres of land to the Grottoes Company, in consideration of the sum of \$25,962.28, one-third of which was paid in cash; and, for the residue, bonds were executed by the company, and a vendor's lien to secure their payment reserved in the deed. These bonds, two of which were payable to L. D. Patterson, were paid by the company, except a balance due on one of those made paya-

ble to L. D. Patterson, and which he had assigned to Fulton & Crawford.

In August, 1893, Fulton & Crawford brought suit to subject the tract of land conveyed (except certain portions of it which had been released from the lien) to the payment of their debt.

It appears from the record that James A. Patterson, who was formerly the owner of the entire tract, had, prior to their sale and conveyance to the Grottoes Company, sold a portion of it to L. D. Patterson, his son, who had paid the consideration, but had not received a conveyance therefor. It further appears that the Grottoes Company made separate contracts with the Pattersons for their respective interests in the land. The complainants allege that their debt was a lien upon the entire tract, but stated that they were willing that the L. D. Patterson portion of it might be held as the primary security, and be first subjected to its payment. The receivers of the company denied that the debt sued on was a lien upon the James A. Patterson portion of the land.

In the progress of the cause it became necessary to decide that question, and the court was of opinion that the debt sued on was a lien only on the L. D. Patterson portion of the land, and so decreed. From that decree this appeal was taken.

The question presented by it for our decision is whether the lien expressly reserved in the deed to secure the payment of the deferred purchase-money bonds extended to the whole tract of land, or whether, in a controversy with the grantee, or those who claim under it, each grantor was confined to his own interest in the land conveyed as a security for the payment of the purchase-money bonds made payable to him.

This case seems to us to be controlled by the case of Patton v. Hoge, 22 Grat. 443. In that case three persons were jointly interested in a tract of land. Two of them sold, and (by the same deed) conveyed their undivided interests in the land to the other partner and joint owner. One of them was paid in cash for his interest, and the other took the grantee's notes for the purchase money due him, and, to secure their payment, retained a lien upon the property conveyed. The contention of the grantee in that case, as in this, was that the vendor who had taken notes for the purchase money due him had a lien, not upon the whole interest which passed by the deed, but only to the extent of the interest conveyed by him. This court held otherwise, and subjected the whole interest conveyed.

Judge Moncure, who delivered the opinion of the court, after quoting our statute which provided that there should be no lien for the unpaid purchase price of the land after the conveyance made, unless it was expressly reserved upon the face of the conveyance, said: "This provision, it is thus seen, leaves unaffected a lien 'expressly reserved upon the face of the conveyance,'

which lien continues to have the same force and effect it always had. The reason of this is obvious. None of the evils growing out of the vendor's implied lien resulted from a lien expressly reserved on the face of the conveyance. Being set forth in the first link of the vendee's chain of title, purchasers from him" (and creditors, he might have added) "had just as much notice of it as they would have had of a lien upon the land by deed of trust or mortgage."

"The question then is," he continues, "what is the true construction of the deed? Did the grantors thereby retain a lien on the whole property conveyed, or only on one-half of it, as security for the payment of the purchase money remaining unpaid? They undoubtedly had a right to retain a lien on the whole or the half of said property, according to their pleasure, even though that part of the purchase money remaining unpaid may have been due and payable only to one of the vendors. Then, which of these two things did they intend to do? The deed itself must answer the question, and we think it does plainly answer it. There cannot be a doubt about it, if we look only to the words by which the lien is retained, and that certainly is the most material part of the deed to be looked to in making the present inquiry. Those words are, 'And the said William Zimmerman and Sallie E., his wife, do hereby retain a lien on the property hereby conveyed, as security for the payment of the above-receipted notes received in payment of their interest. The said George H. Williams has been paid up in full of his interest.' The lien is thus retained upon the property conveyed by the deed,—that is, the whole property, and not half the property thereby conveyed,—or the interest which belonged to Zimmerman in that property. If that had been the intention, it would, as it easily could, have been plainly so expressed. The intention to retain a lien on the whole property being thus plainly expressed, if a different intention can be shown by the context it ought to be very plainly shown, to counteract the natural import of the words by which the lien is retained." After examining the context fully, he adds: "We see nothing in it which is inconsistent with the construction we have put upon the words by which the lien is retained. On the contrary, we think the construction is supported by the other parts of the deed."

In that case this court recognized the right of the parties to reserve a lien upon the face of the deed to secure the payment of all or any part of the unpaid purchase price upon the whole or any part of the land conveyed, and held that the extent of the lien is to be determined from the intention of the parties, and not from the extent of the interest either vendor may have had in the land conveyed, and that such intention is to be gathered from the deed itself.

Let us apply these principles to the case under consideration.

The deed to the Grottoes Company, so far as it is material to the question under consideration, is as follows: "Witnesseth, that in consideration of the sum of twenty-five thousand nine hundred and sixty-two dollars and thirty-eight cents, of which the sum of eight thousand six hundred and fifty-four dollars and twelve cents was paid in cash, the receipt whereof is hereby acknowledged, the said parties of the first and second parts do grant unto the said party of the third part, with general warranty of title, a certain tract or parcel of land lying in Augusta county, Virginia, on the east side of South river, adjoining the Grottoes, containing by recent survey made by Jasper Hauseman, surveyor of Rockingham county, four hundred and thirty-two acres two roods and thirty-three poles (excluding three acres and one rood of S. V. R. R. line, included in the boundary and bounded as follows: \* \* \*) The vendor's lien is hereby expressly retained upon the land conveyed, to secure the payment of four bonds of the Grottoes Company bearing even date herewith,—two for four thousand and fifty-four dollars and twelve cents each, payable to Jas. A. Patterson, and two for four thousand six hundred dollars each, payable to Lee D. Patterson,—payable, respectively, June 1, 1891, and June 1, 1892, with interest from June 1, 1890, given for deferred payments of purchase money."

The deed does not state that a lien is reserved upon the interest of L. D. Patterson to secure the bonds executed to him, but that "the vendor's lien is hereby expressly retained upon the land conveyed, to secure the four bonds of the Grottoes Company \* \* \* given for deferred payments of purchase money." Not only do the words of the clause retaining the lien show that it was the intention of the parties to charge the entire tract of land with the payment of all the purchase-money bonds, but the whole deed shows that they, whatever may have been their previous negotiations or agreements with reference to the land, treated it, when the conveyance was made, as a sale and conveyance of one tract of land, and not as a sale and conveyance of two parcels, in which each vendor was conveying, and covenanting with reference to, his own interest in the land. The land is described and conveyed as one tract. The vendors warrant generally the title to the whole land, and only one sum is named as the consideration for it.

The contention of counsel for the receivers of the Grottoes Company, that the decision in the case of Patton v. Hoge does not control this case, because in that case the interests conveyed were undivided interests in the same parcel of land, while in this case the interests conveyed are separate and distinct parcels of the same tract, cannot be sustained. The doctrine established in that case was that the extent of the lien reserved upon the face of the deed does not depend, as in the case of the vendor's implied or equitable

lien for purchase money, upon the extent of such vendor's interest in the land conveyed, but upon the contract of the parties in reserving the lien; and, since it depends upon the contract of the parties, the question whether the interests conveyed are joint or several, divided or undivided, is a matter of no consequence.

We are of opinion that the debt sued on was a lien upon the whole tract of land conveyed, and that the circuit court erred in not so holding. The decree appealed from must therefore be reversed, and the cause remanded to the circuit court, there to be proceeded with in accordance with the views expressed in this opinion.

(93 Va. 526)

### RUSH'S EX'R v. STEELE.

(Supreme Court of Appeals of Virginia. Sept. 17, 1896.)

#### TRUSTEE—LIABILITY FOR LOSS OF FUND.

1. A trustee directed by court to secure the trust fund, when he invested it, by taking a mortgage of land, loaned the fund, and secured the debt by having the borrowers confess judgment, and directed the clerk not to place the execution which issued thereon in the sheriff's hands until further orders, thus limiting the lien of the judgment to ten years. Three years afterwards the court removed him, and directed him to turn the fund over to its general receiver, which he did. The trustee's account, which showed how such loan was secured, was regularly settled and confirmed, and all investments therein mentioned were approved. The fund was lost solely by allowing the judgment to become barred by limitations seven years after the trustee was removed. *Held*, that the general receiver, and not the trustee, was liable for the loss of the fund, since, under Code 1873, p. 1167, § 12, the execution issued authorized other executions to be issued at any time within ten years from its return day, without the necessity of a scire facias, so that the lien could have been kept alive as long as necessary; and this, though it was the trustee's duty to have an execution issued, and such a return made on it as would have continued it in force for twenty years under such statute.

2. The general receiver was not relieved from liability by the facts that, when the fund was turned over to him, he believed an execution had been issued, and such return made as would continue the lien of the judgment for 20 years, and did not learn otherwise until after it was barred; that among the papers received from the trustee was a copy of the borrowers' bond, with an indorsement in the trustee's handwriting that the original was left with the clerk for judgment to be confessed on it; that he knew the trustee was very prudent, and was told by him that judgment had been confessed; and that it was usual in such cases to have executions placed in the sheriff's hands, and returned so as to extend the life of the judgment to 20 years.

Appeal from circuit court, Augusta county; William McLaughlin, Judge.

Action by J. C. Steele against William E. Rush's executor, and another, the general receiver of the court, to compel one or the other of them to account for the loss of a part of a fund of which Rush was trustee and plaintiff was the beneficiary, and which was, by order of court, turned over to the general re-

ceiver by the trustee after his removal by the court. From a judgment in favor of plaintiff against Rush's executor, the latter appeals. Reversed.

G. M. Cochran, for appellant. R. P. Bell and Charles Curry, for appellee.

BUCHANAN, J. By the will of John Churchman, he gave to his grandson, John C. Steele, about \$9,000, to be held by his executors, as trustees, and invested in some safe and permanent interest-bearing fund, the interest only to be applied to the special use of his grandson during life, and after his death the fund was to pass to his distributees.

A suit was brought by the executors of the testator against his legatees, etc., to have his will construed by the court, and his estate administered under its direction. The executors of Churchman having declined to act as trustees of the fund devised to the grandson, the court, upon his request, appointed William E. Rush to act as trustee for him. Rush qualified as such about the year 1871, and acted until the year 1883, when the court, by a decree entered in the case referred to above, removed Rush as trustee, at the instance of Steele, and upon his own request, because of the unfriendly relations which existed between them, and directed him to turn over the whole of the trust fund to the general receiver of the court. This was done. Among the debts turned over was one of \$1,300, due by judgment. The general receiver took charge of the trust subject, and collected the interest thereon, and paid it over annually to Steele until the year 1891, when the principal debtor in the \$1,300 judgment died. In taking an account of the indebtedness of his estate, it was ascertained that the judgment could not be collected, because it was barred by the statute of limitations.

The beneficiary, Steele, then instituted his suit against the executor of Rush, the trustee, who had in the meantime died, and against the general receiver, for the purpose of compelling one or the other of them to make good the loss which the trust fund had sustained by the alleged mismanagement.

There is no question that the \$1,300 Lightner judgment was lost by allowing it to become barred by the statute of limitations, as the land upon which it was a lien was amply sufficient for its payment.

The only question is, which of the two fiduciaries is responsible for its loss?

The negligence charged against Rush, trustee, is that instead of obeying the decree of the court which directed him to secure the trust fund when he invested it, by taking a deed of trust or mortgage on real estate, he secured the debt which was lost by having the debtors confess judgment upon their indebtedness, and that he not only secured it by judgment, when he ought to have secured it by deed of trust or mortgage, but directed the clerk of the court not to place the execution, which had been issued, in the hands of

the sheriff until further orders, and thus limited the lien of the judgment to 10 years, when but for his direction the lien would have been 20 years. It was further alleged in the bill that he represented to the general receiver, when he turned the trust fund over to him, that an execution had been issued upon the judgment, and such return made thereon as would make it a lien upon the debtor's land for 20 years. The executor of the trustee denies that there was any such representation, and there is no proof whatever to sustain it.

The trust fund was invested under the direction of the court, and in a pending cause to which all the parties in interest were parties. The trustee's account had been regularly settled, and these settlements reported to the court and confirmed. They showed that the \$1,300 loaned to Lightner had been secured by a judgment lien, and not by a deed of trust or mortgage, as the court had directed. The trustee continued to act as such from the time the judgment was confessed, in April, 1890, until October, 1893, when he turned over the trust fund, by order of the court, to its general receiver.

It is admitted, and, if it were not, it is clearly shown by the record, that the Lightner judgment was at the time it was turned over to the general receiver a well-secured debt, and so continued until the year 1890, more than six years afterwards; and that it was lost, not because the property upon which it was secured was not sufficient to pay it, but solely from allowing it to become barred by the statute of limitations.

It is true that if the execution which was issued upon it had gone into the hands of the proper officer (not the sheriff in this case, because he was the judgment debtor), and he had made a return thereon, the lien of the judgment would not have been barred when it was asserted against the estate of Lightner. Code 1873, p. 1167, § 12. But this was not done, nor is there any good reason why it should have been done. The confession of judgment was taken to secure a lien upon the debtor's lands. There was no intention nor desire to collect the debt, nor to acquire a lien upon the debtor's personal property. The lien of the judgment, without execution, would continue for 10 years from its date, and the execution which was issued authorized other executions to be issued upon the judgment at any time within 10 years from its return day, without the necessity of a scire facias. *Id.*; 4 Minor, Inst. (3d. Ed.) 985. And thus the lien of the judgment could have been kept alive as long as was necessary for the protection of the debt.

But granting that it was the duty of the trustee to have an execution issued, and such return made upon it as would have continued it in force for 20 years, under the facts of this case he could not be held responsible for the loss of the Lightner debt. His investments were inquired into by one of the commissioners of the court, and approved by it.

The commissioner's report showed to whom the trust fund had been loaned, and how it was secured. The debt in controversy was described as a "judgment vs. A. B. and C. A. Lightner, confessed \$1,300." After stating how each debt was secured, he adds that the "undersigned has examined all the foregoing investments made by Wm. T. Rush, trustee, and considers them safe and judicious. \* \* \* This report was confirmed without exceptions in the cause of "Churchman, Ex'r., v. Churchman," by a decree of the court, in which it stated that the "investments are approved as safe, solvent, and judicious." The trustee, Rush, lived until the year 1893, nearly 10 years afterwards, and no question was ever made as to the Lightner investment until after his death.

The Lightner debt was solvent when the trustee, under the direction of the court, turned it over to the general receiver of the court. It continued so for more than six years. It was approved by the court as a solvent, safe, and judicious investment, and was lost at a time when he had no control over it.

To hold his estate liable for its loss under these circumstances would make the trustee responsible for a loss resulting from an investment which the court had approved, and which was not lost by any subsequent mismanagement or want of prudence on his part. This we do not think can be done.

The defense relied upon by the general receiver why he should not be held responsible for the loss of the debt is that he believed, and had the right to believe, when the trust fund was turned over to him, that an execution had been issued upon the judgment, and such return made thereon as would continue the lien of the judgment for 20 years, and that he did not learn that such was not the fact until after the judgment was barred. The grounds upon which he contends that he had the right to believe that it was a 20-year investment are that among the papers which he received from Rush, trustee, was a copy of a bond executed on the 2d day of March, 1890, by Lightner, upon which was indorsed a memorandum in the trustee's handwriting that the original had been left with the clerk of the circuit court, in order that the Lightners might confess judgment thereon; that he knew that Rush, trustee, was a very prudent, safe, and unusually careful business man; that Rush had informed him that a judgment had been confessed upon the Lightner bond very shortly after its date, which was a lien upon the lands of the judgment debtors, and made the investment perfectly secure; that he further understood that the judgment was in all respects regular, and that the same was, when turned over to him, in full force and vigor, and was forthwith enforceable and collectible; that he is advised that it is generally under-

stood to be the constant and general practice of business men that, where the plaintiff does not desire to press the immediate collection of his claim, he causes execution to issue, and then within a year has the same returned to the clerk's office with a return thereon showing that the judgment is unsatisfied, and he is advised that common prudence dictates such a course in the case of an ordinary debt, and that where there is an investment of trust funds, for the security of which the judgment is intended to stand for a number of years, such a step is still more necessary and prudent; in fact, the demand for it is imperative; that he had called the attention of the court to the fact that, as he had not made the investments of the Steele trust fund, he was unwilling to assume the slightest responsibility as to their present or ultimate solvency, and the court's attention was called to this in connection with the commissioner's report in order to unite and call the special and careful scrutiny and attention of the commissioner and of the court to said investments, and they had pronounced them safe and judicious investments; and that the judgment debtor had promptly paid the interest upon it as it became due until his death, in 1891, without intimating that there was any trouble or irregularity about the judgment.

When the trust fund was turned over to the general receiver, it was his plain duty, within a reasonable time, to inform himself as to the time when the several investments would become barred by the statute of limitations, so that he could do what was necessary to protect the fund from loss from that source. The original evidence of the Lightner judgment was not delivered to him. That was in the clerk's office of the circuit court, of which he was the general receiver. There he could have ascertained with certainty whether an execution had been issued, and such return made thereon as would extend the lien of the judgment to 20 years. The reasons given by him for not making such an examination are entirely insufficient, in our opinion, to relieve him from responsibility for the loss of the debt. There was nothing in any or all of the facts relied on which showed that an execution had been issued and returned. Even if it were usual in such cases to have executions issued placed in the sheriff's hands, and returned so as to extend the life of the judgment to 20 years (which was not proved and may well be doubted), he had no right to rely upon such a practice when the means of knowledge were at hand, and the facts could be easily ascertained.

We are of opinion that the Lightner judgment was lost to the trust fund by the failure on the part of the general receiver to exercise that degree of care and skill in its management which prudent men ordinarily exercise in the management of their own af-

fairs, and that he should be required to make good the loss to the fund.

The decree of the circuit court holding the trustee responsible must therefore be reversed, and the cause remanded to the circuit court, with direction to it to charge the general receiver with the Lightner judgment, and to require him to make good its loss to the trust fund.

HARRISON, J., not sitting, being connected with case in the court below.

(99 Ga. 214)

#### HANYE v. CANDLER, Judge.

(Supreme Court of Georgia. Sept. 2, 1896.)

HOMICIDE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—BILL OF EXCEPTIONS—MANDAMUS.

1. Where a motion for a new trial is based exclusively on the ground of newly-discovered evidence, and it appears that the evidence relied on is cumulative only, and would not probably produce a different result, the motion should be denied.

2. In the present case the vital and controlling issue contested at the trial was whether or not the accused struck the deceased with a knife while both were in a standing position. The accused introduced evidence tending to show he did not so strike, and which, if the same had been believed by the jury, would have established the truth of the accused's contention upon this point. The newly-discovered evidence on which the extraordinary motion for a new trial is based is on the same line, and, though more direct, is nevertheless only cumulative of the evidence introduced by the accused upon the issue above mentioned; and, in the face of the established and undisputed physical facts of the case, it is not probable that this evidence, had it been introduced at the trial, would have led to a different verdict, or would do so upon another hearing.

3. The motion above referred to being without legal merit, the trial judge did not err in refusing to grant a rule nisi thereon; and, this being so, the supreme court will not grant a mandamus nisi, to the end that he may be compelled to certify a bill of exceptions in which the only error assigned is the refusal to grant such rule nisi.

(Syllabus by the Court.)

Application by Arthur Hanye for mandamus nisi to John S. Candler, district judge. Denied.

W. R. Hammond and Austin & Park, for movant.

PER CURIAM. Mandamus nisi denied.

(99 Ga. 323)

#### SOUTHERN RY. CO. v. DANTZLER.

(Supreme Court of Georgia. Aug. 24, 1896.)

APPEAL—BRIEF OF EVIDENCE—EXCEPTIONS TO INSTRUCTIONS.

1. What purports to be a copy of the brief of the oral evidence agreed to by counsel, and approved by the trial judge, appears in the record. Immediately following this are copies of certain documents, but there is nothing in the record which shows that the originals of these copies were introduced in evidence, or that any copies of such originals ever constituted parts of the brief of evidence as approved

by the judge. This court, therefore, cannot treat as portions of the transcript of the brief of evidence in this case the above-mentioned copies of documents, but is confined to the transcript of the brief of the oral evidence.

2. The supreme court cannot review a charge alleged to be erroneous when the exception thereto does not set forth, either directly or in substance, the language complained of, or, at least, enough of the same to convey a clear understanding of such charge. Accordingly, that ground of the present motion for a new trial which merely refers in general terms to a particular instruction, and undertakes to state the movant's conclusion as to its meaning and effect, without stating with reasonable certainty what the instruction was, does not come up to the legal requirement that an assignment of error shall be plainly and distinctly made. (a) The ground herein referred to is in the following words: "Because the court erred in giving directions to the jury as to how they should find the present value of a sum they might determine would be due him at some future time,—say, the end of his life; the error being that the minds of the jury were led to find first a sum that they should divide by 'the interest on one dollar for thirty-nine years added to the one dollar,' and that they should then decrease the result according to the decreased or decreasing capacity of the plaintiff to labor. This whole plan was calculated to mystify and mislead the minds of the jury as to how they should arrive at the amount of their verdict."

3. Omitting from consideration the numerous assignments of error which cannot be intelligently passed upon without referring to the documents alluded to in the first headnote, and also omitting from consideration the ground of the motion for a new trial above copied, the record discloses the commission of no error which would authorize the granting of a new trial; and, upon the merits, the evidence, though conflicting, warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action by James Dantzler against the Southern Railway Company to recover damages for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

J. B. Estes and Hubert Estes, for plaintiff in error. Van Bpps, Ladson & Leftwich and Howard Thompson, for defendant in error.

PER CURIAM. Judgment affirmed.

(90 Ga. 350)

#### PRITCHETT v. HORNBUCKLE.

(Supreme Court of Georgia. Aug. 24, 1896.)

##### APPEAL—SUFFICIENCY OF EVIDENCE.

The evidence, though entirely circumstantial, and not absolutely conclusive against the defendant, was sufficient to warrant the verdict for the plaintiff rendered in the magistrate's court; and this court, therefore, will not reverse a judgment of the superior court refusing to sustain a certiorari brought to set the verdict aside, on the ground that it was unsupported by the evidence.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by Lizzie Hornbuckle against Peter Pritchett. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

This was a suit for triple damages, under section 1445 of the Code, for killing a sow belonging to the plaintiff. The sole question made is whether the verdict in her favor is sufficiently supported, the evidence to connect defendant with the killing being circumstantial. He farmed on land south of a wagon road, and east of a creek, which runs north and south, and is crossed by the road running east and west. Plaintiff lived on a road leading from said wagon road towards the Shelman place. The sow had some large shoats, and they ran during the day about the ford of the creek where the wagon road crosses it. One night the shoats came home, and the sow did not come. The next day, Hornbuckle and E. B. Holcombe went to hunt for her, and found her dead in a ditch on the Shelman place, in a field cultivated by Forrester, about half a mile down the creek, and north of the wagon road, on the east side of the creek. They first saw her tracks where she came out of the creek a quarter of a mile or more north of the wagon road. They saw where she had lain down on some cane, and there saw blood and flies. From there they followed the tracks a quarter of a mile down the creek in Forrester's field, to where they found her dead. She had been shot, and Holcombe took a number of shot from her. They found no tracks leading down the creek from the wagon road to where they first saw she had lain on the cane, which was a little over a quarter of a mile down the creek, and north of the wagon road. Hornbuckle then went to defendant, and asked him if he did not shoot and kill the sow, and he denied it. He was asked if he had not shot his gun the day before, and he said he had, claiming that he had shot at a hawk. He was asked what kind of shot he used, and from whom he bought them, and said he did not know the number of the shot, and bought shot sometimes from Puckett & Hammond, at Stilesboro, and sometimes at Cartersville. Hornbuckle asked him to go to his house and show his shot; and he said he did not have time, as he was on his way to his work. Hornbuckle and Forrester examined the ground between the defendant's garden and the creek, above the foot log, up to an old road leading from defendant's stable down to the creek, which road was used by him in watering his stock. They found a good deal of blood scattered in this road, and saw blood in one place between the road and the creek, about five or six feet from the creek. Where this blood was found were hog tracks leading from the road towards the creek. Upon being questioned about this, defendant said his mule became sick with colic, and he bled it freely in the mouth. He had frequently done this. He told Hornbuckle to go and examine the mule, the bridle, and the stable, and see whether or not he was telling the truth. Hornbuckle did not make the examination, though he was near the stable. Forrester did not think a mule could have gone to

the spot where they found blood, about half-way between the old road and the creek, from which spot hog tracks led towards the creek, as he had to stoop to get in there. This spot was about 25 or 30 feet from the road. The blood and tracks were about 40 or 50 yards above and south of the foot log. Forrester did not kill the hog. Dock Holcombe had a crop of corn on the east side of the creek, south of Forrester's crop, and north of the wagon road. Wilson Glenn testified that the sow and pigs were at his house on the morning of the day she was said to have been shot, and he made his boy Sam drive them down to the ford of the creek early that morning. He lived about a quarter of a mile from the creek, on the other side of it from defendant. Before that time the sow had broken into Glenn's crib, and eaten a good deal of his corn. He lived north of the wagon road, but had a crop south of it. He went to the creek a short time after his boy drove the hogs there, and saw the pigs at the ford, but did not see the sow. Sam Glenn testified that he drove the sow and pigs to the ford of the creek, and, when they got there, the sow went under the foot log, and went around beyond defendant's garden, but the pigs did not follow. He then went back home, and to school. E. R. Holcombe testified that he heard a gun fired shortly before he last saw the sow. From the report, the gun was fired in the direction and near defendant's house. Witness did not wound, kill, or bruise her. Defendant told him, the same day the hog was shot, that Arthur Davis learned him how to stop hogs from bothering him. He said he generally gave them the cholera, and they went, and nobody knew where. Forrester cultivated the east side of the creek, and Hammond the west side, where witness first discovered the tracks of the hog coming out of the creek, a quarter of a mile below where the wagon road crosses the creek. Witness cultivated the land on the west side of the creek, and his son F. E. Holcombe cultivated the land on the east side, between where he first saw the hog track and the wagon road. Hammond cultivated the land on the other side of the creek. These lands were planted in corn and cotton. A. F. Holcombe testified: "The last time I saw the sow, she was lying down by the fence about 100 yards from our house. I heard a gun fired shortly before I last saw the sow. From the sound of the gun, it was right above the foot log up the creek. It was fired near defendant's house. It was right above his house. I saw the smoke. Never saw the person who fired the gun at the time it fired. Immediately after it fired, I saw a hog. It was right at the foot log when I first saw it. It went right down to a spring box below defendant's house, and came out of the creek there. When I first saw the sow, she was close to where I heard the gun fire. It was on land occupied by defendant. I saw him immediately after the firing. He was going into his

house. He had a gun on his shoulder. When the gun fired, I was about 200 yards from the wagon road. We were below the ford where the wagon road crosses the creek. The hog was right at the foot log when I first saw it after I heard the gun fire. It jumped into the creek, on the opposite side of the creek from me, up at the water gate above the wagon-road crossing. It walked out of the creek at the spring on the opposite side of the creek from me. It went down to the other fence, rooted out a place, and lay down, after it came out of the creek at the spring. It lay down at the fence across the road below the spring, and on the opposite side of the creek from where I was. I never saw it any more after that. When I first saw it, it was about 225 yards from me. The closest it got to me was about 100 yards. This was when it lay down. I did swear on former trials that the last time I saw the hog was when it jumped into the creek, above the wagon road, and went out of the creek, near the spring house, and then down across the wagon road to the fence inclosing the field, and then lay down." Defendant testified, denying that he shot, killed, or in any way injured the sow, or that he ever saw her in his inclosure, etc. The value of the animal was proved.

J. B. Conyers, for plaintiff in error. A. W. Fitts and A. S. Johnson, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 12)

### PICKETT v. STATE.

(Supreme Court of Georgia. March 16, 1896.)

ARREST WITHOUT WARRANT—HOMICIDE—JUSTIFICATION—INSTRUCTIONS.

1. An arresting officer has no authority, without a warrant, upon mere information that another is carrying a concealed pistol, to arrest the latter and search his person for the purpose of ascertaining whether or not he is in fact violating the law prohibiting carrying concealed weapons. Even if he was so doing, the offense was not, in legal contemplation, committed in the presence of the officer; and such an arrest and search are unauthorized by law, and are, within the meaning of the constitution, unreasonable.

2. Where the person thus sought to be arrested fired at the officer with a pistol, was indicted for assault with intent to murder, and upon the trial testimony was introduced to the effect that both parties fired, though it was an issue of fact as to who fired first, it was error to charge, "If you find it would not be a case of murder, had death ensued, you will find [the accused] guilty of shooting at another," such charge being erroneous, in that it omitted altogether any question of justification on the part of the accused.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Dan Pickett was convicted of an assault with intent to commit murder, and brings error. Reversed.

J. B. Conyers and Montz & Conyers, for plaintiff in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

**LUMPKIN, J.** 1. While, under section 4723 of the Code, an officer may, without a warrant, make an arrest for an offense committed in his presence, he has no authority, upon bare suspicion, or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he is carrying a concealed weapon in violation of law. The constitution of this state expressly declares, in the bill of rights, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." Code, § 5008. If any search is unreasonable, and obnoxious to our fundamental law, it is one of the kind with which we are now dealing. Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal contemplation, committed in the presence of the officer; and the latter violated a sacred constitutional right of the citizen, in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality.

2. It appears from the evidence that shots were exchanged between the officer and the accused, who was the person sought to be arrested and subjected to search. The latter was indicted and tried for assault with intent to murder. It was a contested issue of fact as to who fired the first shot. The court, in its charge, gave the instruction quoted in the second headnote, the error of which is obvious, for the reason that it eliminated altogether from consideration any question of justification on the part of the accused. The court, by this charge, assumed that the accused was inevitably guilty of some offense, whereas, under the evidence as it appears in the record, this was a matter for the jury to determine. Judgment reversed.

(99 Ga. 20)

#### DYER v. STATE.

(Supreme Court of Georgia. March 30, 1896.)

**BREACH OF PEACE—OPPROBRIOUS WORDS—JUSTIFICATION—INDICTMENT AND PROOF.**

1. The mere fact that opprobrious words, tending to cause a breach of the peace, spoken to another, are themselves true, is not a legal provocation for their use. In other words, the fact that a man is a liar or a thief is not of itself alone a legal justification for telling him so.

2. On a trial for a violation of section 4372 of the Code by the use of such words, the court ought not to charge the jury that any provocation would justify their use, the question of the sufficiency of the provocation being one for the jury.

3. An indictment for a violation of this section, so far as relates to proving the use of the words charged, is sustained if the evidence shows that the accused used the language set forth in the indictment, or its substance, or sub-

stantially similar language; that is, words having the same effect and meaning. It is certainly enough if some of the words be proved precisely as laid, and the words thus proved, when used without provocation, amount to an indictable offense under this section.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Joel H. Dyer was convicted of breaking the peace, and brings error. Affirmed.

J. W. Harris, Jr., for plaintiff in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

**SIMMONS, C. J.** The plaintiff in error was tried upon a presentment charging him with using the following opprobrious words and abusive language, tending to cause a breach of the peace, to and of Monroe Gillespie, and in his presence: "You swore a God damned infernal lie; God damn you." The case came to this court upon exceptions to the overruling of his motion for a new trial.

1. It is complained that the trial judge erred in refusing to charge, as requested by the accused: "If Gillespie swore to a lie in a case against the defendant, you can consider that fact, and determine whether that was provocation for telling Gillespie that he had sworn to a lie; and, if you find that that was provocation for defendant's words, then you cannot convict this defendant." The court was right in refusing this request. The mere fact that opprobrious words, tending to cause a breach of the peace, are themselves true, is not a legal provocation for their use. In other words, the fact that a man is a liar or a thief is not of itself alone a legal justification for telling him so. The gist of the offense is the use of language to or of another, in his presence, which is calculated to cause a breach of the peace; and, if it is language of this character, it makes no difference whether it is true or false. Code, § 4372.

2. It is also complained that the court erred in refusing to charge: "Any provocation shown will justify opprobrious words. \* \* \* If there was any provocation, you must find [the accused] not guilty." The court did not err in refusing to give this in charge. It is not the law that any provocation will justify the use of opprobrious words. A provocation may exist, and yet may not be a sufficient provocation. It may be very slight, and altogether inadequate to justify the use of language of an extremely insulting and opprobrious character. There must be sufficient provocation, and whether it is sufficient or not is a question for the jury. To instruct them that any provocation is a justification for the use of the words is to take the question from them. See *Meaders v. State*, 22 S. E. 527, 96 Ga. 299.

3. The opprobrious words set out in the indictment were: "You swore a God damned infernal lie; God damn you." The person of whom these words were alleged to have been spoken testified: "Defendant said I had

sworn a God damned infernal lie in court that day. He said: 'You swore a damned lie,—a God damned infernal lie.' The court charged: "The state is not obliged in this case to prove the exact words alleged in the bill of indictment. It is sufficient if the testimony shows that the defendant used the language charged, or the substance of the language charged, or substantially similar words to those charged; that is, the substance of the words charged." The court also charged: "The state must prove enough of the words charged to amount to opprobrious words without provocation." It was complained that this was error, because the accused was not put on notice of any other words than those alleged in the indictment, and was not prepared to meet proof touching similar expressions. There is no merit in this exception. The language in proof was the language set out in the indictment, except that the indictment charged the use of the additional words, "God damn you." The accused was therefore put on notice of the language actually proven. The rule on this subject is stated in Wharton's Criminal Pleading and Practice (section 203) as follows: "Where words are of the gist of the offense, \* \* \* the words themselves must be laid, but only the substance need be proved. \* \* \* If some of the words be proved as laid, and the words so proved amount to an indictable offense, it will be sufficient." And in Clark's Criminal Procedure (page 334) it is said: "By the weight of authority, where spoken words are alleged in the indictment, as in an indictment for perjury, slander, profane cursing, \* \* \* all that is necessary is to prove the words substantially as alleged, and to prove so much of them as is sufficient to make out the offense. A variance in a word, or in several words, where the sense is not in any degree changed, will not be fatal." The evidence warranted the verdict, and there was no error in denying a new trial. Judgment affirmed.

(99 Ga. 34)

#### WRYE v. STATE.

(Supreme Court of Georgia. March 30, 1896.)

#### HOMICIDE—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

1. Where a homicide was committed with a knife, under circumstances which would have made a case of voluntary manslaughter if it had appeared either that there was an actual intention to kill, or that the weapon, considered in connection with the manner in which it was used, was of such character as that the law would conclusively imply the existence of such intention, yet where there was no evidence as to the size, length, or kind of knife used, other than what could be inferred from the nature of the wounds inflicted, and these were not such as to show that the knife must necessarily have been a deadly weapon, and where, under all the evidence and the statement of the accused, it was an open question whether or not the killing was voluntary or involuntary, the law of involuntary manslaughter should have been given in charge to the jury, especially where an appropriate request to this effect

was presented in writing by counsel for the accused; and the failure to do so is cause for a new trial.

2. Except as above indicated, the case, as presented by the record, discloses no cause for reversing the judgment of the trial court.

(Syllabus by the Court.)

Error from superior court, Tattnall county; R. L. Gamble, Judge.

W. W. Wrye was convicted of homicide, and brings error. Reversed.

Garrard, Meldrim & Newman, Lee & Giles, and Hines & Hale, for plaintiff in error. D. B. Evans, Jr., Sol. Gen., and J. A. Anderson, for the State.

ATKINSON, J. The defendant, Wrye, was indicted for the offense of murder. Upon the trial the evidence showed that, as he was passing along near the place where the deceased was at work, the latter came out, advanced towards the accused, and as he reached him they became instantly engaged in an angry controversy, resulting in a personal conflict, in which the deceased was so severely stabbed that he died within a few days from the effects of the wounds inflicted. The wounds were inflicted with a knife, the size and character of which does not appear. Nor does the description given of the wounds indicate that they must have been inflicted with a weapon likely to produce death. The wounds inflicted were described as follows: "The cause of his death was a stab wound in the left side, inflicted with some sharp instrument, just back of the left breast, a little below a line drawn across the breast. That is the wound that he died from. His hand was also cut pretty bad,—a flesh cut through the soft part, to the best of my recollection. I think it was the left hand, but I will not be positive. It struck the hand on the inside, and passed through the back, cutting the skin in two places. The sharp instrument then penetrated the hand on the inside, just leaving small cuts through the skin on the back of the hand." Upon the trial of the case the defendant stated, in substance, that the deceased, without provocation, made a violent attack upon him upon the public highway, and, being much older and feebler than the deceased, he was unable otherwise to resist the violence of the attack, and in order to escape from injury himself, and without any intention to kill the deceased, he inflicted the wounds described. Upon this state of the testimony, the court was requested, in writing, to charge the jury the law of involuntary manslaughter. This request was refused, and of this refusal complaint is made in this writ of error. We are of the opinion that the court should have given in charge the law of involuntary manslaughter. If the theory of the defendant were true, that he was violently set upon upon the public highway by the deceased, and, though his life were not imperiled, he drew a weapon which does not appear to

have been one likely to produce death, or to have been used in such a manner as ordinarily to have produced such a result, and, without any intent to take the life of the deceased, he, under such circumstances, inflicted the wound which resulted in the death of the deceased, it cannot, in any sense, be treated other than as an involuntary homicide. If he had used a weapon of such a character as would likely produce death, and used it in such a manner as was calculated to produce that result, and death followed, the law would have presumed the intent to kill, and the theory of involuntary manslaughter would have been eliminated. But, where both the felonious design and the use of a deadly weapon are wanting, a jury might well find that the killing was unintentional, though the accused intended to strike the blow which produced that result. We are clear that, under the circumstances certified to us in the record in this case, the circuit judge erred in withholding from the jury the determination of the question as to whether the homicide was involuntary, and for this reason the judgment is reversed.

(98 Ga. 523)

### ISON v. MAYOR, ETC., OF GRIFFIN.

(Supreme Court of Georgia. June 18, 1896.)

#### LIQUOR LICENSE — REVOCATION — ACTION FOR DAMAGES.

1. Inasmuch as a license to sell spirituous liquors is neither a contract nor a property right in the licensee, but a mere permit to do what would otherwise be an offense against the general law, it is, when granted by a municipal corporation, subject at all times to the police powers of that corporation; and the latter, in the absence of any charter restriction upon its authority in this respect, may, in the exercise of those powers, revoke the license at any time.

2. Every person who obtains such a license accepts it under the conditions above expressed, is therefore chargeable with knowledge that it is liable to be revoked, and consequently cannot maintain against the municipality an action for damages occasioned by a revocation, even when the licensee has done no overt or unlawful act which would afford cause for revocation.

(Syllabus by the Court.)

Error from superior court, Spalding county; M. W. Beck, Judge.

Action by R. Z. Ison against the mayor and council of Griffin. From a judgment for defendants, plaintiff brings error. Affirmed.

John J. Hunt and Dismude & Mills, for plaintiff in error. Hammond & Cleveland, for defendants in error.

LUMPKIN, J. The mayor and council of Griffin granted Ison a license to sell spirituous liquors. He proceeded to erect a building in which to sell the same, purchased fixtures for use therein, bought a stock of liquors, engaged help, and otherwise incurred expense in preparing to carry on business under his license. Thereupon the city authorities summarily revoked the license, and he

brought his action against the municipal corporation, alleging he had sustained damages of various kinds, the nature of which will be readily inferred from the foregoing brief statement of the facts. The case turns upon the question whether or not such an action is maintainable. We have reached the conclusion that it is not. In *Brown v. State*, 82 Ga. 224, 7 S. E. 915, this court held that such a license was not a contract by the state, county, or city with the licensee, but simply a permit to do business under the license, which was revocable at any time. To the same effect, see *Sprayberry v. City of Atlanta*, 87 Ga. 120, 13 S. E. 197, in which it was further ruled that the granting of a license by a municipal corporation to sell liquor was an exercise of police power. The identical question presented by the case at bar was perhaps involved in that of *Whaley v. City of Columbus*, 89 Ga. 781, 15 S. E. 694, but not decided, for the reason that the plaintiff's declaration did not set forth with sufficient clearness and distinctness the cause of action intended to be stated. Our view of the nature of a liquor license is strongly supported by numerous and most respectable authorities. "The doctrine is too well established to be longer called in question, that a license of this character, whether revocable in terms or not, is neither a contract nor property, in any constitutional sense, but is subject at all times to the police powers of the state government." *La Croix v. Commissioners*, 50 Conn. 328, citing *Board v. Barrie*, 34 N. Y. 667, in which *Wright, J.*, observed: "These licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights, protected on general principles, and by the constitution of the United States, against any subsequent legislation; nor are they property, in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offense against the general law. They form a portion of the general police system of the state, and are issued in the exercise of its police powers, and are subject to the direction of the state government, which may modify, revoke, or continue them as it may deem fit." *Black*, in his work on *Intoxicating Liquors* (section 189), lays down the same doctrine, and says, "Such revocation cannot be pronounced unconstitutional, either as an impairment of contract obligations, or as unlawfully divesting persons of their property or rights." See, also, sections 127 and 128. In the latter section is cited the case of *State v. Baker*, 32 Mo. App. 98, holding that a liquor license was so far within the protection of the law, and to that extent equivalent to a contract right, that it could not be abrogated without sufficient cause; the author, however, quite correctly adding, "But this is not in accordance with the weight of authority." In *Horr & B. Mun. Ord. § 267*, the nature and revocability

of such licenses is stated in substantially the same terms as above laid down.

When he accepted his license from the corporate authorities of Griffin, Ison was chargeable with knowledge that it was revocable at any time, irrespective of the question whether or not he did any overt or unlawful act which would of itself afford cause for revocation. This being so, he took it subject to the city's right to revoke it at pleasure, and therefore when it was revoked no legal wrong was done him. He had no contractual rights as against the city, and therefore it cannot be in any sense liable to him as for a breach of contract. He had no property right in this license, and therefore depriving him of it was not a tort. Upon what basis, then, can his action for damages stand? It must not be overlooked that under the general law the sale of liquors without a license is not a lawful business. No one, consequently, has a right to engage in this business without a license, and the possession of one simply gives to its holder a privilege to which he would not otherwise be entitled. How far the doctrine of this case would be applicable with reference to a useful, and *per se* perfectly lawful, occupation,—such, for instance, as the selling of bread,—is not now for determination.

There is another view of the matter which may add some strength to the conclusion we have reached, *viz.* that, in granting and revoking liquor licenses, municipal corporations are exercising governmental powers, for an abuse of which by its officers and agents the town or city cannot be held responsible in damages. In this connection, see *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, and *Vogt v. Mayor, etc.*, 4 Am. & Eng. Corp. Cas. 329. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 22)

#### ARCHIE v. STATE.

(Supreme Court of Georgia. March 30, 1896.)

CERTIORARI—WAIVER—JURISDICTION OF SUPERIOR COURT—NEW TRIAL.

1. Although the city court of Cartersville may have the power to grant new trials, it is, nevertheless, an inferior judicatory, whose final judgments may be reviewed by the superior court upon certiorari; and this remedy may be invoked without first moving for a new trial in the city court.

2. The fact that, in a given case tried in the city court mentioned, a motion for a new trial was made, will not cut off the movant's right to take the case up by certiorari, if he voluntarily dismisses such motion, and applies for the writ of certiorari within the time prescribed by the statute.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Dave Archie was convicted of a misdemeanor in the city court, and brought certiorari to the superior court. From a judgment

dismissing the writ, he brings error. Reversed.

J. W. Harris, Jr., for plaintiff in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

LUMPKIN, J. The plaintiff in error, upon a trial before a jury in the city court of Cartersville, was convicted of a misdemeanor. He filed a motion for a new trial; but, before the same was passed upon, voluntarily dismissed it, and sued out a writ of certiorari to the superior court. For answer to the writ of certiorari, the judge of the city court stated, in effect, that the accused, having elected to move for a new trial, was bound by his election, and, after voluntarily abandoning the remedy he had chosen, could not elect to avail himself of another; and, further, that no writ of certiorari would lie to a verdict and judgment in the city court, for the reason that a person convicted therein might move for a new trial, to the judgment on which he could then either sue out a writ of certiorari, or assign error by bill of exceptions to the supreme court, but that the jurisdiction of the city court could not be divested until its powers for the correction of errors were exhausted; and, for the reasons thus set forth, no further answer was made. The certiorari was finally dismissed, on the ground that "certiorari does not lie from the verdict and judgment of the city court, where no motion for a new trial has been made"; the judge of the superior court evidently treating the dismissed motion for a new trial as no motion at all, which was undoubtedly the correct view to take of that matter.

If the city court had no power to grant a new trial, certiorari was undoubtedly the proper remedy. *Daniel v. State*, 55 Ga. 222. But, on the assumption that this court has authority to grant new trials, it is, nevertheless, an inferior judicatory, whose final judgments may be reviewed by the superior court upon certiorari. *Hayden v. State*, 69 Ga. 731; *Maxwell v. Tumlin*, 79 Ga. 573, 4 S. E. 853. This being settled, the remaining question is: could the remedy of certiorari be invoked without first moving for a new trial in the city court? This question is answered affirmatively by the principle announced in *Roach v. Sulter*, 54 Ga. 458. It was there held that even after bringing a bill of exceptions to this court from the city court of Savannah, which was dismissed, the complaining party might still file a certiorari to the superior court, if applied for within three months from the dismissal here. The right of certiorari being a constitutional one, the privilege of moving for a new trial is merely cumulative; and a complaining party could avail himself of that in the first instance, or not, as he chose. Certainly, the mere filing of a motion for a new trial could not cut off the plaintiff in error from his right of certiorari, because, that motion having been voluntarily dismissed, it was, as has already been

remarked, properly to be considered as no motion at all. Unquestionably, the dismissal of that motion rendered the judgment of the city court final, and terminated the jurisdiction which that court had over the case. A writ of certiorari having been applied for within the time prescribed by the statute, it ought to have been entertained, and the judge of the city court required to make a full answer. Judgment reversed.

(99 Ga. 56)

## FOSTER v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

## STATUTES—AMENDMENT—PROFANE LANGUAGE—WHAT CONSTITUTES.

1. The act of December 29, 1890, to amend section 4372 of the Code, is not violative of the constitutional provision which forbids the amendment of a section of the Code by mere reference to its title.

2. The word "damned," when used in a sense "importing an imprecation of future divine vengeance," is profane.

3. It follows that the words, "Arrest and be damned!" spoken to a female, and used in a manifestly irreverent sense, relatively to the Deity, are indictable, under the above-cited section as amended.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Jones, Judge.

Clem Foster was convicted of using profane language, and brings error. Affirmed.

W. K. Fielder, J. A. Blance, and C. E. Carpenter, for plaintiff in error. W. T. Roberts, Sol. Gen., for the State.

LUMPKIN, J. The act of December 29, 1890 (Acts 1890-91, vol. 1, p. 83), amending section 4372 of the Code, does not merely refer to the number of the section, but sufficiently describes it, and plainly enough sets forth the alteration to be made. A question very similar to that which is now presented was dealt with by this court in the case of Railroad Co. v. George, 92 Ga. 760, 19 S. E. 813, and nothing as to this particular subject need be added to what was said by the writer in the opinion delivered in that case.

2-3. The act in question amends the section so as to make it a misdemeanor to use profane language in the presence of a female. There was evidence to show that the accused in the present case used to a female the words, "Arrest and be damned!" Was this language profane? If the accused had said, "Arrest and be God damned!" he surely would have been guilty of using profane language. And, when the word "damned" is used in the same sense as "God damned," we think the omission of the word "God" is immaterial; for, if the word "damned" is used in a sense "importing an imprecation of future divine vengeance," it is profane, whether the name of the Deity be called or not. 2 Am. & Eng. Enc. Law, 424 and note. See, also, Holcomb v. Cornish, 8 Conn. 374. We think it manifest that the

words spoken by the accused were used in an irreverent sense relatively to the Almighty. They amounted to the same thing as taking the name of God in vain in a way calculated to impair the respect and reverence due to Him as the Creator and Judge of the world; and this is the very thing which, in our opinion, the statute intended to prohibit in the presence of a female. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 52)

## KING v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

## BURGLARY—DWELLING HOUSE—INSTRUCTIONS—STATEMENT OF ACCUSED—WAIVER.

1. An out house contiguous to or within the curtilage or protection of a dwelling house, being part of the same so far, at least, as relates to the law of burglary, there was no error, upon the trial of an indictment charging the burglary of a dwelling house, in stating the contention of the state as follows: "In this particular case the state charges that the accused did enter the chicken house, the same being within the curtilage or protection of the dwelling house of the prosecutor;" the evidence showing that the house actually broken was, in fact, a chicken house, in the same inclosure with the prosecutor's dwelling house, and under its protection.

2. When, on a criminal trial, the evidence for both the state and the accused had been closed, and the latter thereupon declined to make a statement at that stage of the proceedings, not, however, waiving his right to do so should the state introduce further evidence, it was error, after the state had introduced additional evidence in rebuttal of that offered by the accused, to refuse to allow him to then make a statement.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Charles King was convicted of burglary, and brings error. Reversed.

Blandford & Grimes, for plaintiff in error. J. H. Worrill and S. P. Gilbert, Sol. Gen., for the State.

LUMPKIN, J. 1. Section 4386 of the Code, which defines the offense of burglary, declares that "all out houses contiguous to or within the curtilage or protection of the mansion or dwelling house shall be considered as parts of the same." In describing an out building, "which in law is parcel of the dwelling house, the pleader has his election to employ simply the term 'dwelling house,' or name the out building, and add 'part of the dwelling house.'" 2 Bish. Cr. Proc. § 185. See, also, Bish. St. Crimes (2d Ed.) § 278; 2 Russ. Crimes (6th Am. Ed.) 15. It follows that, where a chicken house within the curtilage or protection of the dwelling house was burglariously broken and entered, the indictment did not improperly allege the offense to be the burglary of the dwelling house itself. And where, on the trial of such an indictment, the evidence showed that the house actually bro-

ken was a chicken house, in the same inclosure with and under the protection of the prosecutor's dwelling house, there was no error in instructing the jury that the state charged the accused did enter the chicken house. Though this instruction was not strictly accurate, it covered the real substance of the charge laid in the indictment, and could not have resulted in any injury to the accused.

2. The right which section 4637 of the Code gives to the accused in any criminal case to make a statement to the court and jury is clear and unequivocal. When the evidence for the state has been closed, the accused may introduce evidence, and make his statement, or he may decline to do either. He may, when the evidence on both sides has been closed, deem it unnecessary to make a statement, and may so inform the court; but, if the state thereafter proceeds to introduce additional evidence in rebuttal to that which the accused has offered, the whole aspect of the case may be changed, and the accused may very much desire to meet the emergency thus brought about by submitting his statement. If so, we hold that he cannot be denied this privilege. His previous announcement that he would not insist upon his right to make a statement must be understood as having reference to the status of the case at that time. The new evidence for the state may change the whole complexion of the case, and render a statement from the accused necessary and proper, although it may not, in the opinion of the accused or his counsel, have been so before. It would violate both the letter and the spirit of the statute to deprive the accused of the substantial right of meeting, by a statement, matter thus brought against him by the state, upon which he had not been heard. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 25)

#### SMALLS v. STATE.

(Supreme Court of Georgia. April 6, 1896.)

HOMICIDE—RESISTANCE OF ARREST—JUSTIFICATION  
—EVIDENCE—EXCEPTIONS—INSTRUCTIONS.

1. The fact that a fugitive from justice is in a state of armed hostility to, and in apparent defiance of, the lawful authorities, may be proved upon his trial for an alleged murder of one authorized to arrest him, though this fact was unknown to the deceased, if upon such trial it was a vitally important issue whether the accused was resisting a lawful attempt to arrest him, or in good faith making a defense against an unlawful assault upon himself. The evidence in question could not, of course, illustrate the conduct of the deceased, but was relevant as a fact or circumstance throwing light upon the conduct and motives of the accused at the time of the homicide.

2. Where evidence, partly competent and partly incompetent, was offered and objected to as a whole, the illegal portion not being specified nor objected to separately, admitting all of such evidence affords no legal cause of complaint to the objecting party.

3. The court is not bound to give in charge requests which, though abstractly correct, are not fairly adjusted to the case on trial.

4. A fugitive from justice, accused of a felony, and knowing that he is liable to be arrested on that charge, may nevertheless resist with such force as may be necessary an unlawful attempt to commit a crime upon him, whether such an attempt is made by an officer armed with a warrant for his arrest, or by a private citizen under circumstances authorizing him to make the arrest; and this is true although the fugitive may have known he was liable to be arrested by the person making the attempt.

5. It is one thing to resist a lawful arrest, and quite a different thing to resist an assault or other crime upon the person of the party liable to be arrested; and the latter cannot be deprived of his right of self-defense, either because the other party could lawfully have arrested him, or because he knew that this was so.

6. In view of the evidence introduced for the defense in the present case, the accused was entitled to have the principles of law above announced given in charge to the jury. As this was not done, and as the charges complained of in the motion for a new trial in effect excluded these principles from consideration by the jury, there must be a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Abram Smalls was convicted of homicide, and brings error. Reversed.

O. N. West and T. P. Ravenel, for plaintiff in error. W. W. Fraser, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, J. 1. On the trial of the accused for the crime of murder, the court, over objection of counsel, admitted certain testimony tending to show that immediately before the homicide the accused, being a fugitive from justice, charged with a felony, was out in a field, heavily armed, and by his conduct and movements manifesting an apparent defiance of the lawful authorities. This evidence consisted of the statements of a witness giving in detail the conduct and movements of the accused, indicating that he was on the alert, evidently watching out for the officers of the law, and fully prepared and determined to resist any attempt to arrest him. The objection to this evidence was that these facts were not communicated to the deceased, who was one of a party who went out to arrest the accused. The vitally controlling issue in the case was whether, in committing the homicide, the accused was resisting a lawful attempt to arrest him, or in good faith making a defense against an unlawful assault upon himself, or what he honestly believed was such an assault. The motives of the accused were directly in issue, and any evidence fairly illustrating or throwing light upon the same was competent, as being explanatory of his conduct under the surrounding circumstances. While the evidence in question obviously could not illustrate the conduct of the deceased, we can see how it might very properly and materially aid the jury in determining the purpose with which the accused fired the fatal

shot. The question, in its essence, being as to which party in the encounter was the assailant, this evidence was certainly admissible to show acts or conduct on the part of the accused indicating that he entertained a previous intention to make the attack. Proof of the accused's attitude of hostility, whether consisting of preparations or declarations, was pertinent, as tending to show that he meditated an unlawful act of violence. In this connection, see *Whart. Cr. Ev.* (9th Ed.) § 757, and notes. The precise question there discussed is in regard to the admissibility of threats made by the deceased, but the reasoning is applicable to the present question.

2. The rule announced in the second headnote was fully discussed by the writer in the recent case of *Harris v. Lumber Co.*, 25 S. E. 519.

3-6. In submitting to the jury the controlling issue in the case, the trial judge—probably inadvertently—fell into the error of using language capable of the interpretation that, if the accused actually knew that the persons who approached him were authorized to effect his arrest, he had no right to make any resistance, even though he might reasonably apprehend from their demonstrations that their real purpose was not to make an arrest, but to commit upon him an unlawful act of violence. It must be borne in mind that the theory of the defense was that there was no honest intention to arrest, and that the accused shot to prevent what he regarded as a murderous attack upon himself. The charge, in effect, ignored this defense by making the right of resistance on the part of the accused depend upon whether he knew, or did not know, that the party of which the deceased was a member was authorized to take him into custody. The law upon this question is stated about as accurately as we can hope to put it in the fourth and fifth headnotes.

There were numerous requests to charge, the purpose of which was to have the theory relied on by the defense correctly submitted to the jury. In the main, these requests embodied propositions of law which were abstractly correct; but we do not think the court was bound to give them in charge, for the reason that, in some respects, they were not fairly adjusted to the case as presented by the evidence. They assumed that the firing by the accused which resulted in the homicide was done immediately upon the approach of the deceased's party, whereas the evidence on both sides shows that it happened some time after the deceased first appeared upon the scene, and after various changes in the relative positions of the parties had taken place. Even if the persons who sought to capture the accused were in fact the aggressors in the first instance, and by their violent demonstrations put the accused in reasonable fear that a felonious attack upon him was meditated, and there-

upon there was a mutual encounter, during which each party used deadly weapons, still, if a running fight ensued, which continued until the deceased was slain by the accused, under the peculiar facts of this case it would not necessarily follow that the homicide was justifiable. It was so only if a legal necessity to kill existed up to that time; otherwise the homicide would be voluntary manslaughter, or even murder, if deliberately done, maliciously, and in a spirit of revenge. Of course, if the accused was the original aggressor, intending to kill in order to prevent his arrest, the homicide was murder, pure and simple.

Thus far we have dealt with the persons forming the party to which the deceased belonged without reference to their official character. It appears that some of them were policemen of the city of Savannah, the deceased being himself such an officer. Irrespective of their authority, legally, to make arrests outside the corporate limits of the city, the fact that they wore the uniforms of officers was a circumstance which the jury might properly consider in reaching their determination as to the good faith of the accused relatively to his contention that he honestly believed the object of these persons was to do him violence, rather than to peaceably arrest him. Judgment reversed.

(99 Ga. 197)

#### KEATON v. STATE.

(Supreme Court of Georgia. April 27, 1896.)

HOMICIDE — JUSTIFICATION — INSTRUCTIONS — EVIDENCE — STATEMENT OF ACCUSED.

1. In charging concerning that part of the law of self-defense which makes it justifiable to kill another who manifestly intends or endeavors to commit a felony on the slayer, the court should not, in effect, instruct the jury that, if the homicide in question was committed in resistance to a felonious assault which was actually being made upon the accused, it was essential to his justification that it should also appear that the killing was not done in a spirit of revenge. It is proper, in charging as to the law of reasonable fears, to instruct the jury that, where one seeks to justify a homicide upon the ground that it was committed in consequence of such fears, it must appear "that the party killing really acted under the influence of those fears, and not in a spirit of revenge." Instructions as to these two distinct branches of the law of self-defense should not, however, be so given as to confuse the one with the other, or make a qualification appropriate only to the latter apply to the former.

2. Under the facts of this case, a charge that "if there should have been an interval, between the assault or provocation given and the homicide, sufficient for the voice of reason and humanity to be heard, the killing will be attributed to deliberate revenge, and be punished as murder," though, in the abstract, a correct proposition of law, was not, without some appropriate qualification, fairly adjusted to the issues presented.

3. That the court, after properly charging the law with reference to the statement of the accused, added the following words, "It is your province to give such weight to the evidence and statement as you see proper, bearing in mind that defendant's statement is not under oath.

and sworn evidence is under oath," is not cause for a new trial; it appearing that this language was immediately followed by the additional instruction, "This distinction, however, will not control you in the consideration of the evidence or statement, they being entirely within your province."

4. The knowledge or ignorance of the accused as to the whereabouts of the deceased at a particular moment being a matter of vital importance, it was error to reject evidence tending to show that the position of the accused in a room was such that he did not have a good opportunity for observing where the deceased actually was at the moment in question.

5. It is not now necessary to rule upon the various questions of practice or other matters to which many of the grounds of the motion for a new trial relate, they being such as will not probably arise at the next hearing.

(Syllabus by the Court.)

Error from superior court, Calhoun county; B. B. Bower, Judge.

Tom Keaton, Jr., was convicted of voluntary manslaughter, and brings error. Reversed.

The following is the official report:

Keaton was charged with the murder of W. P. Lingo. He was found guilty of voluntary manslaughter, and, his motion for a new trial being overruled, excepted. The motion was upon the following, among other, grounds: Error in charging: "The defendant is entitled to make such statement of the case to the court and jury as he sees proper to make, not under oath, to be given such weight and credit by the jury as they see proper to give it, considering it together and along with all the other evidence in the case. You may believe the statement of the defendant in preference to the sworn evidence, or you can believe the sworn evidence in preference to the defendant's statement, or you can believe all, or both, or parts of each. It is your province to give to either such weight—to the evidence and statement—as you see proper, bearing in mind that the defendant's statement is not under oath, and the sworn evidence is under oath." Alleged to be error, as it tended to make the jury believe that the judge believed that the defendant's statement not being under oath was some reason why they ought not to believe the statement in preference to the sworn testimony. In a note to this ground the court states: "This is not a full statement of the charge on this subject. The balance of the charge should have been stated, in order to give proper meaning to the part stated: 'This distinction will not control you, the consideration of the evidence or statement being entirely within your province.'" Error in charging: "If you believe that at the time of the killing the deceased was attempting to commit a serious personal injury upon the defendant, not amounting to a felony, and that the defendant killed the deceased to prevent such serious personal injury, defendant would not be guilty of murder, but you should find him guilty of voluntary manslaughter." Alleged to be error because not warranted by the evidence, and not confining the jury to the evidence in making up their belief. Error in charging: "If you believe that the circum-

stances were such that it would appear to a reasonably brave man that the deceased was about to commit a serious personal injury upon the defendant, not amounting to a felony, and acting under these fears the defendant killed the deceased to prevent such personal injury, the defendant would not be guilty of murder, but would be guilty of voluntary manslaughter, and you should so find." Alleged to be error, because not authorized by the evidence, and not confining the jury to the evidence in reaching their belief; the portion of the charge set forth in this ground and in the ground last above being given in the same paragraph. Error in charging: "If you believe from the evidence that, at the time of the killing, deceased was attempting to commit a serious personal injury upon the defendant, amounting to a felony, or that if deceased was making an assault, with intent to murder, upon defendant, with a weapon likely to produce death, or if the circumstances were such as to make a reasonably brave man believe such was the case, and the defendant killed the deceased to prevent such an assault with intent to murder, or such believed assault with intent to murder, and not in a spirit of revenge, then you should find the defendant not guilty." This charge, following those complained of in the last two grounds, defendant contends, confined the jury to the evidence, and made a distinction in their belief in one case, where defendant's defense is set up, and in the other case, where manslaughter is charged. Further, because the court put into the charge the following, "and not in a spirit of revenge," as defendant would not have been guilty if he had killed deceased under the circumstances in such charge set forth, even if he had malice. As to this ground, and the last two grounds above, the court states that they cannot be fully understood without reference to the whole charge. Error in charging: "If there was an unprovoked assault made on the defendant by the deceased previous to the killing, and there was not a sufficient interval for the passion of the defendant to cool, and the voice of reason and humanity to be heard, and the defendant killed deceased in this heat of passion, he would not be guilty of murder, but would be guilty of voluntary manslaughter; but if the interval between the assault or provocation given and the killing was sufficient for the voice of reason and humanity to be heard, then the killing would be attributed to deliberate revenge, and you should find him guilty of murder." Alleged to be unauthorized by the evidence, there being no contention upon either side that the previous difficulty had anything to do with the killing, all the evidence going to show that the previous difficulty had been settled, and that defendant did not act, or claim to act, by reason of said previous difficulty, and therefore this charge upon the question of manslaughter was not a proper one to give in this case. Because the court erred in the following: When the witness Bill Graham was being examined, he was

asked the question, "If Keaton was not in the front of the store, so that he could not know as much as he (the witness) knew?" intending to show by this question that the defendant did not know where Lingo was, and which way he came. This question was objected to by the solicitor general, and the objection was sustained, and it was material. The court refused to certify this ground until the following was added to it, to wit: "The preceding questions and answers, as follows: 'I heard Webb say something to Keaton like, "Come, go to bed." I don't know whether Webb asked Keaton to "come, go and sleep with him." Keaton followed right after Webb. I don't know that Lingo was out of the rear door.'"

J. H. Guerry, J. J. Beck, and G. H. Dosier, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(99 Ga. 46)

### JONES v. STATE.

(Supreme Court of Georgia. May 4, 1896.)

CHEATING—INDICTMENT—INTERLINEATIONS—EVIDENCE—ALTERATION OF INSTRUMENTS—SECONDARY EVIDENCE.

1. Interlineations or erasures in an indictment, apparently made before it had been acted upon by the grand jury, present no cause for quashing the same.

2. An offense against section 4595 of the Code is set forth by an indictment which charges that, in selling and delivering a load of hay, the accused, falsely, fraudulently, and for the purpose of defrauding the purchaser, represented to the latter that the hay had been weighed, and that its weight was 1,244 pounds, when in fact its real weight was only 644 pounds, which was well known to the accused, and that by means of these false and fraudulent representations the purchaser was cheated and defrauded of a specified amount of money.

3. In such case it was competent to show, as a part of the false and fraudulent representations, that the accused exhibited to the purchaser a written ticket purporting to evidence the weight of the hay; and this is true although the indictment alleged nothing with reference to such ticket.

4. The loss of the ticket in question having been accounted for, and its contents, as it appeared when exhibited to the purchaser, having been proved, the corresponding stub in the book from which the ticket had been taken was admissible in evidence,—the witness who had made out both the ticket and the stub having identified the latter, and having testified that the figures on both were originally the same, and correctly set down; that the stub was made out and kept for the purpose of preserving a record of the weight; and that he could not testify as to the matter, except by reference to the stub. Under these circumstances, the stub was relevant and material in determining the question as to whether or not the figures originally entered upon the ticket had been changed.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Jim Jones was convicted of cheating, and brings error. Affirmed.

Marion Harris, for plaintiff in error. A. W. Lane, Sol. Gen., for the State.

LUMPKIN, J. The nature of this case, and of the questions involved in it, will be rendered sufficiently apparent by reading the foregoing syllabus in connection with the following brief discussion:

1. One of the grounds of demurrer to the indictment was that it contained certain interlineations and erasures. The demurrer did not set forth what they were, and the judge certifies, in effect, that they were apparently made before the indictment had been acted upon by the grand jury. We therefore have no difficulty in holding that there was no error in refusing to quash the indictment on this ground.

2. The acts which the indictment charged the accused with committing constituted the offense of being a common cheat and swindler, under section 4595 of the Code. With a full knowledge of the truth, he falsely stated the weight of the hay, for the purpose of defrauding the purchaser. In principle, the case is quite similar to that of *Tatum v. State*, 58 Ga. 408, where it appeared that the accused knowingly misrepresented that the eyes of a blind horse, which apparently were good, were sound, and thus cheated and defrauded another person. The recent case of *Parks v. State*, 94 Ga. 601, 20 S. E. 430, is also in point. There the accused cheated and defrauded another by knowingly telling a willful falsehood as to the then-existing capacity of a cow to yield milk,—a matter as to which the person to whom the cow was traded depended upon the statement of the accused. A promise not meant to be kept is not such a false pretense as will support a prosecution for cheating and swindling. The false pretense must relate to some existing or past fact. *Bish. St. Crimes* (1873) § 451. "It appears that a mere false statement of the weight of an article sold is a sufficient false pretense." 2 *Bish. New Cr. Law*, § 442. See, also, section 443, and cases cited. In support of the text above quoted, the author cites the case of *Reg. v. Sherwood*, 40 Eng. Law & Eq. 584, which may also be found reported in 7 Cox, Cr. Cas. 270. In the volume first cited the syllabus is in the following words: "The prisoner, having contracted to sell and deliver to the prosecutrix a load of coals, at 7d. per cwt., delivered to her a load of coals, which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt.; and he produced a ticket showing such to be the weight, which he said he had himself made out when the coals were weighed. She thereupon paid him the price as for 18 cwt., which was 2s. 4d. more than was due. Held, that the prisoner was indictable for obtaining the 2s. 4d. by false pretenses." It will be noted that this case

is very similar to the case at bar. There was no error in holding that the indictment charged an offense under the above-cited section of the Code; and, as the evidence was ample to support the indictment, the conviction was not illegal.

3. The indictment did not allege that the accused, as a part of the false and fraudulent representations made to the purchaser, exhibited to the latter a written ticket purporting to evidence the weight of the hay. We hold, nevertheless, that the ticket in question was admissible at the trial for the purpose of showing by what means the accused endeavored to substantiate the false representations made by him, and induce the defrauded party to believe the same, and that it was also competent to prove that the accused exhibited it to the purchaser, at the time of selling the hay, for the purpose stated. The existence of the ticket, and the use made of it, certainly threw light upon the transaction, and explained the nature of the false representations made by the accused, and the purpose and intent with which he made them. Such representations need not consist solely of mere oral statements, but may be in writing, or by signs, or the like; and where, in order to prove the real meaning and intent of the words actually spoken by the accused, it is essential to show his acts and conduct in connection therewith, evidence as to the latter should be received. Here the exhibition of the ticket, and the nature of its contents, constituted a part and parcel of what the accused did in carrying out his purpose of defrauding the purchaser, and are practically inseparable from his oral representations.

4. The stub of this ticket, referred to in the fourth headnote, we think was also relevant and material evidence, as bearing directly upon the question whether or not the figures originally entered upon the ticket had been changed by the accused in order to enable him the better to defraud the purchaser of the hay, by inducing him to believe the false representations made in regard to its weight. The principle upon which this stub was admissible in evidence was recognized by this court in the case of *Davis v. State*, 91 Ga. 167, 17 S. E. 292. There a book kept by a car inspector "for the purpose of preserving the memory" of the numbers of railroad cars was held admissible, in connection with the inspector's testimony as to its genuineness, for the purpose of proving the numbers of certain cars, and thus identifying brasses stolen therefrom, the inspector being unable to testify as to these numbers independently of the book. In the present case the person who made out both the ticket and the stub testified that the latter was made out and kept "for the purpose of preserving a record of the weight, and that he could not testify as to the matter except by reference to the stub." Taken in connection with the other

evidence, the contents of the stub were entitled to be treated the same as the sworn testimony of the witness as to other matters concerning which he professed to remember independently of any aid derived therefrom. Judgment affirmed.

(99 Ga. 44)

### DYSON v. STATE.

(Supreme Court of Georgia. May 4, 1896.)

CRIMINAL LAW—PROOF OF VENUE—NECESSITY.

1. The petition for certiorari in a criminal case, alleging error in the verdict on the ground that it was contrary to law and the evidence, and there being in the evidence set forth in the petition, which purported to contain a statement of all the evidence introduced on the trial, nothing to show that the offense was committed in the county where the trial was had, this court, following its previous adjudications on this subject, is constrained to hold that the judge of the superior court erred in refusing to sanction the petition.

2. The error above indicated requires a reversal of the judgment, irrespective of the other questions presented by the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Jim Dyson was convicted of a misdemeanor, and brings error. Reversed.

J. P. Brown and H. T. Lewis, for plaintiff in error. H. G. Lewis, Sol. Gen., Anderson, Felder & Davis, and J. B. Park, Jr., for the State.

LUMPKIN, J. 1. The plaintiff in error was tried and convicted of a misdemeanor, in the county court of Greene county. He presented his petition for certiorari to the judge of the superior court, whose refusal to sanction the same is complained of in the bill of exceptions. The petition complains of quite a number of rulings and decisions which it alleges were made by the county judge, avers that the verdict of guilty was contrary to the evidence, and sets forth what purports to be a statement of all the evidence introduced upon the trial. From this statement—which, for the present purpose, must be treated as a correct one—it nowhere appears that the alleged offense was committed in Greene county; and for this reason, if for no other, the judge ought to have sanctioned the petition. There was no distinct assignment of error in the verdict on the ground that the venue was not proved, and it does not appear that the attention of the judge was called to this defect in the evidence, or that he distinctly passed upon this particular question. Under these circumstances, we would, if left free to do so, be very strongly inclined to hold that it was not incumbent upon his honor to closely scrutinize the evidence with a view to ascertaining whether or not the venue was shown; but this question has been settled for us by several decisions of this court, among which, and

precisely in point, is that of *Davis v. State*, 82 Ga. 205, 8 S. E. 185, holding that: "There can be no legal conviction without proof, direct or circumstantial, that the offense was committed in the county. And the lack of sufficient evidence of the venue is covered by exceptions taken by certiorari to the finding of the county judge, as contrary to law, and without evidence to support it."

2. The other questions presented by the petition for certiorari need not be passed upon. Indeed, many of them may be entirely eliminated by the answer of the county judge, which will be forthcoming after the writ of certiorari has been issued and served upon him. Judgment reversed.

(99 Ga. 54)

### SASSER v. STATE.

(Supreme Court of Georgia. June 8, 1896.)

STATUTES—SUFFICIENCY OF TITLE—INTOXICATING LIQUORS—ILLEGAL SALES.

1. In so far as the act of September 5, 1879 (Acts 1879-79, p. 381), "to prescribe the method of granting license to sell spirituous or intoxicating liquors in the county of Bulloch, and to increase the fee for the same to five thousand dollars," undertakes to make it a misdemeanor to "sell spirituous or intoxicating liquors of any kind" in that county without obtaining the license provided for by this act, it contains matter different from what is expressed in its title, and is to that extent unconstitutional.

2. It was error to refuse to quash, on demurrer, an indictment based upon this act, and charging the accused with selling "a certain quantity of intoxicating liquor."

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

S. S. Sasser was convicted of selling intoxicating liquors without a license, and brings error. Reversed.

Cason & Everitt and Hines & Hale, for plaintiff in error. B. D. Evans, Jr., Sol. Gen., for the State.

LUMPKIN, J. The plaintiff in error was convicted in the county court of Bulloch county upon an indictment transferred to that court from the superior court, charging him with the offense of selling intoxicating liquors without a license. He carried the case by certiorari to the superior court; alleging, among other things, that the county judge erred in overruling a demurrer to the indictment. It distinctly appears from the record that the accused was prosecuted under the special act for Bulloch county, which is referred to in the first headnote; and one of the grounds of demurrer was that this act was unconstitutional, for the reason that it contains matter different from what is expressed in its title, and, consequently, that no prosecution could be based upon it. We therefore find it unnecessary to deal with any question in this case, except the one raised with reference to the constitutionality of this special act. This question, in our opinion, is

entirely free from difficulty. As has been seen, the title of the act contains nothing in the slightest degree indicating a purpose to make penal any sale of spirituous or intoxicating liquors, or to prescribe the punishment therefor. In so far, therefore, as this act undertakes to make it a misdemeanor to sell such liquors in the county of Bulloch, it manifestly contains matter to which no reference whatever is made in its title; and consequently this act is, to the extent above indicated, in plain violation of paragraph 8, § 7, art. 3, of the constitution. Code, § 5067. Had the prosecution been founded upon the act of December 18, 1893 (Acts 1893, p. 115), which makes it unlawful to sell spirituous, malt, or intoxicating liquors in any county where such sale "is prohibited by law, high license or otherwise," the question would be entirely different. The county judge erred in not sustaining the demurrer to the indictment, and the superior court erred in overruling the certiorari. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 260)

### FELTHAM v. SHARP.

(Supreme Court of Georgia. July 20, 1896.)

ARCHITECTS—WHEN ENTITLED TO FEES.

An architect employed to prepare plans and specifications for a building, and furnish an estimate of the probable cost, is not, upon submitting the same, entitled to his fees, unless the building can be erected at a cost reasonably approximating that stated in such estimate. Lloyd, Bldg. § 10; 29 Am. & Eng. Enc. Law, tit. "Working Contracts," p. 878, and notes.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by George Feltham against J. S. Sharp. From a judgment for defendant, plaintiff brings error. Affirmed.

The following is the official report:

George Feltham, an architect and builder, sued J. S. Sharp upon an account for "professional services,—preparing plans, specifications, and details for the erection of a proposed store building in Waycross, Ga., at an estimated cost of \$4,300, at 3½ per cent. of such estimated cost." The jury found for defendant, and plaintiff's motion for a new trial was overruled. Plaintiff testified: "Defendant came to my office, and employed me to prepare plans, specifications, and details for the construction of a storehouse building on Plant avenue, in Waycross. My commission was to be three and one-half per cent. of the estimated cost of the building, which was about \$4,300. I thereupon prepared rough plans, specifications, and details, submitted them to defendant, and he made some suggestions in regard to the finishings and fittings of the building; and I thereupon made the plans, specifications, and details, and furnished

them to defendant. In order for the building to be constructed at the estimated cost, I advised defendant to advertise in the Savannah and Jacksonville papers for bids under these plans and specifications. This he failed to do, but simply submitted the plans and specifications to two local firms of builders,—Rowbotham & Murphey and Miles & Bratt. Subsequently defendant said to me that he had been unable to purchase the property he desired on Plant avenue, to put his storehouse on, and that, therefore, the building would not be built. Learning this, I went to his house, and he returned to me the plans and specifications which I had prepared for him. Plans, specifications, and details are always the property of the architect, just as tools of the carpenter are his property. The account is just, due, and unpaid, etc. The preparation of these plans, specifications, and details was reasonably worth what defendant contracted to pay me. This building, in my opinion, could have been constructed at the cost at which I estimated it, to wit, between four and five thousand dollars. Defendant called at my office several times while these plans were being prepared, and I explained them to him in detail, and corrected them several times, until they conformed to his ideas. When completed, they were turned over to him, and were by him submitted for bids upon them." Defendant testified: "I told plaintiff I intended putting up a storehouse building on Plant avenue, if I could arrange for a site; and he thereupon stated that he had some plans that he had made for a building in Brunswick, which he would like to show me. He did show me some rough sketches at his office one day. These plans, specifications, and details put in evidence by plaintiff, I think, were afterwards prepared by him, and shown to me. He advised me to advertise for bids under them, but this I never did. I have never employed him to draw any plans or specifications for me, nor have those plans and specifications ever been in my possession. Miles & Bratt submitted written bids under these plans. I threw them away, and do not know where they are. Miles & Bratt and Rowbotham & Murphey submitted bids to me; and my recollection is that the bid of Rowbotham & Murphey was \$7,800, and that of Miles & Bratt about \$9,000. Plaintiff was never at my house. He did this work, not under employment by me, but voluntarily. It is true, I am not in the habit of having work of this kind and magnitude done voluntarily, but this was done in that way." Murphey testified: "I was in partnership with Rowbotham. We were contractors and builders. We submitted to defendant a bid under these plans and specifications; and, while I am not positive, my recollection is that our bid was about \$7,800,—not less than \$7,000,—which was as low as we could reasonably do it for. I do not recollect who submitted the plans and specifications to us,

but I know that when our bid was made it was submitted to defendant. We were agents of certain manufacturing companies, and were in position to do the work lower than any one else." The motion for new trial alleges that the verdict is contrary to law and evidence; that the court erred in admitting the testimony as to the amount and contents of the bids, over objection that they were shown to be in writing, and the foundation for introducing secondary evidence had not been properly laid; and that the court erred in charging the jury as follows: "If you find, as a matter of fact, that there was a contract or understanding or agreement between these parties by which the plaintiff, George Feltham, was to make plans and specifications for a building to be erected in the city of Waycross for the defendant, J. S. Sharp, to cost about four thousand dollars, and that he was to be paid three and one-half per cent. upon the estimated cost of the same, and you shall find in that connection that the plans and specifications, as made by the plaintiff, for the building thus to be erected, when submitted to competent contractors for bids upon the erection of the building, disclosed the fact that the building, in accordance with the plans and specifications so made by the plaintiff, could not be erected for the sum as understood and agreed upon (about four thousand dollars), but the cost of the erection of such building in accordance with the plans and specifications as made would largely exceed that,—would cost the sum of seven or nine thousand dollars,—the court charges you that in that event, without any further understanding or agreement made and entered into between the parties, by which the defendant, in any event, was to pay for the plans, he would not be liable to the plaintiff for the three and one-half per cent., or any other sum, and would not be called upon to take and accept the plans as thus prepared, and to pay for them." Also, that the court failed to charge the jury as to the weight of evidence in civil cases.

Toomer & Reynolds, for plaintiff in error.  
L. A. Wilson, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 258)

KAISER et al. v. UNITED STATES NAT. BANK et al.

(Supreme Court of Georgia. July 20, 1896.)  
NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS—NOTICE—PLEDGE.

1. Where a promissory note executed solely for the accommodation of a bank, and intended by the makers to be used for its benefit only, was made payable to the order of its cashier, and indorsed in blank, the mere fact that the president of that bank negotiated the note, for

his own personal benefit, to a third person, who knew he was such president, would not of itself be notice to that person that this action of the president was unauthorized or improper; nor would this fact be sufficient, without more, to put the third person upon inquiry as to the legality or correctness of the president's conduct in the premises.

2. A creditor of the president, who in good faith received the note from him before its maturity, and without notice of the equities existing between the makers and the payee, was a bona fide holder for value, in the due course of business, although the creditor took the note as collateral security for an existing debt of the president, and for this purpose and upon this consideration only. *Colebrook, Collat. Sec. § 18, 1 Morse, Banks, § 600, and authorities cited in both; Gibson v. Conner, 3 Kelly, 47.*

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by the United States National Bank against A. Kaiser & Bro. and another. From a judgment for plaintiff, defendants Kaiser & Bro. bring error. Affirmed.

The following is the official report:

The United States National Bank sued A. Kaiser & Bro., as makers, and the Brunswick State Bank, as indorser, upon a promissory note for \$2,500, dated May 3, 1893, due 60 days after date, payable to the order of F. E. Cunningham, cashier, and indorsed: "Brunswick State Bank, Brunswick, Ga. F. E. Cunningham, Cashier." The suit was defended by the makers. The jury, under the court's instruction, found for the plaintiff, and defendants' motion for a new trial was overruled. It appears from the evidence that defendants were accommodation makers, and received no consideration for the note. On May 17, 1893, they were requested by F. E. Cunningham, who was the cashier of the Brunswick State Bank, to lend that bank their credit to the amount of the note, for the purpose of having it discounted in New York, and putting said bank in funds in that city. At Cunningham's request, the note was dated back to the time appearing on its face. On May 18th it was indorsed, as before stated, by Cunningham, who forwarded it on the same day, or soon after, to Lloyd, the president of the Brunswick State Bank, who was in New York, with a letter of instructions as to the purpose for which it was sent. The indorsement upon it was made for the purpose of raising funds in New York for the Brunswick State Bank. On May 29th it was received by the plaintiff, from Lloyd, as collateral security for an indebtedness already existing from the firm of Lloyd & Adams to the plaintiff. Plaintiff knew that Lloyd was president of the indorser bank, and received the note without parting with any new consideration, and solely as collateral security for the notes which it had previously discounted for Lloyd & Adams, and which are yet due to plaintiff. It had no account with

the indorser bank. That bank failed and was insolvent on May 24, 1893, when it closed its doors. In addition to the general assignment of error in directing the verdict, the motion for new trial alleges that the court erred in refusing to allow the cashier of the indorser bank to answer the questions: "When that note left here, and reached New York state, whose property was it? What is the custom of a bank receiving paper from an indorsee, with regard to whether or not the indorsee shall indorse that paper? What is their custom as to requiring indorsements from the indorsee?"

W. G. Brantley and Symmes & Bennett, for plaintiffs in error. Atkinson & Dunwoody and Goodyear & Kay, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 258)

## LEIGH v. BROWN.

(Supreme Court of Georgia. July 20, 1896.)

### INSURANCE—DEFECTS IN POLICY—WAIVER.

1. Where a policy of life insurance, which was duly delivered to an applicant, differed in any material respect from the kind of policy for which he had contracted, it was his duty, if he did not desire to retain and accept the policy received by him, to return, or offer to return, the same, within a reasonable time, to the company, or an agent thereof authorized to receive it; and, upon failing to do either, the applicant could not avoid paying a promissory note which he had given for the first premium due upon the policy.

2. If such applicant, without returning, or offering to return, the policy, as above stated, delivered it to one who was not an agent of the company, nor in any way connected with its affairs, and after the lapse of some months an agent of the company casually found it among the papers of the person last referred to, who had died, he being the agent's father, the plaintiff was not discharged from liability upon the note in question.

3. Under the evidence in the present case, the verdict for the plaintiff was right, and, irrespective of the assignments of error made in the motion for a new trial, ought not to have been set aside.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by W. W. Brown against J. W. Leigh on a premium note. From a judgment for plaintiff, defendant brings error. Affirmed.

Hitch & Meyers, for plaintiff in error. Toomer & Reynolds and W. M. Toomer, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 255)

SAVANNAH, F. & W. RY. CO. v.  
WAINWRIGHT.

(Supreme Court of Georgia. July 20, 1896.)

ACTION FOR PERSONAL INJURIES—PHYSICAL EX-  
AMINATION—DISCRETION OF COURT—EVIDENCE  
—INSTRUCTIONS—HUSBAND AND WIFE.

1. This court will not reverse the action of a trial judge in refusing, pending the trial of a suit for personal injuries, to order a medical examination of the plaintiff, when it appears that no request for such an examination was made of the plaintiff before the trial began, and no request to this effect was made of the court until after the plaintiff's evidence had been closed, and it was then impracticable, without too long a suspension of the trial, to obtain a satisfactory and competent physician, by whom an impartial examination could be then made. While the power to order such an examination exists, it is in each case to be exercised, or not, according to the sound discretion of the presiding judge. *Railroad Co. v. Childress*, 9 S. E. 602, 82 Ga. 719, 722.

2. Even where it would be proper for the judge to call the attention of the jury to the failure of a party to produce evidence of a more certain and satisfactory character than that which had been introduced by him upon an important and controlling issue, a request so to do should be refused when it also embraces an instruction authorizing the jury to consider adversely to such party his conduct in a matter arising during the trial, the propriety of which had properly been sustained by a ruling of the court.

3. While a husband is not competent to testify as to oral complaints made to him by his wife concerning her "pains and hurts" resulting from a physical injury (*Railroad Co. v. Walker*, 21 S. E. 48, 93 Ga. 462, 467), he may testify as to the physical condition of any of her members of which he had actual knowledge; and, if such condition manifestly caused suffering, he may so state.

4. There was no merit in the grounds of the motion for a new trial relating to newly-discovered evidence. The verdict was warranted, and there was no error in denying a new trial. (Syllabus by the Court.)

Error from superior court, Charlton county; J. L. Sweat, Judge.

Action by Alice Wainwright against the Savannah, Florida & Western Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Mrs. Alice Wainwright sued the railway company for damages which she claimed resulted to her from injuries she sustained by a fall from the company's passenger coach, on which she had been a passenger. The negligence charged against the company was in not stopping the train a sufficient time to allow her reasonable opportunity for leaving the same. According to her testimony, which was corroborated in some measure by that of a witness who claimed to have been present, the train did not stop longer than three seconds. She was upon the steps, and about to get off, when the train began to move, whereupon she turned, and endeavored to reascend the steps to the platform of the coach, and while so doing fell to the ground. It was at the regular stopping place of the train at Folkston, in Charlton county. According to the testimony

of the engineer of the train, it was stopped for a minute or more, during which time he went out and oiled the engine at the side. The plaintiff further testified that she was bruised on her knee, side, shoulder, and right arm, but was not confined to bed on account of the injuries until three days after they happened. She was then confined to bed for several weeks, has not been well since, is getting worse all the time, has no use of her right arm, and is unable to perform her regular household work, which she did before. The trial was about fourteen months after the fall, which was in the latter part of August, 1894. For three years, up to March, 1894, she had suffered and been treated for ovarian troubles, the pain and sickness being in her left side. From that date up to the time of the fall she thought she was in perfectly sound health; had not taken a dose of medicine for three months. The principal pain which she has suffered on account of the fall has been in her right side. She has had nine children, the last one of whom was born in October, 1891, nearly three years before the injury complained of. She was 32 years of age. The motion for new trial alleges that the verdict is contrary to law and evidence, and is excessive. It sets forth the following special grounds: In the examination of plaintiff's husband as a witness, her counsel asked him the question, "She has been suffering from what?" Defendant objected that the answer would be secondary evidence, and hearsay. The objection was overruled, and the witness answered: "I don't know the cause of it, but she has suffered a great deal from her hip. I saw its swollen condition, and frequently rubbed and bathed it for her." Upon cross-examination of the same witness, defendant's counsel asked him to describe the instruments used by the physician treating the plaintiff when she was sick with womb trouble, prior to the alleged fall from the car. This was ruled out by the court, upon which ruling error is assigned. In the testimony of the witness, as it appears in the brief of evidence, he states: "The doctor also applied medicine to her womb with instruments, a few times, during the three years. I don't know what kind of instruments they were."

Further error is assigned upon the refusal of the court to appoint physicians, and require a medical examination by them of plaintiff's person, during the progress of the trial. Before evidence was introduced the witnesses were sequestered, and defendant's counsel stated that they desired Dr. Folks to remain as a representative of the company, as defendant might desire to introduce him as a witness, but could not then say. Dr. Folks was permitted to remain. Plaintiff having introduced testimony and rested her case, defendant introduced the testimony of the engineer of the train, and then made the request for medical examination. The court asked what physicians would be suggested, and defendant's counsel replied that Dr. Folks, who had heard the

plaintiff's evidence, would be a suitable physician to be appointed, with some other physician to be selected by plaintiff's counsel. Counsel for plaintiff objected to the proposed examination at that time, and failed to suggest the name of any physician. Defendant's counsel stated that the only other physician anywhere in the vicinity was Dr. Wright, Plaintiff's counsel would not consent to an examination made by Dr. Wright, who was, for certain reasons, objectionable to his client. Thereupon the court declined to require plaintiff to submit to a medical examination, not being satisfied that an impartial examination could then be made, and because the request was made late in the afternoon in the progress of the trial, when, under the existing circumstances, there were no conveniences or proper place for the examination to be had, and because a suspension of the trial and adjournment of the court would be necessary for the purpose.

The refusal of the court to give the following in charge to the jury is assigned as error: "I charge you that you should, in determining whether the plaintiff was injured by a fall from the defendant's car, or the extent of such injury, consider the fact that plaintiff did not produce any of the physicians who treated her, as witnesses, and the fact that Mrs. Wainwright did not take any legal steps to insure having their testimony in this court at this trial, and determine whether it was an attempt to prevent the truth, or to conceal any facts. You should also consider the fact that plaintiff, Mrs. Wainwright, objected to submitting to any personal examination by a physician or physicians to be appointed by the court, who would report the result of such examination to the court." It appears from plaintiff's testimony that the physician who treated her for the injury sustained by the fall was Dr. Parker, of Nichols, Coffee county; his treatment extending from a time shortly after the injury to January, 1895. In August or September, 1895, Dr. Walker, of Waycross, was called, and treated her for the same trouble for which Dr. Parker had treated her. No other physician, except these two, had treated her for the injuries. The last time she saw Dr. Parker was about two weeks before the trial, when he promised her to come to court, but he was not present.

It is further alleged as a ground for new trial that defendant has since discovered new evidence, as shown by the affidavit of Dr. Folks, who was present at the trial, and who swears that since the rendition of the verdict he had a conversation with Dr. Walker, who informed him that he had made three visits to plaintiff during 1895; that he had at that time made an examination of her womb, and found that she was suffering from laceration of the womb, due to childbirth; that this laceration was not due to any injury received from a railway, or from a fall; that he (Dr. Walker) told her that a surgical operation was the only thing that would relieve her, and

common treatment would do no good; that plaintiff told him she knew the laceration did exist, but contended that it had been worse since the railway injury. Deponent requested Dr. Walker to make a certificate or affidavit to these facts, which Dr. Walker refused to do, assigning as a reason that plaintiff was his patient, and he did not feel at liberty to voluntarily give any testimony or an affidavit to be used in the trial of the case, because of the relationship which existed between them, as physician and patient. Also, the evidence shown in the affidavit of W. B. Stephens, who swears that a month after the verdict was rendered he saw Dr. Parker, who, upon being informed that deponent was from the office of defendant's counsel, and being inquired of concerning what he knew of plaintiff's injuries, etc., told deponent that he had treated Alice Wainwright, prior to her alleged fall from the railway car, for ovarian trouble, and that she suffered from falling of the womb; that an inside membrane of the womb had been ruptured, and that this rupture would cause an enlargement, and result in a falling of the womb; that, a short time before she went on the alleged trip to Jacksonville, he had stopped treating her; that she seemed to be in pretty good health, and was as well as she could expect to be, but that she would never be perfectly cured of the womb trouble from which she was suffering; that three days after her alleged fall he was called to treat her, and found her suffering from peritonitis, which, in his opinion, might have been caused by a severe fall, or might have been caused by the womb trouble prior to the alleged trip to Florida and her alleged fall, but that a severe fall would have to produce or result in an abdominal bruise, in order to produce peritonitis, and the only bruise he found upon her was a bruise upon her thigh, and that was not a very large bruise; that he made no examination of her womb subsequent to her alleged fall, and does not know whether at the time that he treated her, subsequent to the alleged fall, she suffered from ovarian or womb trouble, but his diagnosis was that her trouble was peritonitis, and that that was what he treated her for. In connection with these affidavits there were others, by defendant's counsel and superintendents, as to their ignorance of the newly-discovered evidence, and their diligence before the trial. There was a counter showing on plaintiff's behalf tending to establish the fact that counsel for the defendant were in possession of sufficient information before the trial to have led to a knowledge of the facts shown in the affidavits containing the newly-discovered evidence. Plaintiff also produced the affidavit of Dr. Parker in rebuttal, viz.: From 1891 up to within two or three months of the alleged fall from the train, he treated plaintiff for ovarian troubles, which was the only disease with which she was afflicted prior to the fall. He was called by her the day after the fall, and found, dur-

ing his subsequent treatment of her, that within three days after the fall she developed a severe case of peritonitis, which she did not have prior to the fall. She was severely bruised, also, as he found upon examination the morning after the fall. The conversation he had with W. B. Stephens is the only conversation he ever had with any of the representatives of the defendant. Deponent never refused to give information concerning plaintiff's condition, and has always been ready to give information to any one, in court or elsewhere, as to her condition, at any time within his knowledge. He would have attended the trial, had it not been impossible on account of the critical condition of his patients at that time. The statements contained in this affidavit are the only and correct ones made by him to Stephens or any one else, and truly represent plaintiff's condition at the times mentioned. This affidavit contains all deponent knows of her condition, either before or after the fall. He would have answered interrogatories of defendant willingly concerning this matter, if they had been propounded to him.

Erwin, Du Bignon & Chisholm, for plaintiff in error. W. M. Toomer, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 264)

**DENTON v. BUTLER et al.**

(Supreme Court of Georgia. July 20, 1896.)

**SURETIES—DISCHARGE BY USURY—BURDEN OF PROOF.**

1. A surety upon a promissory note secretly tainted with usury, of which fact he had no knowledge, is discharged from liability if it contained a waiver of homestead. This is so because the usury made the waiver void, and thus rendered the surety's risk greater than it would otherwise have been. *Lewis v. Brown*, 89 Ga. 115, 14 S. E. 881; *Harrington v. Findley*, 89 Ga. 385, 15 S. E. 483; *Howard v. Johnson*, 91 Ga. 319, 18 S. E. 132.

2. In an action on such a note, it is incumbent upon the plaintiff, in order to hold the surety liable, to prove affirmatively that he signed the note with knowledge of the usury.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by Butler & Stevens against W. M. Denton and others. From a judgment for plaintiffs, defendant Denton brings error. Reversed.

The following is the official report:

A promissory note for \$1,000, dated November 17, 1893, and due at 30 days, containing a waiver of homestead, etc., was executed by Spence & Co. to the South Georgia Bank of Waycross, and was indorsed by W. M. Denton. After it fell due, it was assigned by the bank to the plaintiffs, without recourse. Suit upon it was defended by Denton, on the

ground that he was a surety, and was discharged by usury having been taken by the bank. The court directed a verdict for the plaintiffs, and overruled Denton's motion for a new trial. The member of the firm of Spence & Co. who signed the note testified: "The indorsement was an accommodation indorsement. The makers discounted the note, and paid 10 per cent. discount. No one was present at the time, except the cashier and myself. Denton was not present, and I am not positive that he knew I was paying 10 per cent. to discount it. I prepared the note, took it to Denton, and had him to indorse it as an accommodation indorser, and did not tell him what discount I proposed to allow the bank. I do not know whether or not he had notice of the fact that we were paying 10 per cent. I believe he knew we were doing business with the bank. I do not know that he knew what the bank's rates were. I don't think I ever heard him say. I can't remember ever to have discussed with him our arrangements about raising money at the bank. I am not prepared to swear that he did not know that we were going to discount it, and pay 10 per cent. interest."

Leon A. Wilson, for plaintiff in error. John C. McDonald, for defendants in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 253)

**GOLDSMITH v. STATE.**

(Supreme Court of Georgia. July 20, 1896.)

**CARRYING CONCEALED WEAPONS.**

1. One who transports a pistol from a shop where it had been repaired, although he does so at the request of the owner, and for the sole purpose of delivering it to the latter, is guilty of the offense of carrying a concealed weapon if, in the act of transporting the pistol, he carries it concealed upon his person. *Pen. Code*, § 341, and cases cited.

2. None of the grounds of the motion for a new trial were meritorious, and the conviction of the accused was manifestly right.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

Henry Goldsmith was convicted of carrying a concealed weapon, and brings error. Affirmed.

The following is the official report:

Goldsmith was tried in the criminal court of Atlanta upon an accusation charging him with carrying a weapon concealed. His motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in refusing to charge the following written request: "If you believe from the evidence in this case that the pistol in question was the property of another, and had by the owner been placed in the shop for repairs,

and that the owner requested defendant to call at said shop for the pistol and return it to him, and that defendant, in obedience to this request, called for and obtained the pistol for the purpose of transporting it to the owner, who resided in an adjoining county, and that he, in good faith, was carrying same, not for the purpose of offense or defense, but for the sole purpose of delivering it to the owner, the defendant would not be guilty, although you might believe from the evidence that he had it concealed about his person, and not fully exposed to view." Because the court erred in not postponing the case, on motion of counsel, so as to allow the defendant time to get the benefit of Aaron Blackwell's testimony, who had been subpoenaed, and who promised to come, and, if present, would testify that the pistol was his property, and not the property of defendant, Henry Goldsmith, and that he, Aaron Blackwell, had left the pistol at a repair shop on Broad street, Atlanta, to have it repaired, and had sent Henry Goldsmith after it the morning of his arrest. Because the court erred in ruling that the testimony of Aaron, if he were present, would be incompetent, and would be ruled out by the court, and that the case must proceed without the witness Blackwell. Because the court erred in permitting Barnes to be reintroduced, and to testify that, the day before, he saw the defendant as he was coming out of Wheeler's bar, and that he had a pistol in his hip pocket, when witness had on first examination testified to the same, and it had been ruled out by the court on motion of counsel. (It was not stated in this ground what objection was made to this testimony when offered.) Because the court erred in ruling out that portion of the testimony of the policeman Shepard which showed that the defendant stated after the arrest at the station house that the pistol was not his, but belonged to another man, in Dekalb county, and that the man had sent him to get it, and he was carrying it home to him. The testimony of Shepard on this point, as it appears in the brief of evidence, was that defendant had told him when arrested that the pistol belonged to another party, and that he had only got it at the gunsmith's to carry to the owner at Decatur. Shepard was the police officer who arrested defendant. Because the court erred in charging the jury that if they believed the defendant was carrying the pistol from a repair shop to deliver to another, and carried it concealed, then he would be guilty of carrying concealed weapons, and "you would find the defendant guilty."

E. A. Angier, M. Macks, and A. C. Perry, for plaintiff in error. J. F. O'Neill, for the State.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

v.258.E.no.12—40

(99 Ga. 185)

# JACKSON v. DOUGHERTY COUNTY.

(Supreme Court of Georgia. July 20, 1896.)

ACTION BY COUNTY—HOW BROUGHT—DEED OF GIFT—CONSTRUCTION.

1. An action by named persons as commissioners of roads and revenues of a specified county is not an action by the county, and cannot be made the means of obtaining for such county any relief, legal or equitable, to which it may be entitled. See *Bennett v. Walker*, 64 Ga. 328, *Arnett v. Board of Com'rs*, 75 Ga. 782, and other decisions to the same effect.

2. Even if the present action had been properly brought in the name of the county, it would seem that under a deed made in 1854 donating a city lot to the justices of the inferior court thereof, and their successors, "for county purposes, to be used for the public buildings of the said county, and for vacant grounds to surround them, and for no other purpose whatever," the county authorities would not, upon determining to abandon or discontinue the use of the lot for the purposes specified in the deed, be entitled, as against the grantor's estate, to obtain an order of the superior court authorizing a sale of the property, or a decree canceling as cloud upon the county's title a claim of reversion under that deed asserted by the grantor's representative. Apparently, the estate or interest which passed by the deed was simply and plainly a restricted use.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by the commissioners of roads and revenues of Dougherty county against John Jackson to quiet title. On defendant's death, Adelaide E. Jackson, administratrix, was substituted. From a decree for plaintiffs, defendant brings error. Reversed.

The following is the official report:

On July 10, 1854, John Jackson conveyed to the justices of the inferior court of Dougherty county, and their successors in office, in consideration of one cent, city lot 28, on the corner of Flint and Washington streets, in Albany, containing a quarter of an acre, "for county purposes, to be used for the public buildings of the said county, and for vacant grounds to surround them, and for no other purpose whatever." Upon the deed was written a contemporaneous note, signed by Jackson, viz.: "Lot No. 28 in the above deed named is donated to the county of Dougherty by me, in consequence of my preference of that locality and its immediate vicinity for the location of the public buildings of the county." On February 22, 1893, a petition to the superior court was brought by the commissioners of roads and revenues of the county, praying for an order allowing them to sell the lot so conveyed, alleging that it is the object and desire of the county to sell the lot, and apply the proceeds of sale to the erection of a new jail (the present jail being on the lot in question), such new jail to be on a lot more remote from the public streets and depots of the town, to wit, on the same street and locality due west from the present jail, to which the county has title under a deed of the same date as the one before mentioned, from said Jackson, convey-

ing lots 28, 30, 32, 34, and 36, in consideration of \$900, all of which lots lie on Flint street, west of said lot 28, and joining thereto; "and for the purpose of removing said cloud from said lot 28 as aforesaid, and to enable your petitioners to sell the same," they pray for process against Jackson. The petition further states that it is desirable and necessary to change the location of the jail, the present one being defective and unsafe, etc. Jackson filed his answer, objecting to the grant of the order, and alleging that petitioners have no right to the same, and that the county accepted said land under the deed of gift, and has up to date used it for the purposes therein specified. The case having been submitted to the judge, he passed an order "that the plaintiff do have leave to sell the lot of land set forth in said petition, without prejudice to the defendant's right to sue for damages." Jackson excepted.

W. T. Jones, for plaintiff in error. Richard Hobbs, for defendants in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 254)

#### MINTON v. STATE.

(Supreme Court of Georgia. July 20, 1896.)

WITNESS—COMPETENCY OF CHILD—CRIMINAL LAW  
—CONFESSIONS—INSTRUCTIONS—  
HARMLESS ERROR.

1. Although a child eight years old, on a preliminary examination had for the purpose of testing his competency as a witness, stated that he did not know what an oath was, yet where he also stated that he knew what it was "to go up in the courthouse, and swear you have to tell the truth," that the law would punish him if he told a story, and that he was bound to tell the truth when sworn, and the examination, as a whole, disclosed such a degree of intelligence and knowledge on the child's part as to satisfy the judge of his competency, this court will not reverse a ruling permitting the child to be examined as a witness concerning the facts in issue.

2. That one under arrest and accused of a crime voluntarily asked another, "Would it be better for me to tell the truth?" or "What had I better do?" and received the reply, "You had better tell the truth about it," affords no cause for excluding from evidence a confession then made, on the ground that it was improperly induced by another. "The hope that excludes is that which some other person excites." Pen. Code, § 1006, citing *Bohanan v. State*, 18 S. E. 302, 92 Ga. 32. And see *Miller v. State*, 21 S. E. 128, 94 Ga. 1, 11.

3. The liability of a witness to misunderstand the language of one making a confession is one of the reasons for the rule requiring all confessions to be scanned with care, but not the only one; and while a judge, in charging a jury, should not use words which may impress them with the idea that this is the only reason for receiving a confession with caution, his so doing will not of itself be cause for a new trial.

4. There was sufficient evidence to warrant the verdict that no material error was committed, and the record discloses no valid reason for granting a new trial.

(Syllabus by the Court.)

Error from superior court, Dodge county; O. C. Smith, Judge.

Scott Minton was convicted of murder, and brings error. Affirmed.

The following is the official report:

Scott Minton and Abe Thomas were indicted for the murder of Flem Lee. Minton was tried and found guilty, with a recommendation to life imprisonment. His motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in admitting the testimony of Flem Lee, introduced by the state. To said testimony, defendant objected that the witness did not understand the nature of an oath, and was incompetent to testify, and his testimony should be excluded, for that the witness, upon the preliminary examination on the present trial, said: "I don't know what an oath is. I don't know what it means." It appears from the record that this witness, Flem Lee, is the son of the deceased, and was eight years old at the time he testified. He seems to have been examined quite fully touching his competency. Among other things, he testified: "If I swear to a lie, I will go to hell. Am bound to tell the truth when I am sworn." "I can read a little." "Hell is a bad place. They put you in the fire in hell, and it will burn you. God made me, and if I am a good man, and behave myself, when I die I will go to heaven." "When you say, 'Do you understand an oath?' I don't know what you are talking about. I know what it is to go up in the courthouse, and swear you have to tell the truth. If I tell a story, I will go to hell. I don't know what will be the consequences in this world. Nobody has told me to make these answers. My mother never said a word at all to me about it. She never told me to tell the truth, nor told me to tell a story, and nobody has been talking to me about it. The law will punish me if I tell a story. Nobody told me that. That is the law of the Bible. They would give me a libel if I tell a story. I don't know what an oath is; don't know what it means. I don't know that if I were to tell a lie on Scott Minton, and he was to be hung, that I would be hung too. I don't know anything about people going to the penitentiary for telling lies in the courthouse, nor do I know what the punishment is. When you come in the courthouse to swear, ain't like telling stories out of the courthouse; that ain't like coming inside." Error in admitting the testimony of Taylor James, introduced by the state, over defendant's objection, as to alleged confession of defendant, after the witness had testified: "He asked me if it would be better for him to tell the truth. He sent for me, and I told him, 'Yes.'" Defendant objected to the evidence, contending that the state had laid no proper foundation for the admission of said testimony, that the alleged confession was not freely and voluntarily made, without the slightest hope of benefit or remotest fear of

inquiry, and that said answer and conversation of witness induced the confession, if any was made. Before the testimony quoted above, this witness had testified that he saw Scott, and arrested him; that he heard him say he did the killing; that what he said was freely and voluntarily said; there were no threats made to make him say it, and no inducements held out to him, nor any reward offered him. Just following the testimony of this witness first above quoted, he testified: "I did not tell him that it would be lighter with him. Myself and Josh Lee and Henry Williams were along. I never heard any of these parties tell him it would be lighter with him." Error in admitting the testimony of Josh Lee, over defendant's objection, upon the rebuttal examination as to alleged confessions of defendant. To this testimony defendant objected, upon the following grounds: (1) That, the testimony being introduced in rebuttal of defendant's statement, and going to the same point as did the testimony of Henry Johnson and Taylor James, the same was cumulative and inadmissible in rebuttal. (2) Because the state did not lay a good foundation for the admission of the same, because the witness testified: "He was under arrest at that time. He asked me what would be best for him to do. He called me, and asked me what would be best for him to do. I says, 'Scott, it is best for you to tell the truth.' That is what I told him. I says, 'Scott, it looks like you might know something about it.' He called me off to himself, and he says, 'Lee, they are talking around here;' and I says, 'Scott, if there is anything you need so far as eating is concerned, let me know.' He says, 'What is best for me to do?' I says, 'It is best for you to tell the truth.' After he commenced talking, several came up,—Taylor James, Henry Johnson, Isaac Johnson, and old man Tom Bolding. They all heard it." The defendant contended that the above evidence shows that said confession was not freely and voluntarily made, but was induced by the promises and inducements held out by the witness to defendant. Defendant moved the court then and there to withdraw from the consideration of the jury the before-given testimony of Taylor James and Henry Johnson as to confession at the same time or subsequently made, upon the ground that defendant was under arrest, and that Josh Lee was a brother of the deceased, and was a prosecuting witness, and these witnesses had defendant in charge, and that said confessions, if made, to said James and Johnson, were made under the inducement and advice of Josh Lee, and were not voluntary. All and singular the objections of defendant were overruled. Before testifying as quoted above, the witness Josh Lee had testified, among other things: "Scott Minton made a statement to me in regard to the shooting that night. It was freely and voluntarily done. I made no threats to get him to state it, nor did I hold out any inducement to him, nor offer him any reward." This was on Fri-

day, after the killing, on Thursday night. Error in charging: "I charge you that a confession should be scanned with care, for the reason that the memory of people is not always infallible. They may be liable to misunderstand the language used in confessing. Therefore a confession should be scanned with care, and be looked into carefully." Error in not charging the jury specially as to the evidence of the witness Flem Lee, after he had testified as set forth in this motion, and cautioning the jury as to the credit to be given said witness.

D. M. Roberts and O. Wooten Griffin, for plaintiff in error. Tom Eason, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 256)

### SMITH v. HOLBROOK et al.

(Supreme Court of Georgia. July 20, 1896.)

AGENCY—RATIFICATION—ASSUMPSIT—GENERAL ISSUE—SECONDARY EVIDENCE.

1. Where a clerk who was left in general charge of a mercantile establishment during the absence of the proprietor ordered goods appropriate to the conduct of the business, which were received and placed in stock, and the proprietor, upon ascertaining these facts, did not, within a reasonable time, countermand the order and offer to return the goods, he was bound to pay for the same, although in the first instance the clerk may have transcended his authority in ordering the goods, it appearing that his want of authority was unknown to the seller.

2. Under the pleading act of 1893, a mere plea of "not indebted," it being simply a plea of the general issue, does not, in law, amount to a denial of averments distinctly and plainly made in the plaintiff's petition, and all such averments not otherwise denied are to be taken as prima facie true.

3. Accordingly, where the action was upon an open account, with appropriate allegations, a plea of the nature above indicated raised no issue as to the correctness of the amount of the account sued upon.

4. The contents of letters cannot be proved by parol, notwithstanding the fact that they were addressed to, and remained in the possession of, a nonresident plaintiff, no notice to produce the same having been served upon the local attorney of such plaintiff. As their production could have been compelled in this manner, the letters were not "inaccessible."

5. There was no error in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by Holbrook, Glazier & Co. against W. J. Smith. From a judgment for plaintiffs, defendant brings error. Affirmed.

The following is the official report:

The plaintiffs, of Hartford, Conn., sued W. J. Smith upon an account for shoes. The court directed a verdict in their favor, and overruled defendant's motion for a new trial. In addition to the plea of not indebted, he set up that the bill of goods sued for was or-

dered by a clerk in his store, without his knowledge or authority, and before a partnership was formed between him and one Kimbrough, and before said goods were shipped to defendant he countermanded said order, but the goods were shipped, and received at the store of said firm, whereupon they notified plaintiffs that they would handle the goods only for plaintiffs' account, and would not be held liable for the same, and that if this was agreeable to plaintiffs they could advise them to that effect, otherwise the goods would be held by said firm subject to plaintiffs' order, and that plaintiffs never replied to said notification, and said firm have since held the goods subject to plaintiffs' order, and now have them in their possession, subject to the order of plaintiffs. At the trial plaintiffs relied upon the admissions contained in the foregoing plea. Defendant testified: "The bill of goods mentioned in the account was not ordered by me, but, as I afterwards learned, by a clerk employed in my store, without my authority. They were ordered just before, and received after, the partnership had been entered into with Kimbrough, and were opened and placed upon the shelves. I do not know if any were sold or not. On my return after my absence, I found the goods, but would not permit any of them to be sold, and they were held subject to plaintiffs' order. I took Kimbrough into the business as a partner, and these goods remained at the store as plaintiffs' property, but were not offered for sale. Afterwards the business was sold out to a corporation [named] in which I am a stockholder, but said goods were not included in the sale, but were left 'n charge of the corporation for safe-keeping, subject to plaintiffs' order. They are still in possession of said company, and I am prepared at any time to deliver the same to plaintiffs. I offered to return them to plaintiffs' counsel before the suit was brought. I did not at any time ratify the act of the clerk in ordering the goods." In addition to the general grounds, error is assigned upon the refusal of the court to allow defendant to testify that he had written a letter to plaintiffs, stating that the goods were ordered without his authority, and would be held subject to their order.

L. A. Wilson, for plaintiff in error. Hitch & Meyers, for defendants in error.

PER OURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 271.)

HOOD et al. v. RODGERS.

(Supreme Court of Georgia. July 20, 1896.)

EVIDENCE OF INDEBTEDNESS.

Evidence that a husband managed and conducted for his wife and as her agent a mercantile business belonging exclusively to her, giving

to it his entire time and attention, and that his services in so doing were worth a stated sum per month, would not, without more, be sufficient to show that there was any unpaid indebtedness by her to him for such services, nor would this be made to appear by introducing in evidence, in addition to the above, the books kept in the business, showing its nature and extent, and containing no entries of any payments to the husband.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action by Hood, Foulkrod & Co. against James Rodgers, in which C. C. Rodgers was summoned as garnishee. From a judgment of nonsuit, plaintiffs bring error. Affirmed.

The following is the official report:

Hood, Foulkrod & Co. obtained judgment against James Rodgers on a suit filed March 29, 1894, on an account for merchandise sold him by them September 20, 1890, the judgment being dated May 9, 1894. They sued out summons of garnishment, which on July 24, 1894, was served on Mrs. C. C. Rodgers. She answered, denying any indebtedness, etc. Her answer was traversed by plaintiffs, and upon the trial, after the introduction of the evidence for plaintiffs, a nonsuit was granted. To this ruling, and to a certain ruling as to evidence, hereinafter mentioned, plaintiffs excepted. Plaintiffs introduced the record of their suit and judgment against Rodgers. William Beggs testified: "I know defendant and the garnishee, who is his wife. I have been living in Atlanta a number of years. Rodgers runs a retail store on Decatur street, Atlanta, the business being carried on by him in the name of his wife. It has been run by him that way for about two years prior to April or May, 1893, as well as I can remember. He has bought goods during that time from the house I am connected with. Mrs. Rodgers had nothing to do with the active management of the store. It is all managed and controlled by him. He stays there, and seems to devote his whole time to the business. She stays at home. It is her stock of goods and business, but is run and managed by him. He has a clerk there, and seems to do a very good business. He is a man of considerable experience in that line of business. They sell dry goods, etc. My opinion is that the services of a man of his capacity and experience, in giving his whole time and attention to a business of the kind and extent conducted by him for his wife, would be worth at least \$50 or \$60 a month." Plaintiffs tendered in evidence the books of defendant, kept by him in connection with the business of Mrs. Rodgers, produced under notice by her, the same being the regular books of account kept by her in said mercantile business, and showing the original entries of cash sales, collections, and expenditures, and covering the period of two years prior to the service of the summons of garnishment on her, and at and subsequent to said date, the evidence having been offered to show the

nature and extent of the business, and that there were no entries of any money paid out to Rodgers during that time. The evidence was rejected by the court, to which ruling plaintiffs excepted.

Hall & Hammond, for plaintiffs in error. W. W. Hayden and Rosser & Carter, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(39 Ga. 266)

ATLANTA CONSOL. ST. RY. CO. v.  
KEENY.

(Supreme Court of Georgia. July 20, 1896.)

CARRIERS—FARE—LEGAL TENDER—EJECTION OF PASSENGER—DEFENSES—VINDICTIVE DAMAGES—INSTRUCTIONS—HARMLESS ERROR.

1. A genuine silver coin of the United States, distinguishable as such, though somewhat rare, and differing in appearance from other coins of this government, of like denomination and of later dates, is nevertheless a legal tender for car fare, and a passenger ejected for refusal to make payment otherwise than by tendering such a coin is entitled to an action for damages. See *Railroad Co. v. Morgan*, 18 Atl. 904, 52 N. J. Law, 60.

2. That the conductor declined to receive a coin of this character because he, in good faith, believed it was a counterfeit, will not relieve the railroad company from liability.

3. There being evidence tending to show that in ejecting the passenger the conductor used to him insulting language, and was "very impolite and gruff," the court was not unwarranted in charging the jury upon the law of vindictive damages.

4. Though the law relating to the extraordinary care due by railroad companies to passengers was not involved, it does not appear that alluding to it in the charge given to the jury resulted in any injury to the defendant.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by H. G. Keeny, against the Atlanta Consolidated Street-Railway Company to recover damages for a wrongful ejection from a car. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Keeny sued the street railway for damages, and obtained a verdict for \$100. The testimony in his behalf shows that he boarded one of defendant's cars, not far from his home, about 4 o'clock of an afternoon in August, for the purpose of riding to his place of business. Upon the conductor coming to collect his fare, he tendered a silver half dollar coined in 1824, that being all the money he had about him, though he had other money at home. The coin was somewhat rare, and of somewhat different appearance from coins of the same denomination of later dates. It was, in fact, a genuine coin of the United States; but the conductor pronounced it a counterfeit, handed it back, and said, "You will pay the fare,

or get off the car, mighty quick." Plaintiff replied that was all he had, and submitted the coin to a policeman who was on the car, and who examined it, and stated in the hearing of the conductor that he thought it was a good half dollar. The conductor again said, "Pay the fare, or get off the car;" and plaintiff replied as before, and looked round, but did not know anybody from whom he could borrow a nickel. The car passed the next cross street, and the conductor stopped it about the center of the block, and told plaintiff to get off the car, or pay his fare. Plaintiff replied that he could not do it, and got off and walked to town, a distance of nearly a mile. He was aware that cars ran every 15 minutes, and another car did pass him coming into town; but he did not halt it to get on, as he was afraid he would be insulted a second time. The manner of the conductor in addressing him was very impolite and gruff. The coin was in evidence before the jury. Plaintiff was corroborated in some degree by the policeman referred to. There was very material conflict between their testimony and that of the conductor and another policeman. The conductor admitted having rejected the coin because he did not think it was good, but denied having been impolite, or having ordered plaintiff to get off the car, and claimed to have intended to let him ride to town, etc. The court charged the jury: "If you find from the evidence in the case that the plaintiff boarded defendant's car, intending to become a passenger, he was entitled to all the rights and privileges of a passenger,—that is, the defendant was due him the exercise of extraordinary care; and if he tendered to the conductor a genuine coin of the denomination as alleged,—United States silver coin,—in payment of his fare, it was the duty of the conductor to accept the coin, and transport him to his destination. If the coin presented was not a genuine coin,—in other words, if it was a counterfeit coin,—the conductor ought not to have accepted it, and if the plaintiff failed to pay the fare demanded of him he had the right to expel him from the car. But if the coin, as I have stated, was a genuine silver coin of the United States government, the conductor should have accepted it, and returned to him the change that was proper, and conveyed him to his destination. It is a question of fact to be determined by you under the testimony in the case. The coin is in evidence, and you have the right to inspect it, in passing upon that question." This charge is assigned as error: (1) As to the exercise of extraordinary care being due to plaintiff, because there was no question of carelessness or negligence in the case. (2) As, touching the tender of a genuine coin, inapplicable to the real controversy; for if the coin tendered, though genuine, was so rare, or of such appearance, as to make it doubtful if it was genuine, the conductor

had a right to refuse it, if he really believed it was not genuine. (3) Plaintiff had no right to tender a coin of doubtful appearance, and insist on change for it, and thereby claim the rights of a passenger. (4) He had no right to demand change from the conductor; his duty being to pay his fare in the amount demanded, and the conductor not being bound to accept a coin of different amount, and treat him as a passenger. The evidence in the record does not state what the amount of fare was, nor indicate that any question arose between plaintiff and the conductor with regard to changing the money. The court charged the jury in the language of sections 3065 and 3066 of the Code, and added: "Before you can allow any damages for aggravation, you must believe from the evidence that there were aggravating circumstances, either in the act or the intention; and in passing upon this question you can take into consideration the manner of the conductor, his surrounding circumstances at the time, the necessity for him to act quickly and promptly as conductor, and every other circumstance in the case which may throw light upon the good faith or bad faith of the conductor in expelling this passenger, if you find he expelled him." The court then charged in the language of section 3067 of the Code, omitting any reference to the worldly circumstances of the parties, also omitting the last sentence of that section, and stating that "the amount of bad faith in the transaction, if any, and all the attendant facts, should be weighed by you." The error assigned is that the evidence did not justify any charge which would authorize vindictive damages, or any other than merely compensatory damages sufficient to carry the costs against defendant. Error is further assigned upon the refusal of the court to charge, upon oral request, that if the jury believed from the evidence that the coin offered by plaintiff was genuine, and yet that the conductor in good faith declined to take it because he believed it a counterfeit, or not good money, they should give only nominal damages, if they found for the plaintiff.

N. J. & T. A. Hammond, for plaintiff in error. Simmons & Corrigan, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 270)

#### VINSON v. KELLY.

(Supreme Court of Georgia. July 20, 1898.)  
DAMAGES—EVIDENCE—RELEVANCY—INSTRUCTIONS.

1. One of the contentions of the defendant on the trial of an action against him by a discharged clerk, for his salary, being that the misconduct of the plaintiff had caused a diminution in the defendant's business, from loss of cus-

tomers, evidence that such diminution was caused in whole or in part by rumors injuriously affecting the defendant's character and conduct was admissible in the plaintiff's favor.

2. The court, in this connection, committed no error in charging, in substance, that the evidence in question was not admissible for the purpose of excusing any misconduct or immorality on the part of the plaintiff, or showing that his discharge on this account would not have been authorized, but solely for consideration by the jury in determining what was the real cause for the diminution, if any, in the defendant's business, and in deciding whether or not such diminution was or was not attributable to the conduct of the plaintiff.

3. The evidence, though conflicting, warranted the verdict, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by R. B. Kelly against G. A. Vinson. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Kelly sued Vinson for breach of an alleged contract of employment, by which contract plaintiff was to labor for defendant in his drug store during the year 1892, and defendant was to pay him \$720 for his services. He claimed that he faithfully performed his duties thereunder until May 1, 1892, when defendant discharged him, without fault on his part, and without any reason. He obtained a verdict, and defendant's motion for a new trial was overruled. Defendant's plea set up that plaintiff, while in his employment, neglected his business, and defendant repeatedly told him that unless he gave better satisfaction, and attended to his business, and stayed at the drug store so that he could fill prescriptions without forcing customers to wait his convenience, he would discharge him; that plaintiff would promise, and then continue to neglect business; that it was a part of the contract that if either became dissatisfied the contract could be annulled by either; and that defendant lost largely in amount of sales, owing to the negligence of plaintiff in not staying in the drug store. Further: The conduct of plaintiff while in his employment was such as to injure and damage defendant's business. Plaintiff was inattentive to duties required of him as clerk at the store. Contrary to agreement, he persisted in having women of questionable character come to the store during business hours, whereupon he would absent himself from the store. He would take said questionable characters to his room, over the store, and remain there with them during business hours. This was of frequent occurrence, and became so notorious in that section of the city as to cause a large portion of the customers of the store to withdraw their patronage and support. Defendant knew of said conduct, and frequently warned plaintiff that he must desist, or be discharged. Defendant was notified by some of his customers that plaintiff's conduct was such as to compel them to withdraw their trade if he retained him in his employment. The motion for a

new trial alleges, in addition to the general grounds, that the court erred in ruling that, on the question of the diminution of trade, testimony was admissible as to any public rumors or charge of like character made against the defendant, not as an excuse for any conduct on the part of the plaintiff, but simply as bearing on the question of what caused the trade to fall off, if it did; and in allowing evidence to be introduced under said ruling, over objection that it was irrelevant and hearsay, viz: J. M. Johnson, a witness introduced by defendant, was asked on cross-examination whether there were charges of immorality made before the church session against defendant. He testified: "No charges were ever preferred before the church, by women, against Dr. Vinson. I do not know it to be a fact that a letter from a woman, accusing Dr. Vinson of bastardy, was carried to our church session. I did not hear about the scandal concerning Dr. Vinson that J. D. Johnson had reported." Over like objection, the court allowed the following questions to be asked of and answered by defendant on cross-examination: "Q. When did you get so particular about women coming to your drug store? A. Whenever it began to injure my business. Q. You don't want a thing of that kind to go on, unless you have got a hand in it? A. I will attend to my part of that." In this connection the court gave the following charge to the jury, and the same is assigned as error: "Testimony was introduced during the progress of this case concerning the conduct of the defendant, Dr. Vinson, and whether or not there were certain rumors touching his character and conduct. This was admitted under the plea and contention of the defendant that the plaintiff's conduct had caused, and was likely to cause, injury to his business. The defendant contended that there were rumors and discussions of the character and conduct of the plaintiff, and that these, being broadcast in the community, were likely to injure the business of the defendant, and did injure it. The plaintiff, on the other hand, responded that, if there was injury to the business of the defendant, it was not his (the plaintiff's) fault, but that it was attributable, at least in part, to the defendant. On this issue this evidence was admitted before you. If the defendant employed the plaintiff in his drug store, and the plaintiff was guilty of conduct which authorized his discharge by the defendant, it would be no substantial defense on his part, preventing the defendant from discharging him, to retort that this defendant himself was also guilty of misconduct or of immorality; but, as I stated to you, this was admitted for your consideration on the question of what was the real cause of the injury, if any, to the defendant's business, and whether it was attributable to the plaintiff, as contended by the defendant, or whether it was not so attributable; and if you believe it was not so attributable, under the evidence in this case, to the plaintiff, then, as to this particular branch of the defense, it would not be sustained."

Bishop, Andrews & Hill, for plaintiff in error. W. T. Moyers, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 270)

KEY v. ABBOTT et al.

(Supreme Court of Georgia. July 20, 1896.)

APPEAL—HARMLESS ERROR.

It so manifestly appears from the evidence as a whole, even omitting those portions of the same to the admissibility of which objections were made, that the verdict was right, that it is not necessary to examine closely the various grounds of the motion for a new trial, with a view to determining whether or not errors were committed by the trial judge. Irrespective of the legal questions presented, it is quite clear that, upon the substantial merits of the case, the judgment of the court below refusing to grant a new trial should not be disturbed.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Epps, Judge.

Action between James L. Key, administrator, and Abbott, Parker & Co. From a judgment for the latter, the former brings error. Affirmed.

James L. Key, in pro. per. Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 275)

PORTER et al. v. JOHNSON.

(Supreme Court of Georgia. July 27, 1896.)

LANDLORD AND TENANT—EVICTION—ACTION FOR DAMAGES.

Under the decision of this court in the present case, rendered at the March term, 1895 (23 S. E. 123, 96 Ga. 145), the plaintiff below was entitled to a recovery if the defendants acted with malice and without probable cause in suing out and having executed the dispossessionary warrant under which the plaintiff's intestate was ejected from the premises in controversy. This being so, and there being evidence to authorize a finding that they did so act, the judge, who tried the case without the intervention of a jury, was warranted in rendering a judgment in the plaintiff's favor; and, in view of the entire evidence, this court is not prepared to hold that the judgment he did render was excessive in amount.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Annie Johnson, administratrix, against J. H. Porter and others, to recover damages for a wrongful eviction from premises which plaintiff's intestate entered as tenant. From a judgment for plaintiff, defendants bring error. Affirmed.

The following is the official report:

The case of Mrs. Johnson, administratrix of James Johnson, against Porter et al., hav-

ing been tried in the city court of Atlanta, there was a verdict for the plaintiff. The defendants moved for a new trial, and, their motion being overruled, brought the case to this court, by which the judgment of the court below was reversed. See *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123. The case was again tried before the judge below, without a jury, by agreement of parties, the hearing being upon the same evidence as was introduced at the former trial, with the exception of the additional evidence of H. M. Atkinson, hereinafter mentioned. There was a finding for plaintiff for \$1,236.50. Defendants moved for a new trial, and, their motion being overruled, excepted. The motion was upon the grounds that the verdict was contrary to law, evidence, etc., and was excessive; further, that the court erred in that he construed the decision of the supreme court in this case to mean that, under the facts, there should be some recovery in behalf of plaintiff against defendants, and the case was tried on the same evidence which was before the supreme court when said decision was rendered by it, with the additional evidence of H. M. Atkinson, that he and his co-defendants, in suing out the warrant complained of, acted on the advice of respectable counsel, after laying all the facts before him, and he advised him that he had the right to sue out said warrant, and his judgment in said case was based on said construction.

Brandon & Arkwright, for plaintiffs in error. Arnold & Arnold and C. D. Hill, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 272)

STRICKLAND et al. v. ANGIER et al.  
(Supreme Court of Georgia. July 27, 1896.)

PARTITION—EVIDENCE OF TITLE.

This being an application for partition, and the plaintiffs' evidence, as a whole, failing to show that they had any interest in or title to the land in dispute, there was no error in dismissing their petition.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Simon Strickland and others against A. E. Angier and others. From a judgment for defendants, plaintiffs bring error. Affirmed.

The following is the official report:

Simon Strickland and Mrs. Matilda Jett, as the children and heirs of Simon Strickland, Sr., brought their petition against Mrs. Elizabeth Angier, widow of N. L. Angier, and Alton Angier and others, children of N. L. Angier, praying for the partition of lot No. 176, and part of lot 145, in the Fourteenth district of Fulton county, the whole containing 282½ acres, which petitioners claimed belong to them and the defendants as tenants in common; petitioners further claiming that

the defendants were only entitled to one-third interest in the land, and that said one-third interest was derived by defendants through a conveyance made by D. H. Strickland, one of the children and heirs of Simon Strickland, Sr., the latter having died in possession of the entire property.

Upon the trial, Simon Strickland testified: "I am the brother of Mrs. Jett. Having never seen my father, I know nothing personally with reference to his having possession of this land sued for,—only by what my mother said." He was then asked, "What did she say?" This question was objected to, and the objection sustained, which ruling is assigned as error; the purpose of the evidence being to show by the wife the possession of her deceased husband at the time of his death. The witness was asked, "What did your mother say about your father being dead?" Defendants objected to anything she might have said, except about the death. The objection was sustained, which ruling, also, is excepted to. The witness then testified: "She told me that father was dead; that he was Simon Strickland. She said he died on this land over here." The witness was then asked, "Where did he live?" Defendants objected on the ground that the witness could not know. Plaintiffs' counsel stated that he wanted the witness to testify what the witness' mother said about it. The objection was sustained, to which ruling, also, plaintiffs excepted. The witness was asked, "What is your interest in it [the land]?" Defendants objected because this was not the way to prove interest. The objection was sustained, to which ruling, also, plaintiffs excepted. The witness further testified: "D. H. Strickland, Matilda A. Jett, and myself were heirs of my father. D. H. Strickland is dead." The witness was asked, "State whether you have ever disposed of your interest in the land," and answered, "I have never received a cent." Defendants objected because the evidence was irrelevant. The court stated that he did not think the evidence competent, that the question was whether the witness had an interest, and ruled out the evidence. To this ruling, also, plaintiffs excepted. In a note the court states that, at the time this question was asked, neither title nor possession had been shown. The witness further testified: "I am about 55 years old. My father died about two weeks before my birth, so my mother said. Since I was about four or five years old, I have been living in Alabama, where my mother went with me, and where she lived up to her death, some twelve or fourteen years ago. My father's name was Simon Strickland. Mrs. Jett is about two years older than I am, I suppose. She went to Alabama with mother, lived there some ten or fifteen years, and then came back to Georgia. D. H. Strickland lived in Alabama all the time since mother moved there. None of us ever had anything to do with that prop-

erty since we lived in Alabama, so far as I know. D. H. Strickland has been dead from two to four years. I never paid taxes on this land."

Mrs. Jett testified: "I was two years old when my father, Simon Strickland, died. I do not exactly know the land in dispute. It lies on Proctor's creek. It is due southwest of Atlanta, or north, or south, or something. There are 340 acres, I suppose. I do not remember the description, as read in the declaration." The witness was asked, "What is your connection with the land?" Defendants objected, and the objection was sustained, to which ruling, also, plaintiffs excepted. The witness was then asked, "Have you ever, in any way, disposed of any interest in it?" She answered that she had not. Defendants objected because the evidence had already been ruled out. The court excluded the evidence, and to this ruling, also, plaintiffs excepted. The witness further testified: "My father lived on that place, where I was born, I suppose. He died on that same land. I suppose I was about six years old when my mother moved to Alabama. At the time of the removal we lived at the same place where father was killed. I cannot recollect his dying, but I remember moving. I suppose I was about two years old when he was killed. I remained there on that place; and my mother, she was there up to the time we moved; and my brother Simon and my other brother was there with us. It was this land that is now claimed that we moved from. I was in Alabama eleven years, and, when I married, came back to Georgia, but never went back on this property, and don't remember whether any one was living on this property when I got back. I think there was a house on the place, but the house we lived in was not there. None of my family have been living on the place, or been in possession of it, since mother moved to Alabama. I don't think there have been people on the place all the time ever since the war, and during the war. I think partly every year since the war somebody has been living there, but I think it was vacated some."

Oliver Baker testified: "I never knew Simon Strickland in his lifetime. I know where he lived. I know the land in dispute here. It corners with my land. I have known that land ever since I lived there,—about forty-odd years." The witness was asked, "Do you know of Mrs. Jett having a claim to it?" Defendants objected, and the objection was sustained, to which ruling, also, plaintiffs excepted. In a note the court states: "The court had several times ruled that title or interest in realty could not be proved by a parol statement. When the question was asked as to whether witness knew of her having a claim to it, objection was made and sustained." The witness continued: "They hauled a good deal of wood off of it. Old man Anglier, I reckon, had it done. I reckon, between 1,000 and 2,000 cords. I used to get about

the same time \$4 a cord for wood. This was a year or two after the surrender in 1865. The wood in the tree was worth \$1 a cord. Dr. Anglier was in possession then, cutting wood off the land, and selling it. I have been living there about 40 years, and never knew any of the Stricklands to be in possession of that land. Somebody has been living on the land ever since and during the war. Dr. Anglier's tenants were there when the wood was cut, living about where the old house was. There was not more than one settlement on it then. Now there is some cleared, and two or three houses on it." Defendants' counsel suggested that possibly the testimony about wood would show that it was barred by the statute of limitations. The court said he "would admit the testimony now, but would deal with it at the proper time." The remark about dealing with it at the proper time plaintiff alleges as improper, and assigns it as error, as being an intimation or an expression of opinion as to the evidence.

Mrs. A. M. Baker testified: "The name of plaintiffs' father was Simon Strickland. I knew him about fourteen years. I knew him from the time he bought his place and lived on it. The place was on the Mason & Turner's Ferry road." Defendants objected to the statement of the witness that Strickland bought the place. The objection was sustained, and this ruling, also, is excepted to. The witness continued: "He lived about two miles from here, I reckon, on said Ferry road. He lived— I know the land in dispute." Plaintiffs' attorney asked, "What do you know in reference to Simon Strickland, the old man, in regard to that land?" The witness answered, "I know he owned it." Defendants objected, and the court at once sustained the objection, which ruling is alleged as improper, and is excepted to, as there was no ground of objection stated, and nothing to show that the witness did not know what she said, and it was competent and relevant testimony. In a note the court states: "The court, on objection of defendants' counsel, ruled again and again, in substance, that witnesses should not testify in parol that Strickland or plaintiff owned the land; the objection being urged that such proof was incompetent, and that title to realty could not be so proved. After several similar rulings the court did not think it necessary to go over the ground and reargue it each time." The witness continued: "With reference to his being in possession of it, I know he got killed there. He had possession of land right out where I told you, about three miles. He did live on that land. I saw him when he was a corpse, and saw him buried. He was on this land at the home. The Strickland home at that time was about three miles from here, on said Ferry road. I lived on adjoining lots. It is the very same land. There is about 400 acres of it, I think. A good deal of it has been cleared up, but it is old fields. When he died there he left Mrs. Jett and her brother,

Mr. Strickland. They lived there not very long after he died. I reckon, about a couple of years. I was small, and can't tell exactly how long. There was not any other settlement on the land at that time, that I know of." The witness was asked: "Do you know anything about Mrs. Jett, or any of the Strickland family, having any possession of this land since that?" She answered, "I know about her father owning it, that is all." Defendants objected, but without stating the ground of objection. The objection was sustained, without hearing any suggestion in support of the question and answer, which ruling is excepted to, as the question and answer were pertinent, relevant, and competent testimony. In a note the court states: "The objection that title to realty could not be thus proved by parol was sustained a number of times. After having ruled this several times, the court saw no use in asking for or awaiting reargument every time the question was asked or testimony given which he had ruled illegal; and, when counsel for defendants would announce that they again objected, the court would rule it out." The witness continued: "About two years after Mr. Strickland was killed, the Stricklands moved to Alabama. I don't remember if all of them went. After the Stricklands went away, I did not see them for some time. Different people have been living there ever since."

J. T. Akridge testified: "I know the land in dispute. I know about where it lies. Simon Strickland and Mrs. Strickland lived on it 40 or 50 years ago. He was killed there. I do not recollect that there was more than that one settlement on the land. There has been a good deal of wood cut since that. Dr. Angier had wood cut there, worth on the ground, not cut, \$1 a cord, I reckon. I cannot say for certain whether Mrs. Jett was on that land or not at any time. She was a little child when her father was killed, and was there on the place, I suppose. I don't recollect how long they stayed there after her father was killed. It might have been two or three years. Mrs. Strickland lived there a year or so, and then went to Alabama. I think all of her family went with her, and none of them have been in possession of that land since. Other people lived in the house after Mrs. Strickland and Samuel went to Alabama. Dr. Angier was in possession of it; had his tenants in there 24 or 25 years ago when he cut the wood off; has had his tenants in there ever since, and, since he died, his family. One Leonard was in possession before Dr. Angier took possession."

R. M. Tuck testified: "I know there was a man named Strickland who lived on the land in dispute, and who died there. If there was any other settlement on the land, I could not tell. It was well timbered. They claimed about 500 acres, I think. He died about 55 years ago, as well as I can recollect, and lived there, and was in possession there, at the time of his death."

E. R. Elliott testified: "I knew Simon Strickland, the father of plaintiffs. He lived and died on the land in dispute. There has been a good deal of wood cut off of the land, —about 1,000 or 1,200 cords. I suppose wood would be worth from 60 to 75 cents in the tree at those times. All I know is that, 25 or 30 years ago, Dr. Angier had some wood cut off the land, but I do not know how much. Strickland's widow went away to Alabama, and carried all the children, soon after he was killed. I think the house has been occupied since. There were tenants there, who said they were the tenants of Dr. Angier and Mr. Glenn."

W. E. Sims testified: "The father of plaintiffs lived and died on the land in dispute. I don't think there was any other settlement, perhaps, but his, to amount to anything. Dr. Angier had a good deal of wood cut off the place since. He told me he had cut about 1,200 cords. That wood was worth, in the tree, 75 cents or \$1. Mrs. Strickland and her children remained on the place several years after her husband died. It was about 25 years ago when Dr. Angier cut the wood off."

W. A. Jett testified: "I know the land in dispute. I know nothing at all about it, with reference to the father of plaintiffs living on it." He was asked, "What do you know with reference to one of the children disposing of his interest in it?" Defendants' counsel objected upon the ground that it had not been proved that any of the children had an interest in it. The objection was sustained, and this ruling, also, is assigned as error, on the ground that it was an intimation as to what had or had not been proved, and was a decision upon the evidence which had already been adduced, and the evidence sought and rejected was material and relevant. The witness continued: "All the wood I know of being cut off the place was by Mr. E. R. Elliott, but there was other wood cut."

W. F. Reed testified: "Forty-five years ago I lived on Mr. Strickland's land, four miles west of Atlanta. I know the land in dispute now." Defendants' counsel objected to the statement of the witness that he lived on Mr. Strickland's land, if it referred to the land in dispute. The objection was sustained, and to this ruling, also, plaintiffs excepted, claiming that the evidence was material and relevant. In a note the court states: "This was another repetition of the rule that it could not be proved by a mere parol statement that the land was Strickland's." The witness continued: "The widow Strickland had possession of that land when I lived there, in 1845. Her husband was killed in 1840, and had possession of the land when he was living. His widow lived there three or four years after he was killed, and moved to Alabama."

E. A. Angier testified: "I wrote this letter [exhibited to witness]. I went out there with my father frequently when there was some wood cut, but don't know how much was cut. It was worth about 75 cents, in the tree."

Defendants' counsel objected to the testimony about the wood, and the court ruled that he "would let in the evidence, and deal with it afterwards," which remark or ruling is assigned as error, because of its tendency to suggest an intention to afterwards repudiate the testimony. The witness continued: "I think my father died the latter part of February, 1882. At odd intervals since, some within the last winter and this winter, my mother and several of the family have had wood cut. I gave no other notice or letter to Mrs. Jett or her brother about a claim to this land. My father was in possession of this land 22 or 23 years ago, and then my mother was appointed administratrix on his estate in 1882, and took possession of it, and I think she divided the land between the children four or five years ago. Tom Glenn was in possession of it with my father." The witness was asked, "Under whom did they claim?" Defendants' counsel objected to this question because, he said, the witness could not know. The court ruled that plaintiffs' counsel could prove whether they were in possession, claiming title, or whether they claimed as tenants, and, if so, whose tenants, but could not prove title in that way. To this ruling plaintiffs except, because the question was as to the claim of possession, so as to show the joint possession or tenancy in common of plaintiffs and defendants, and also because it was proper in this way to lay the base or foundation of a common title in the parties to the suit, as to this land. The witness continued: "I know that my father and Mr. Glenn were in possession jointly, claiming ownership of it. I think, about 1872 or 1873 my father took possession individually, and remained in possession up to his death. When the land was divided, my mother took a child's share, and we all have been in possession ever since. My father cultivated part of the land, and had tenants there. The house which stood upon the land is there now. He cut wood in various places all over the land." Defendants' counsel asked, "Did he have any signs driven up around the place?" Plaintiffs' counsel objected because irrelevant. The objection was overruled, and to this ruling, also, plaintiffs excepted. The witness continued: "My mother had signs put up, warning people not to trespass on the land, and signed it, 'Mrs. E. A. Angier, Administratrix of N. L. Angler.' They are there now, and have been there twelve years." Plaintiffs' counsel objected to the witness stating the contents of the signs. The court ruled that they were admissible, as showing the declaration of the person in possession, which ruling, also, is excepted to as not pertinent. The witness continued: "As to the kind of possession mother and children have had, we have sold some of it to a person who is now in possession." This statement was ruled out. The witness continued: "I delivered possession to somebody else, or portions of it." Plaintiffs' counsel objected to this evidence, and the objec-

tion was overruled, which ruling, also, is excepted to. The witness continued: "I wrote the letter of April, 1893, to Mrs. Jett, because that was the year of the panic. I was pretty hard up. I was land-poor, and needed some money, and was on a trade with reference to this land." Plaintiffs' counsel objected because irrelevant. The court said he thought it was competent as to what were the surrounding facts at the time, but not as to what were the private intentions of the witness, to which ruling, also, plaintiffs excepted. The witness continued: "I was on a trade as to a portion of the land, in order to get some money; and about the time we were going to conclude the trade it was brought to my attention by the person to whom I was going to deliver possession that Mrs. Jett had made some statement about the title to our property, and that broke up the trade, and then I wrote Mrs. Jett the letter. That is the reason I wrote it." Plaintiffs introduced the letter in question, dated April 27, 1893, which stated: The writer, on various occasions, has heard of alleged claims by Mrs. Jett to some of the property, and was sure she is laboring under a misapprehension about that matter. Among his father's papers he found where some such claim was made very many years ago, sounding "Jett & Strickland vs. N. L. Angler and J. T. Glenn," describing the land lot, and then followed a waiver of all claims by said Jett & Strickland; the waiver being signed by Hulsey & Tignor for Jett & Strickland, in consideration of a money payment. If she, or Hulsey & Tignor, would read this paper, which was of record, she would become convinced that she was mistaken.

Mrs. Jett was reintroduced, and testified: "Neither Mr. Angler nor any of the Anglers ever gave me any other notice, besides this letter, in reference to their claiming against me this land. I never made any conveyance with regard to this land."

Simon Strickland was reintroduced, and testified to the same effect that Mrs. Jett had testified.

J. A. Casy testified: "Plaintiffs' father lived, I think, about the center of the land in dispute. Much timber has been cut from the land, but I do not know how much."

Plaintiffs having closed, defendants offered in evidence letters of administration, "making Mrs. Stacy Strickland the administratrix of the estate of Simon Strickland." Plaintiffs objected to this evidence as irrelevant, and that it could not be used to show title out of plaintiffs. The objection was overruled. In a note the court states: "Defendants' counsel stated that he would offer with it a deed from such administratrix, as a part of their title. Subject to such statement, the court let the letters in." Defendants then offered a paper purporting to be a deed from Mrs. Strickland, as administratrix, to Elias Wood. Plaintiffs objected, unless there was an order of court shown for a sale, as a foundation for

such deed. The court ruled that if it were offered as title he would rule it out, and rejected it, and said that unless the order was produced the letters of administration would have to go out too. Defendants' counsel then stated that, the deed being rejected, the letters would have to go out, and moved to rule out, or allow withdrawal of, the letters. The court then ruled out the letters, which ruling out of such evidence at the time, plaintiffs claim, was improper, and except to it. In a note the court states: "Plaintiffs' counsel had objected to the introduction of the letters, and made no objection to their withdrawal." Defendants moved to dismiss the petition on the ground that plaintiffs had shown no title. The court, before hearing the argument on this motion, sent out the jury, which direction in sending out the jury is assigned as error. In a note the court states: "That counsel might discuss more freely the evidence on the motion to dismiss, and that the court might ask certain questions, and refresh his mind as to certain testimony, without danger of affecting the minds of the jurors should the case proceed, he sent them out pending the discussion. Nobody raised any objection." The court then granted an order that, petitioners having failed to prove a prima facie title to the land, it was adjudged that their application for partition be denied, and the petition be dismissed. To this order, also, plaintiffs excepted.

Robt. L. Rodgers, for plaintiffs in error.  
J. T. Glenn and C. J. Simmons, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 273)

BELL v. WEYMAN et al.

(Supreme Court of Georgia. July 27, 1896.)

CANCELLATION OF DEED—FRAUD—USURY—SUFFICIENCY OF BILL.

The declaration, as amended, made a case entitling the plaintiff to equitable relief, and it was therefore error to dismiss it on demurrer. (Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by George Bell against Weyman & Connors to cancel a deed. From a judgment for defendants, plaintiff brings error. Reversed.

The following is the official report:

To the petition of Bell against Weyman & Connors, as amended, the defendants demurred. The demurrer was sustained, and to this ruling plaintiff excepted. The petition alleged: About the — day of 1892, petitioner borrowed from defendants \$100, but they paid him in cash only \$60, for which his note was given for \$100, payable nine months from date; and, to secure payment of the note, a mortgage was executed by him on certain realty in Atlanta, described. The paper he

signed was, as he understood it, a simple mortgage, and not a mortgage and option to purchase the property, as it appears to be from the exhibit attached. When the day came for the payment of the \$100, he called at their office to repay it. They could not be found, and he called the next day, and still they could not be found. He called the third time, and they were not in. About the third day after the note was due, he again called, and tendered them the \$100; but they declined to take it, claiming that the time for redeeming the land had passed, and that he also owed them \$250, which debt they had purchased, or had contracted to purchase, from one Ford, and that he must also secure them on that debt. He did owe Ford the \$250, and had also given Ford a security deed to said property, and was willing to secure defendants, as he had Ford, by giving them a mortgage or a security deed on the property; and, at their instance and solicitation, he executed a paper he then and there thought and understood was a mortgage, to secure them for the \$100 and the \$250. At that time he never received a cent from them, nor did they pay for him any debts due by him. All the money due by him to them was the \$100 borrowed March 22, 1892, and the \$250 they claimed was purchased by them from Ford; and the statement in the deed that he had received \$500 is untrue, and at the time he executed the deed he thought he was executing a mortgage, and never knew the difference until thereafter explained. Shortly afterwards defendants obtained from Ford a quitclaim deed to the premises. At the time petitioner executed the writing to secure defendants in the sums of \$100 and \$250, it was agreed that the rents and profits of two of the small houses on the lot should be paid over to defendants, in order to liquidate the indebtedness due by him to them, as above mentioned; and, in pursuance of this agreement, his tenants have been paying their rents regularly to defendants from December 13, 1892, to the present, amounting to some \$250. If the said paper signed by petitioner on December 13, 1892, is a deed, it was simply meant for a security deed, and not one of pure bargain and sale; and petitioner never understood that he was signing a regular sale deed to the property when he executed said instrument to secure defendants for the \$100 and the \$250. The lot described in said deed contains three houses, and is worth not less than \$2,500. It is subject to be subdivided into three lots on which will be a house, and either of the houses and lots is worth more than the deed by him to defendants, and that fact alone shows that he never intended to sell and convey the entire property for \$500, the sum stated as the consideration for the deed. He is an ignorant negro, can neither read nor write, and never knew until recently the character of the instrument signed by him December 13, 1892. Defendants are now claiming absolute ownership of the property, basing their claim upon the deed obtained from Ford, and that

made by petitioner on December 13, 1892, and, under this pretended claim, are proceeding to dispossess petitioner from his lot. He is poor, and cannot give the bond and security required by law to arrest the proceedings to dispossess, and therefore has no legal remedy to prevent the execution of the dispossession proceedings. He prayed: To enjoin the dispossession proceedings; to enjoin defendants from selling, incumbering, or interfering with the property; to cancel the deed of December 13, 1893, because it was not the kind of deed he was induced to believe he had signed, and because it contains usury; that the deed made by Ford also contains usury, and should therefore be declared void; that defendants be required to credit the amounts collected by them as rents upon the amount actually due by him; for general relief and process. By amendment, he alleged: On account of his poverty, he is unable to tender the amount due defendants on the deed of December 13, 1892. He therefore prays that whatever the jury finds is due defendants for money loaned to him March 22, 1892, be found in their favor by the jury against him; and that defendants have all the equities they are entitled to. The demurrer was on the grounds: The petition is without equity. Plaintiff does not tender defendants the sums admitted to be due them. He does not allege defendants to be insolvent, and is therefore not entitled to the relief prayed for. There was also a ground of demurrer as to the manner in which the petition had been paraphrased.

W. I. Heyward and T. O. Battle, for plaintiff in error. King & Anderson, for defendants in error.

PER CURIAM. Judgment reversed.

(99 Ga. 276)

SMITH et al. v. WILSON et al.

(Supreme Court of Georgia. Aug. 3, 1896.)

DECEDENTS' ESTATES—SALES BY WIDOW AND ADMINISTRATRIX—SUFFICIENCY OF DEED—INSTRUCTIONS—HARMLESS ERROR.

1. It was lawful in 1857 for a widow, who was the administratrix of her deceased husband, after selling and conveying in her individual name and right her life estate in the land which had been assigned to her as dower, to sell, as administratrix, the reversion therein; such sale being made under an order of the court of ordinary granting her leave, as administratrix, to sell all the realty of her intestate.

2. In the present case the deed from the administratrix to the purchaser at the sale in question sufficiently described the land embraced in the reversion.

3. The charge complained of was not adjusted to the issues involved, but as the verdict, under the evidence, was manifestly right, it should not be disturbed.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action by Thomas H. Smith and others against John T. Wilson and others to recover

land. From a judgment for defendants, plaintiffs bring error. Affirmed.

The following is the official report:

Suits to recover 70 acres of land in the northeast corner of lot 305 in formerly Newton, now Rockdale, county, were brought by Thomas H. Smith and others, children and heirs at law of Hillman Smith and his wife, Amanda R., and by certain grandchildren, whose parents were dead. The youngest child of Hillman and Amanda R. Smith was born in 1852, and died in 1880. Hillman Smith died in 1854, in possession of lot 305, which had been conveyed to him in 1850 by deed reciting a consideration of \$305. His widow, Amanda R., was appointed administratrix of his estate by the court of ordinary of Newton county, which court on September 3, 1855, passed an order granting her leave to sell the real estate of the deceased for the benefit of his heirs and creditors. She applied to the superior court of Newton county for dower; stating in her application that Hillman Smith died on June 15, 1854, possessed of lot 305. Upon this application, with the return of commissioners, the land in dispute was set apart to her, as dower, by the judgment of said court, on October 31, 1855. On November 6, 1855, two deeds were made,—one by Mrs. Smith, as administratrix, to William Wright, who was her father, this deed reciting a public sale of the land conveyed; the other by Wright to Mrs. Smith individually. Each of them recites a consideration of \$180, and conveys lot 305, containing 202½ acres, "with the exception of the widow's dower recently laid off." On October 21, 1857, Mrs. Smith, by deed reciting a consideration of \$250, conveyed to Henry Wilson the same property as described in the two deeds last mentioned; and on the same day she conveyed, by separate deed, reciting a consideration of \$50, "all her right and title to dower" in lot 305 (the same being one-third of said lot, in the northeast corner thereof), in fee simple, with warranty. On December 7, 1857, she, as administratrix, conveyed to said Wilson by deed reciting a consideration of \$38, and further reciting that it was made agreeably to the order granting her leave to sell (already mentioned) "a parcel of land belonging to the estate of the deceased," situate in Newton county, "known and distinguished as part of lot 305, in the Sixteenth district, containing sixty-seven and three-quarters acres." This deed was recorded on November 28, 1859. Mrs. Smith had remained in possession of the land in dispute from the time of her husband's death until she sold it to Wilson, when she moved away, and he entered in possession, and so remained until December 5, 1879, when he sold the land to Mrs. Camp, making her a warranty deed, which was recorded in the same month. She remained in undisturbed possession until 1889, when she sold to de-

defendants, who have since held the possession. Mrs. Smith died in 1894, and these suits, which were tried together, were brought on March 9, 1895. Mrs. Camp testified that she believed the title all right when she purchased, and each of defendants testified that he knew of no adverse claim when he purchased, and believed he was getting a good title. For plaintiffs, there was testimony that the land embraced in the dower assigned to Mrs. Smith was worth in 1857 five dollars or more per acre. Thomas H. Smith testified that all the plaintiffs, except the wife of W. B. Smith, reside out of Rockdale county; that witness and all the other plaintiffs always understood that nothing was ever sold by his mother, except a life estate in the dower, and at her death it would go back to the estate of his father; that none of them knew anything of the deed made by his mother, as administratrix, to Henry Wilson, in 1857, and therefore never ratified and confirmed it; and that about 15 years ago the father-in-law of one of the defendants visited witness' mother and family, in Newton county, in reference to the dower, and was told by them that she had only sold a life interest in the same. W. B. Smith testified similarly, and added that the husband of Mrs. Camp came to him before the deed was made by Wilson to her, and inquired of him as to the titles of the dower, and whether or not the heirs of Hillman Smith expected to claim it after her death, and he informed Mr. Camp that Mrs. Smith had only sold a life interest in her dower, and that at her death the children of Hillman Smith would certainly claim it. The jury found for the defendants, and plaintiffs' motion for a new trial was overruled. The grounds of the motion were that the verdict was contrary to law and evidence, and the court charged the jury as follows: "If you believe from the evidence that Mrs. Amanda R. Smith was the administratrix of her husband's estate, and that, after dower was assigned to her, she sold her dower interest, and afterwards she, as administratrix, sold the dower land, as a part of the estate, and in that capacity made a title to the purchaser at said sale, and that she then or thereabouts abandoned the possession of the dower land, and passed the possession to the said purchaser, such deed and such possession constituted a point of time from which a title by prescription would begin to run; and if you believe from the evidence that the heirs at law were old enough to hold the adverse possession as much as seven years before these suits were instituted, and that the said adverse possession was had for said length of time, their right to recovery would be barred; such deed being good, and good only, as color of title, under which, if there has been any adverse and notorious possession for the statutory period, as against persons capable of suing, the defendants would be entitled to prevail."

The errors assigned upon this charge are that it took from the consideration of the jury all questions of the legality, fairness, sufficiency, or legal effect of the several deeds made by Mrs. Smith in her individual and representative capacities, and that it was not supported by the evidence.

J. N. Glenn and J. R. Irwin, for plaintiffs in error. A. O. McCalla, for defendants in error.

PER CURIAM. Judgment affirmed.

(88 Ga. 626)

# BAGLEY v. COLUMBUS SOUTHERN RY. CO.

(Supreme Court of Georgia. June 18, 1896.)

JUSTICES OF THE PEACE—JURISDICTION—REALTY—WHAT CONSTITUTES—RAILROAD COMPANIES—ACTION FOR FIRE.

1. A justice's court has no jurisdiction of an action for damages to realty.
2. Fences permanently affixed to land constitute a part of the realty; and, as a general rule, unmatured crops growing upon land belonging to the owner of the crops are to be regarded as part and parcel of the land.
3. It follows that a justice's court has no jurisdiction of an action for damages alleged to have been occasioned by the negligence of a railway company in setting fire to and burning fences inclosing the plaintiff's land, and causing damage to his pasture and to a crop of unmatured cotton growing in his field.

(Syllabus by the Court.)

Error from superior court, Chattahoochee county; W. B. Butt, Judge.

Action by John D. Bagley against the Columbus Southern Railway Company to recover damages for injuries caused by a fire set by a locomotive. From a judgment for defendant, plaintiff brings error. Affirmed.

Leonidas McLester, for plaintiff in error. Miller, Wynn & Miller, for defendant in error.

SIMMONS, C. J. 1. Under the constitution of 1877, the jurisdiction of a justice's court over actions arising ex delicto is confined to "cases of injuries or damages to personal property." Code, § 5153; *James v. Smith*, 62 Ga. 345, 347; *Mayor, etc., v. Lyon*, 69 Ga. 577, 580; *White Star Line S. S. Co. v. County of Gordon*, 81 Ga. 47, 7 S. E. 231. It follows that a justice's court has no jurisdiction of a case in which the plaintiff seeks to recover damages for an injury to realty caused by the wrongful act of the defendant.

2. In the present case, which was commenced in a justice's court, the plaintiff alleged that the defendant railway company "did carelessly set fire to and destroy and burn a certain cow pasture, and about 300 yards of fencing, and about one-half acre of cotton growing in the field, the property of complainant, and all of the value of \$25." Whether the magistrate had jurisdiction to entertain the suit must depend, therefore, upon whether the property alleged to have been thus destroyed

is legally to be considered and characterized as personality or as realty.

The burning of the plaintiff's "cow pasture" can scarcely be regarded as anything less than an injury to realty. Indeed, to characterize such an injury merely as damage to personality would appear to be a euphemism unwarranted under the strict rules of law. If the plaintiff really intended to aver that the grass or other natural herbage growing upon his pasture lands was destroyed by fire, still such damage is to be legally considered as an injury to realty. "Growing crops, if fructus naturales, are part of the soil before severance." 4 Am. & Eng. Enc. Law, 894. "It is generally held that growing trees, fruit, and grass are parcel of the land." Tyler, *Fixt.* 735. As we shall hereinafter more fully discuss the nature of growing crops and their legal status, we may dismiss for the present further consideration of the plaintiff's claim of injury to his pasture, and pass to a discussion of the character of the damage he sustained by reason of the burning of his fences.

"A fence is generally considered to be a part of the realty." 7 Am. & Eng. Enc. Law, 905, 906, citing cases. And, to the same effect, see Tyler, *Fixt.* 116, 132, 133. Certainly, where the owner of land builds or maintains thereon a substantial fence, as a permanent structure, constituting an improvement of the premises, such fence becomes as much an integral part of the realty as would a house or brick wall erected thereon. Our Code settles this question, for it is declared in section 2219 that "anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty." So, the burning of the plaintiff's fences is likewise to be regarded as damage to realty.

Our main difficulty in disposing of the question of jurisdiction raised in this case has been to properly determine the legal character of the third item of damage claimed by the plaintiff, arising out of the destruction of unmatured cotton growing in his field. Many of the modern text-books and numerous adjudicated cases have been adverted to during the course of our investigation, but with a result tending rather to confusion than practical aid, so far as concerns a correct determination of the question whether, at common law, growing crops were characterized as personal or as real property. For instance, Mr. Freeman says: "Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty." 1 *Froom. Ex'ns*, § 113. And, in support of his text, he cites cases to show that unmatured crops are "liable to voluntary transfer as chattels," "may be seized and sold under execution," and pass "to the executor or administrator of the occupier [of the land], if he die before he has actually cut, reaped, or gathered the same." On the other hand, it is broadly stated in the Ameri-

can & English Encyclopedia of Law (volume 4, p. 887) that "growing crops, before maturity, and unsevered from the soil, are part and parcel of the land on which they grow, and pass with a conveyance of the land." Cases almost innumerable are cited as showing that this rule obtains in nearly every state in the Union. This text is then immediately followed by the statement (page 891) that "crops ripe for harvest are personal property. They pass to the executor, and not to the heir. They are liable to be seized on execution, and the officer may enter, cut down, seize, and sell the same as other personal estate." On the succeeding page it is said: "Although growing crops are part of the realty, unless severed from the soil, yet, for the purpose of levy and sale on execution, they are suffered to be treated as personality." Again, we find it stated in 6 *Lawson, Rights, Rem. & Prac.* § 2681, that "crops, until they are gathered, are things immovable, or real estate, because they are attached to the ground"; but, when "crops are gathered, they become movable or chattels personal, because they are no longer attached to the soil. \* \* \* Corn, ripe, but standing cut in the field, passes by deed of the freehold. Unharvested crops go to the devisee of the land, and not to the executor; but, as against the heirs at law, they go to the executor." This statement is met by the assertion to be found in 3 *Ballard, Real Prop.* § 128, that "annual crops sown by the owner of the soil or by his tenant, and which are the produce of industry and care while growing and immatured, are personal property": whereas in the first volume of the same work (section 111) it is said that, "as a general rule, growing crops, which have been planted by the owner of the soil, constitute a part of the realty; but this rule is held not to apply to crops which have matured and are ready to be harvested." Mr. Kerr says: "Growing crops planted by the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance. \* \* \* And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past. \* \* \* It is the general rule that a crop growing on land at the time of a sale under execution passes to the purchaser; and the same is true on a sale under a mortgage foreclosure. \* \* \* And growing crops are a part of the realty as between the successful plaintiff in an action of ejectment and the evicted defendant, where the crops were planted after the commencement of the action in ejectment. But the rule is otherwise where the grain was sown and harvested by one on lands to which he claimed title, and of which he was in actual possession. Crops planted by a tenant who holds under the owner of the soil are, as between the landlord and his tenant, personal property; and the tenant has the right to remove them. They become part of the realty, however, should the tenant voluntarily abandon or for-

felt possession of the premises." 1 Kerr, Real Prop. §§ 50, 51. In the second volume of the same work (section 958), the author says: "Where there are annual crops upon the lands assigned to a widow as her dower, which were growing at the time of her husband's death, they will belong to her, and not to the heirs or executors of the husband; but if there has been a severance by the husband, as where he has assigned the crops to pay his debts, the wife will not be entitled to have dower assigned therein." So far as the offense of larceny is concerned, Mr. Bishop says that standing grain was at common law considered as realty, and it required statutory enactment to constitute an unauthorized taking of crops larceny in the several states where such act is made a crime. 1 Bish. New Cr. Law, § 577. In *Preston v. Ryan*, 45 Mich. 174, 7 N. W. 820, Justice Cooley said: "While it is quite true that the growing crops are a part of the realty, yet, for the purposes of levy and sale on execution, they are suffered to be treated as personalty." And there are numerous cases in which it has been held that where the owner of crops has undertaken to sell the same at private sale, before they matured, or while ripe, though ungathered, such crops, if grain or other agricultural produce raised annually, are to be treated as personalty for the purposes of such sale. The question as to whether such crops were personalty or realty arose in considering the effect of the statute of frauds upon sales of this character. These decisions were confined, however, to sales of such crops only as were termed "emblems" at common law. Clark, Cont. 106. Says Mr. Kerr, in dealing with this subject: "A distinction is to be observed between 'fructus naturales,' or the natural growths of the soil, such as trees, grasses, herbs, fruit on trees, and the like, which at common law are part of the soil, and 'fructus industriales,' or fruits or products the result of the annual labor of man in sowing and reaping, planting and gathering, which, though strictly a part of the realty, as much as those products which the soil brings forth without man's intervention, are treated as personal property for many purposes." 1 Kerr, Real Prop. § 53. Mr. Bishop doubts much the soundness of the distinction made in regard to crops of the latter kind, but says: "The exception of deeming them personalty for most civil purposes, even while attached to the soil, is probably established too firmly in authority to be overthrown." Bish. Cont. § 1296. For a full discussion of the subject, and a review of the leading cases, English and American, see Browne, St. Frauds (5th Ed.) § 235 et seq.; 1 Benj. Sales, § 113 et seq.; 4 Am. & Eng. Enc. Law, 893 et seq.; Blackb. Sales, 5; 1 Add. Cont. § 206; Baker, Sales, § 153; Tied. Real Prop. § 799; Tyler, Fict. 732 et seq.; 3 Washb. Real Prop. 364 et seq.; 2 Add. Cont. § 656 et seq.; 2 Schouler, Pers. Prop. § 448 et seq.; Tied. Sales, § 59. In summing up, the author of the work last cited says: "The better opinion, independent

of the authorities, would seem to be that any contract which undertakes to pass title to anything annexed to the soil, without severance, is a contract for the sale of an interest in land, whatever may be the character of the thing to be severed, and falls within the fourth section of the statute."

Any one wishing to further entangle himself in the mystic maze of uncertainty and contradiction in which the law governing growing crops has become involved may profitably direct his attention to the legion of cases cited by the various text writers to whom we have above referred. The field thus open to him is promising even unto distraction. Such a rich mine of abstruse legal learning is, doubtless, of untold value. It has not, however, proved helpful in the decision of the present case, nor led us to an understanding of the general principle underlying the whole subject. Indeed, we are free to confess that about the only deduction we have been able to draw therefrom is that a growing crop is a sort of legal species of chameleon, constantly changing color to meet the emergency of each peculiar class of cases in which the question arises whether it is to be considered as personalty or as realty. Amid all this glare of legal light, we have not been so fortunate as to find any case, or class of cases, like the present, in which this creature of the law has thus arbitrarily volunteered to assume its distinguishing hue. Like a man with many aliases, it presents itself sometimes under one name, at other times under quite another; so that we may not know how, upon special occasion, to address it. Being thus thrown upon our own resources, we feel at liberty, and shall endeavor, to classify the plaintiff's unhappy crop of cotton agreeably to our own understanding of the legal status of growing crops at common law, and without regard to the conflicting views entertained by the several authors from whom we have above quoted.

We may at the outset remark that, in our opinion, growing crops, before actual severance from the soil, were consistently regarded at common law as realty. Whatever incongruities may have crept into the law upon the subject as now understood in many jurisdictions we believe attributable alone to a misconception on the part of courts of the present day of the rules which governed this species of property under the feudal system prevailing in England at an early period of its history. Especially would it seem that the principle which underlies the doctrine of emblements has been too often overlooked, disregarded, misunderstood, or misconstrued. Blackstone tells us that in feudal times, when a common recovery suffered by the tenant of the freehold had the effect of annihilating all leases for years then subsisting, estates for years were necessarily of a precarious nature, and of short duration. 2 Bl. Comm. 143. The hardship attending a thus sudden termination of the lessee's estate be-

fore he could reap the fruits of his toil, by gathering his crops, appealed strongly for his protection. Relief was justly afforded by the courts upon the doctrine of emblements, designed to meet an emergency thus occasioned, whereby the tenant for years was given a right to gather that which he had in good faith planted. Not so, however, if a tenant whose term was certain sowed a crop he could not reasonably expect to be able to harvest before his term expired, or by his own act terminated his estate before his crops were matured and gathered,—in the one case, because “it was his own folly to sow what he could never reap the profits of”; and, in the other case, because his estate terminated by reason of his own default or caprice. 2 Bl. Comm. 145. And in like manner was the doctrine applied as to tenants at will. Id. 146. It is proper to further observe that the right established by the doctrine of emblements was something more than a mere naked privilege accorded to the outgoing tenant to sever from the soil his ripened crops (thus converting the same into personalty), and carry them off, along with such chattels belonging to him as might happen to be upon the premises at the termination of his estate. Growing and immature crops were also covered by this doctrine, which further gave to the tenant “the right of ingress, egress, and regress so far as needful for due attention to and gathering” the same. 1 Kerr, Real Prop. § 652. “The right to emblements includes the right to the land to cultivate and harvest them.” 8 Lawson, Rights, Rem. & Prac. § 2682. So, it will be seen that the effect of the doctrine was to give the departing tenant a right to the use and sustenance of the soil for a period sufficiently long to mature his crops; thus, to this extent, extending the term of his original estate, and, in consequence, depriving his successor in estate of the unrestricted use, and of all profits, of such lands as were necessary to the growing of the crops, until the same matured and were harvested. If the doctrine of emblements extended no further, the tenant at will, the tenant for years, or the tenant *pur autre vie*, would be fully protected, provided he remained in life; otherwise, his very natural failure and omission to demand and enforce his right would inure to the benefit of his successor in estate, thus unjustly depriving the family and creditors of such tenant of the fruits of his toil. Neither creditors nor his heirs could enter upon the land and gather the crops without committing trespass, were this a right restricted to the tenant himself, although, had the tenant himself exercised this right before his death, his heirs and creditors would have gained a just benefit and advantage by reason of such exercise, the result of which would have been to convert the crops into personalty, and render the same capable of due administration and distribution agreeably to law. But this emergency was foreseen. The maxim of the law, “*Actus*

*Del nemini facit injuriam*,” was invoked, and the representatives of the deceased tenant were given the right to enter upon the land and gather the crops, after which, of course, having thus become converted into personal estate, they were subject to administration as such. See 2 Bl. Comm. 122. Subsequently, the doctrine of emblements was still further extended to include crops planted by a tenant in fee who died before time for harvest, principally for the protection of creditors (Id. 404); and with much reason, for, as against creditors, the heir to the inheritable estate had no just claim to profits derived therefrom before he succeeded to its possession, certainly not when, indeed, his ancestor may have been enabled to plant and tend such crops solely by reason of credit extended to him by such creditors.

The whole doctrine of emblements was based upon two reasons: (1) Upon natural justice and equity; (2) upon grounds of public policy. The substantial merit of the first reason assigned is apparent. How public policy was subserved by an application of the doctrine is explained by Blackstone when he says: “The encouragement of husbandry, \* \* \* being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it.” 2 Bl. Comm. 122. We have already shown that, where the reason of the doctrine fails, it has no application; as where, for instance, a tenant terminates his estate through his own default or misconduct. In such case the law as it existed prior to the establishment of this doctrine was suffered to apply in all its rigor, whereby a growing crop, until actually severed from the soil, was regarded as a part of the land itself, and passed accordingly. That this is true is evidenced by the fact that the courts of England have uniformly held that, at common law, growing crops were not considered personalty before severance, and were therefore not the subject-matter of larceny. 1 Bish. New Cr. Law, § 577; 2 Bish. Cr. Law (7th Ed.) § 763; 12 Am. & Eng. Enc. Law, 781, 782, and notes; 2 Bl. Comm. 404. Indeed, if, at common law, standing crops were regarded as personal property, the doctrine of emblements was needlessly devised, so far, at least, as ripened, though ungathered, crops were concerned; for we apprehend it was always the right of a tenant, upon a sudden and unexpected termination of his estate, to demand a reasonable time within which to gather up his household goods and other personal effects before vacating the premises, and, if his ungathered crops constituted a part of his chattels, he would have a reasonable time in which to gather and carry them away. The truth of the matter is, however, that, before the introduction into the law of the doctrine of emblements, the tenant had no right to the usufruct of the land a single day beyond his

term, nor to any profits thereof not arising strictly within the period of his right of occupancy. Consequently, after his estate had become fully determined, he would have no better right to claim standing crops than he would plowbote, although, had he gathered his crops or exercised his right as to plowbote before the expiration of his term, his right to carry the one or the other off as personalty would certainly exist. The doctrine of emblements is based, and proceeds solely, on the idea that the tenant is justly entitled to gather his crops, even though his term has expired, and without regard to whether such crops are to be considered as in the nature of personalty or realty. Nor is the fact that at common law the executor of a deceased tenant was entitled to claim emblements any test as to the legal character of such crops while yet standing in the field. Here we disagree with the conclusion drawn by Mr. Freeman and other writers. Formerly, under the common-law rules of succession, the title to crops unsevered from the soil could not pass into the executor. Under the doctrine of emblements, however, he was given the right to enter upon the land, in the name of the deceased tenant, and convert the crops into personalty, by gathering the same and carrying them away, whereby the rules of succession governing personalty were given opportunity to ultimately take effect upon this species of property.

Again, as has been seen, many text writers call attention to the fact that at common law an execution could be levied on a growing crop; evidently regarding this as persuasive authority for the statement that such crops were considered personalty. In this view we cannot concur. As is well known, under the feudal system alienation or incumbrance of estates was strictly prohibited. Even a tenant in fee had no power to sell, mortgage, or otherwise incumber the estate of inheritance held by him; and, so long as this restraint upon alienation continued, the owner in fee was, in effect, no more than a life tenant. Creditors had therefore to look solely for payment to property of their debtor, in which he could, because having a right under the law to alienate the same, claim an unqualified and exclusive interest, and as to which the heir to the inheritable estate had no vested rights. Crops raised by the tenant in fee, being profits arising from the estate of freehold to which he was solely entitled, were, of course, no part of the inheritance. They were therefore held subject to his debts; not upon the idea that they were personalty rather than realty, but upon the theory that they were a species of property in which the debtor had an unqualified and exclusive ownership. We believe the doctrine that all the property of a debtor, of every kind and description, of which he is sole owner, should justly be held subject to the pay-

ment of his debts, obtains even in this degenerate day. In this regard we find no inconsistency in the common law as to its treatment of growing crops as realty. On the contrary, the distinction between this class of property and mere chattels belonging to the debtor seems to have been strictly observed. The writ of fieri facias was restricted in its operation to the seizure of the "goods and chattels" of the debtor. To reach the profits of his lands (which consisted chiefly of crops grown thereon or rents issuing therefrom), the writ of levavi facias was requisite, which writ remained in use until the writ of elegit (established by statute), conferring greater rights upon creditors, naturally displaced it in general practice. 3 Bl. Comm. 417-420. It is, perhaps, proper to note in this connection that, by special enactment in this state (Code, § 3642), it is provided that growing crops shall be exempt from levy and seizure under execution until matured and fit to be gathered, unless the debtor absconds or removes from the county or state. The purpose of this statute was merely to provide against a sacrifice of the debtor's property. In view of the fact that realty, as well as personalty, is subject in this state to seizure under execution, it would, of course, be absurd to draw the conclusion that this change in the law as previously existing was a recognition that, at common law, growing crops were considered personalty, and that the effect of the statute was to give such crops the character of realty.

We think the whole troublesome subject is pretty satisfactorily explained and relieved of much difficulty by the following extract, which we take from 2 Bl. Comm. 404. Says Blackstone: "Emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills, and at the death of the owner shall vest in his executor, and not his heir. They are forfeitable by outlawry in a personal action; and by the statute 11 Geo. II. c. 19, though not by the common law, they may be distrained for rent arrear. The reason for admitting the acquisition of this special property by tenants who have temporary interests was formerly given; and it was extended to tenants in fee, principally for the benefit of their creditors; and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distrainable for rent, they are not in other respects considered as personal chattels; and, particularly, they are not the object of larceny, before they are severed from the ground." We understand this distinguished writer to mean, when he says, "Emblements are distinct from the real estate in the land," that they constitute no part of the inheritance, as between the heir thereto and the legal representatives of the tenant in fee, but are to be regarded as merely profits arising

out of the land, rather than an integral part of the land itself, considered as a vested estate; or, as between a lessee and the owner of the freehold estate, that emblements never become attached to the land in such manner as to constitute a permanent part of the realty comprising such freehold estate, but, as profits to which the lessee alone is entitled, are distinct from the land itself, and vested exclusively in him. In fact, the doctrine of emblements was designed for the very purpose of effecting such a separation, and declaring emblements "distinct" from the "real estate in the land," no matter in whom such estate vested by reason of the sudden expiration of the tenant's term. It will be noted that Blackstone does not say that growing crops are distinct from the land upon which they are grown, but only that they are so after they become "emblements." Of course, where the doctrine of emblements has no application, growing crops cannot be considered as "emblements" at all. As, for instance, when, at the present day, the owner of lands in fee simple has an unqualified and exclusive interest therein, himself plants the crops, and remains in undisturbed possession of the premises, no such distinction between the land and unharvested crops growing thereon is properly to be observed. Thus, it is the almost universal rule in this country that where such owner voluntarily sells his lands, without expressly reserving a right to enter and gather growing crops planted thereon, such crops are to be regarded as realty, and, as such, pass to the purchaser. See the collection of cases cited in 4 Am. & Eng. Enc. Law, 887.

It will further be observed that Blackstone seems very studiously to avoid characterizing even "emblements" as personalty, but very happily, we think, remarks, instead, that they are "subject to many, though not all, the incidents attending personal chattels." And herein we believe he has struck the keynote explaining how, in later times, growing crops have come to be considered personalty, simply because, the law having placed upon them many incidents common alike to chattels, no reason ordinarily exists for observing their true status as realty; and therefore the distinction which really still survives between them and mere chattels has not been clearly and consistently kept in view. Under various rules of law, many "incidents" attend, and are alike common to, both real and personal property. For instance, a new and special tax upon property might be laid upon both realty and personalty, irrespective of their inherent character, and yet this would really make them no closer kin than they were before. We have already seen that at common law, while estates of inheritance were not subject to be levied on under execution, growing crops were held liable for the claims of creditors, simply because the exclusive ownership of such crops was vested in the debtor, and the heir to the inheritance had no interest therein. As crops raised by the debtor were,

perhaps, the only species of realty of which this was true, and as all chattels were held subject to execution, it is not strange that, in course of time, the impression should take root in the minds of those not familiar with or not recalling the history of this rule of law, and the reasons upon which it was based, that no distinction existed between these two kinds of property, especially as in other respects no difference in the treatment of either was observed. That growing crops were subject to forfeiture upon outlawry may likewise be explained upon the idea suggested why crops were subject to execution, viz. that the debtor had an alienable, and therefore exclusive, interest therein. In the initial or preliminary proceedings to outlawry, if the recreant debtor persistently failed to obey the summons of the court, a writ was issued "commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called 'issues,' and which he forfeits to the king if he doth not appear." 3 Bl. Comm. 280. So, it will be seen that his crops were reached and forfeited, not as chattels, but as "profits of his lands."

We have already explained how emblements came to be vested in the executor, instead of descending to the heir. The remaining "incident" referred to by Blackstone, viz. that emblements "were devisable by testament before the statute of wills," will readily be understood as a natural sequence of the doctrine of emblements. As thereunder the executor was empowered to reduce his testator's crops to possession, the latter could very properly direct in his testament what disposition should be made of the same after they had been so reduced to the executor's possession, and had thereby become converted into personalty belonging to the testator's estate.

We shall not in the present case undertake to enter upon any discussion of the effect of the statute of frauds upon private sales of growing crops made by the owner thereof; preferring to make no attempt to successfully cross this dangerous legal bridge until necessity brings us to it. As it would appear an unpromising and impracticable task to try to reconcile the many decisions, English and American, in which this question has been dealt with and discussed, we could hope to gain no fuller light as to how, in point of fact, growing crops were classified at common law. So we may dismiss the topic, merely remarking that if "for the purposes of such sales, emblements are suffered to be treated as personalty," the case with which we are now dealing does not fall within this exception to the general rule, nor, indeed, within any other of the "exceptions" referred to by text writers, or of which we are aware.

We cannot refrain from remarking in this connection the embarrassment we have experienced arising out of the practice, which seems to have sprung up in some jurisdictions, of

arbitrarily regarding growing crops as personality for one purpose, and as realty for another. In the very nature of things, this species of property, being tangible in form, and possessing many marked inherent characteristics, is capable of being properly classified, and should be given a fixed legal status. Of course, where there is no imperative necessity for strictly observing and remarking the distinction existing between two entirely different species of property,—as where rules of law operating alike upon either class are merely to be construed and enforced,—no vicious consequence or positive harm immediately results from “treating” them as though they were identical in character, or even inaccurately styling something “personalty” which should properly be referred to as “realty.” But the importance of preserving, if possible, absolute consistency in the entire fabric of our law,—thus rendering the same unequivocal, and therefore more readily and more clearly comprehended,—should by no means be overlooked. The justice of this critical observation is evidenced by the utter confusion in which we find the law upon the subject with which we are now dealing to be involved.

That growing crops cannot properly be “treated” as personality under the law as understood in this state seems indisputable. In view of the definition of “realty” contained in section 2218 of the Code, which purports to be declaratory of the common law, and which reads as follows: “Realty, or real estate, includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of, or dependent thereon.” Following this definition, it was held in *Cody v. Lumber Co.*, 82 Ga. 793, 10 S. E. 220, that “trees growing upon land constitute part of the realty; and a sale of them, under the statute of frauds, must be in writing.” And in *Frost v. Render*, 65 Ga. 15, wherein it appeared that a sheriff sold, under execution, land upon which was growing a crop of cotton, it was held that, “a levy being on certain land as the property of the defendant in *fi. fa.*, a sale under such levy carries with it the crop growing on the land, and the sheriff cannot limit the sale by an announcement that the rent of the current year is reserved”; for the reason that the law considers growing crops part and parcel of the land itself, following its ownership as a mere element of value incident thereto. This is certainly the general rule which obtains in this state, and we know of no exceptions thereto which have gained any foothold in our law on the subject. A review of the decisions previously rendered by this court in cases wherein the question as to the legal character of growing crops arose shows that they are all in harmony with the conclusion reached in the present case. In *Pitts v. Hendrix*, 6 Ga. 452, it was held that “a growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land.” This case was

cited and followed in *Ferguson v. Hardy*, 59 Ga. 758, wherein the question arose as to whether the title to crops growing on lands sold under execution passed to the purchaser, as against the defendant in *fi. fa.* In the more recent case of *Dollar v. Roddenberry* (decided at the March term, 1895) 25 S. E. 410, the question was presented whether such a purchaser also acquired title as against a tenant who planted the crops, and whose estate was terminated thus suddenly by a sale of the lands; and, upon the doctrine of emblements, this question was decided in the negative. This decision was, of course, rendered without regard to whether the crops were to be considered as personality or as realty, being based solely upon the idea that the tenant was entitled to the crops as emblements, which, even though a part of the realty, were, nevertheless, not included in the sale of the land; for no greater interest than the landlord had therein could be sold under execution as his property, and, of course, the purchaser got only that which was in fact sold. Again, in the case of *Scolley v. Pollock*, 65 Ga. 339, wherein there was a contest between a judgment creditor of a tenant and one who claimed cotton levied on by virtue of a prior purchase from the tenant of his immatured crop, and who had accordingly entered upon the land, cultivated the crop, and harvested it when ripe, the decision in *Pitts v. Hendrix*, supra, was cited approvingly, and it was further said: “Before maturity the crops only constitute an element of value, and are not themselves distinct chattels. We know of no ruling to the contrary by this court.”

There only remains to be noticed the decision in *Hamilton v. State*, 94 Ga. 770, 21 S. E. 995, wherein the accused was charged with having fraudulently sold and disposed of personal property upon which she had previously given a mortgage, contrary to the provisions of section 4600 of the Code. The indictment against her alleged that, having mortgaged her crops in May, she, in the following November, fraudulently sold and disposed of the same, without the consent of the mortgagee, and with intent to defraud him, whereby he sustained loss. The point was raised that a mortgage given upon a growing crop could not properly be regarded as a mortgage upon personality. The decision of the court in that case was pronounced by the writer of this opinion. In dealing with the question thus raised, the distinction drawn between growths that are “fructus naturales” and those termed “fructus industriales” was stated, and to a limited extent discussed; 1 Corbin, Benj. Sales, § 126, and note to *Norris v. Watson*, 55 Am. Dec. 162, being referred to as showing that this distinction had been recognized and followed by many courts of high repute. The subject did not then, however, receive the careful and laborious investigation which this opinion evidences; and it was not necessary, for we did not rest our decision on the ground

that the crops were to be deemed personalty at the time the mortgage upon the same was given, but called attention to this widely-recognized distinction merely as persuasive argument tending to show that, in any view of the case, the conviction of the accused was right. As will be perceived from the concluding remarks of the opinion then delivered, the ground upon which we rested our decision was that whatever might be the character of the crops when mortgaged, if the accused fraudulently disposed of the same after maturity, so that they were removed from the land and carried beyond the reach of the mortgagee, the offense with which she was charged would unquestionably be complete. The record before us did not disclose whether she gathered the crops herself, and afterwards carried them off and sold them, or whether the sale took place while the crops yet stood, ripe, but un-gathered, in the field. But we did not then, nor do we now, think this would make any difference. Even in the latter event, the produce of these matured crops being the subject-matter of sale, and their separation from the land being necessarily contemplated and included in the terms of sale, severance from the soil would be an essential incident to an effectual delivery; and, until actually delivered, the sale would remain executory and incomplete. Unquestionably, the lien of the mortgage adhered to the crops as effectually after severance as before. 1 Cobby, Chat. Mortg. § 380. "A mortgage of a growing crop follows the matured and harvested grain." Id. § 381. And a mortgage lien on a crop is not lost by any natural change in its condition. Id. § 379. Therefore, we concluded that, irrespective of whether such crops should properly be considered as personalty while yet immatured and growing in the field, "the crop in question being personalty when sold, and being then subject to the mortgage, it does not matter whether it was personalty or not at the time it was mortgaged."

The foregoing comprise all the cases of which we have any knowledge in which this court has dealt with the subject presented by the case at bar.

In the foregoing discussion we have faithfully endeavored to dissipate the darkness which overhangs and envelops the subject at the present day, and to show that at common law no inconsistency in the treatment of growing crops as realty, in fact, existed, even though "emblements" were subjected to many of the "incidents" which attached to chattels. Whether or not this attempt has been successful we leave to the reader to determine. That the proper result in this particular case has been reached we are entirely convinced, and cannot regard as even debatable. The plaintiff was the owner, not only of the crop destroyed, but also of the land upon which it was growing. His crop, therefore, cannot possibly fall within the term "emblements," nor properly be considered as even constructively constituting a species of property distinct from

the land upon which it was growing at the time it was destroyed by fire.

3. Our conclusion, therefore, is that the justice's court had no jurisdiction to entertain the plaintiff's action. In reaching this result, we have endeavored not to be unduly swayed in our judgment by the importance of this particular case, nor deterred by the thought of the consequences which must inevitably ensue. After deliberate reflection, and after a most painstaking investigation of the law, we are constrained to hold that the recovery of six dollars, which the plaintiff obtained in the magistrate's court, cannot legally be upheld. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 303)

**BENSON v. DUBLIN WAREHOUSE CO.**  
(Supreme Court of Georgia. Aug. 18, 1896.)

**NEGOTIABLE INSTRUMENTS — CONSIDERATION — MARGINS—LIABILITY OF INDORSER—PARTNERSHIP—POWER OF ONE TO BIND FIRM.**

1. Where a promissory note is executed by one person, and another, who is not the payee, and whose indorsement is neither essential nor proper to the transmission of title to the note, signs his name upon the back of it, he becomes liable thereon either as joint principal or as surety, but does not, by thus signing his name, enter into such a contract of indorsement as will cut him off from setting up against the payee the defense that the note was founded upon an illegal consideration, and therefore void.

2. A promissory note given for money which had been advanced by the payee to the maker to be used "as margins in speculating in cotton futures," and which the lender had, in the maker's behalf, in fact "placed" for this purpose, is void; and its payment cannot, either as against a principal or a surety thereon, be enforced by suit.

3. Borrowing money to be used in speculating in "cotton futures" is not within the scope of a legitimate partnership business. Therefore, where a member of a partnership, without the knowledge of a co-partner, borrows money in the partnership name, and uses it for this purpose, and such co-partner, in ignorance of the truth, joins the other in executing to the lender a promissory note for such money, honestly believing at the time that the note is being given in settlement of a lawful partnership debt, he is not liable on such note to the lender, if it be shown that the latter took the same with full knowledge of all the facts.

4. The court erred in striking the pleas of the defendant in so far as they set up the defenses above indicated.

(Syllabus by the Court.)

Error from superior court, Wilkes county; Seaborn Reese, Judge.

Action by the Dublin Warehouse Company against James A. Benson and others. From a judgment for plaintiff, defendant Benson brings error. Reversed.

The following is the official report:

The Dublin Warehouse Company sued Thomas E. Fortson, as maker, and James A. Benson, as indorser, upon a promissory note for \$2,154, principal, with interest from maturity at 8 per cent, and 10 per cent. attor-

ney's fees, dated April 21, 1893, and due November 1, 1894, and upon a note for \$2,060.34, principal, besides interest and attorney's fees, bearing the same date as the other note, and due November 21, 1893. In addition to the plea of the general issue, Benson filed several special pleas, which were stricken on motion of the plaintiff. To this ruling, and to the direction of a verdict by the court, instead of the rendition of a judgment by the court, Benson excepted. The special pleas so stricken were in the following words: "For further plea, defendant says that the consideration of said notes was in whole or in part money advanced by said Dublin Warehouse Company, to be used as margins in speculating in cotton futures, or options and loans on same; that said company made such advances with full knowledge that the money was to be used by Fortson & Co. as margins in speculating in cotton futures, and, in fact, said company placed the margins for Fortson & Co. Said transaction was a gaming contract, and the promise founded thereon is founded on an illegal consideration, and is not binding on defendant. For further plea, defendant says, without admitting that any partnership existed between defendant and Thomas E. Fortson in the transactions out of which the debt sued on arose, if it should be held that they were partners, this defendant says that speculating in cotton futures was entirely outside the scope of the partnership business, and this was well known to plaintiff. The advances for speculative purposes were made to Thomas E. Fortson, and this defendant, when he signed the notes sued on, had no notice or knowledge of the fact that any portion of the debt for which said notes were given was for such advances. For further plea, defendant says all transactions between Fortson & Co. and plaintiff out of which the debt sued on arose were carried on by said company with Thomas E. Fortson, this defendant having no personal connection with or knowledge of them. All advances made by said company to Thomas E. Fortson in his dealings with it were charged on the books of said company to Fortson & Co., and, when defendant signed said notes, he did so relying upon the correctness of said books, and believing that they were proper charges against Fortson & Co. Since signing said notes, he has ascertained, and now charges, that a considerable portion of said debt, to wit, one thousand dollars, or other large sum, was for advances made Thomas E. Fortson individually, as margins in buying and selling cotton futures; and defendant, when he signed the notes, was entirely mistaken as to the fact, and the mistake was brought about by defendant's conduct in improperly charging to Fortson & Co., on its books, money advanced to Thomas E. Fortson individually." "And now comes James A. Benson, and says that the notes sued on were given to close up an

account claimed by plaintiff to be due it by Fortson & Co., a firm of which it was claimed and alleged he was a partner. He says the account represented by these notes was the balance of account claimed by plaintiff against Fortson & Co., a firm composed of T. E. Fortson and J. A. Benson, and was given to close up said account. He further says the said balance of account was the sole and only consideration of said notes. He further says that, under the allegations in his original plea and this amendment, the taking of these notes as above set forth was a fraud upon him. He further says that the whole of said notes was for money advanced to Fortson & Co. for margins and losses put up in cotton speculations or futures, as set forth in the original plea. These speculations and dealings in futures being gambling operations, when cotton was ostensibly bought where there was no expectation of delivery of property under the purchase, no skill or labor or expense entered into the consideration, but the same was a pure speculation upon chances, when it is a contract for a sale of goods to be delivered at a future day, and where both parties are aware that the seller expected to purchase himself to fulfill his contract. Defendant further says that had he known at the time of indorsing said notes that the consideration in whole or in part was for gambling in future operation of cotton, as alleged, he would never have indorsed the same, and that he signed or indorsed the same believing it represented a legitimate debt due by Fortson & Co. to plaintiff."

Colley & Sims, Irvin & Wynne, and S. H. Hardeman, for plaintiff in error. M. P. Reese, for defendant in error.

PER CURIAM. Judgment reversed.

(99 Ga. 233)

# WORLDS v. GEORGIA R. CO.

(Supreme Court of Georgia. Aug. 3, 1896.)

## RAILROADS—SECTIONMAN—ASSUMPTION OF RISKS.

1. When one enters the service of another, he impliedly assumes the usual and ordinary risks incident to the employment about which he is engaged, and, in discharging the duties which he has undertaken to perform, he is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which his employment relates; and if he fails to do this, and in consequence is injured, the injury is attributable to the risks of the employment, and the master is not liable.

2. Where an employé of a railroad company, in the discharge of his duties, is directed to lift and carry an ordinary object, like a cross-tie, he is bound to take notice that it is heavy, and that a certain amount of physical strength will be required to accomplish the task; and if he misconceives the amount of physical strength to be exerted, and overstrains himself in lifting the tie, and is thereby injured, the master is not liable. The fact that he was acting under the orders of a superior at the time does not alter the question, even though he might have had

reason to believe that disobedience of the order would result in his dismissal.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by William Worlds against the Georgia Railroad Company. From a judgment for defendant, plaintiff brings error. Affirmed.

The following is the official report:

Worlds sued the railroad company for damages for personal injuries. Defendant demurred generally to the petition. The petition was amended, and the demurrer renewed and sustained. To the ruling sustaining the demurrer, plaintiff excepted. The petition alleged: "Defendant has damaged plaintiff \$5,000, by reason of the following facts: On January 1, 1894, and for some time previous, petitioner was employed by defendant as a yard train hand; his duties being to couple cars, and do general work about the yard. Said duties were performed by petitioner at night, in the yards of defendant. (3) On the night of said day, during the working hours of petitioner, a coal car became derailed; and petitioner, with others, was ordered by the yard master, one Tuggle, to carry cross-ties for the purpose of putting the car back on the track. The cross-ties were about 100 yards from where the car was derailed. (4) Petitioner was required by the yard master, under whose instructions he worked, to carry the ties without any assistance. To this he complained that the ties were too heavy for one man to carry, and Tuggle replied: 'Go ahead, God damn it! and tote them cross-ties. You are as much able as any of the rest of them.' (5) At this time, petitioner, knowing that his daily bread depended upon his labor, and fearing that unless he obeyed the order given him by the yard master he would be discharged, and wholly ignorant of the serious result that might arise from carrying said heavy cross-ties, went to work according to the order of Tuggle. (6) The results to petitioner from carrying said cross-ties on said occasion were that he wrenched and strained his back, causing an abscess to form in the small of his back, which abscess is still in a bad condition, causing great suffering to him. (7) By reason of the injury he is totally unable to perform any manual labor, and is now depending upon charity, mostly, for a living. He believes that the injuries are permanent. (8) Defendant, by its yard master, Tuggle, was negligent in not giving petitioner help in carrying said heavy cross-ties, as it was well known, or ought to have been known, to defendant, that the cross-ties were too heavy to be carried by one man a distance of 100 yards. (9) By reason of said injuries, petitioner has suffered, and will suffer, great pain and inconvenience, and his ability to labor has been greatly impaired." The amendments were: By adding to the third paragraph, that petitioner had had no experience in the effect of carrying cross-ties, this character of

work not having heretofore been required of him. By adding to the fourth paragraph, that seeing the cross-ties being carried by his co-employés, and relying on the experience and better judgment of his superior officer, petitioner undertook, with care and caution, to execute the orders given him by defendant. By adding to the sixth paragraph, that the injuries were received by him without fault or negligence on his part, and are directly traceable to, and have resulted from, the negligence of defendant in executing the work to which petitioner was assigned, short-handed.

S. B. Vaughn and F. W. Capers, for plaintiff in error. Jos. B. & Bryan Cumming, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 289)

#### HERRON et al. v. BELT.

(Supreme Court of Georgia. Aug. 8, 1896.)

ACTION TO CHARGE TRUST ESTATE—BURDEN OF PROOF.

The action being against a trustee, and having for its purpose the subjection of the trust property to the plaintiff's demand, and the evidence, as applied to the allegations of the declaration, being insufficient to show that the cash and other articles furnished by the plaintiffs, and constituting the basis of that demand, were really for the use and benefit of the trust estate, or that it actually received the benefit of the same, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Burke county; E. H. Callaway, Judge.

Action by Herron & Gaudry against O. T. Belt, trustee. From a judgment for defendant, plaintiffs bring error. Affirmed.

Johnston & Brinson, for plaintiffs in error. Thos. M. Berrien and J. J. Jones & Son, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 285)

#### COSNAHAM v. ROWLAND.

(Supreme Court of Georgia. Aug. 8, 1896.)

HOMESTEAD—PROCEEDING TO SET APART—VALIDITY—NOTICE TO CREDITOR.

According to the principle laid down by this court in the cases of Oleghorn v. Johnson, 69 Ga. 369, and Wimberly v. Mansfield, 70 Ga. 783, there was no error, upon the trial of a claim case, in refusing to admit in evidence, in behalf of the claimant, who was claiming as the head of a family, under an alleged homestead, an established copy of proceedings to set the same apart; it appearing that the order establishing such copy was granted by the ordinary while the claim case was pending, and without notice to the plaintiff in execution.

(Syllabus by the Court.)

Error from superior court, Burke county; E. H. Callaway, Judge.

Trial of the right of property between Robert C. Rowland, administrator, as plaintiff,

and McDaniel B. Cognaham, as claimant. From a judgment for plaintiff, claimant brings error. Affirmed.

T. D. Oliver and F. W. Capers, for plaintiff in error. Johnston & Brinson, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 264)

**SAVANNAH, T. & I. O. H. RY. CO. v. MIDDLETON.**

(Supreme Court of Georgia. Aug. 3, 1896.)  
APPEAL—WEIGHT OF EVIDENCE—DISCRETION OF COURT.

There being no complaint of any error of law, and the case depending entirely upon questions of fact, as to which the evidence was conflicting, and the trial judge being satisfied with the verdict, this court will not overrule his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action between the Savannah, Thunderbolt & Isle of Hope Railway Company and Belle H. Middleton. From a judgment for the latter, the former brings error. Affirmed.

Saussy & Saussy and Barrow & Osborne, for plaintiff in error. McAlpin & La Roche, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 300)

**MAYOR, ETC., OF PERRY v. NORWOOD et al.**

(Supreme Court of Georgia. Aug. 10, 1896.)  
MUNICIPAL BONDS—NOTION OF ISSUANCE—SUFFICIENCY.

Under the principles announced by this court in the case of Mayor, etc., v. Hemerick, 18 S. E. 72, 89 Ga. 674, the judge was unquestionably right in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by W. H. Norwood and others against the mayor and council of Perry, to enjoin the issuance of municipal bonds. From a judgment for plaintiffs, defendants bring error. Affirmed.

R. N. Holtzclaw, for plaintiffs in error. L. L. Brown, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 299)

**GEWINNER v. McCORARY.**

(Supreme Court of Georgia. Aug. 10, 1896.)  
APPEAL—REVIEW—WEIGHT OF EVIDENCE—INTERLOCUTORY INJUNCTION.

1. In view of the conflicting evidence disclosed by the record, there was no abuse of discretion in granting the interlocutory injunction.

(a) Had it been otherwise, seemingly there would now be no occasion for reversing the judgment, since the death of the party enjoined, occurring after the writ of error was sued out, has taken the question of injunction out of the case.

2. The remaining questions at issue can be adjudicated at the final trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Action by A. E. McCorary against the intestate of N. G. Gewinner, administrator, for injunction. On defendant's death the administrator was substituted. From a judgment granting an interlocutory injunction, defendant brings error. Affirmed.

Kilbee & Grace and Robt. Hodges, for plaintiff in error. Chambers & Polhill, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 298)

**STIRKS v. JOHNSON et al.**

(Supreme Court of Georgia. Aug. 10, 1896.)  
TRIAL OF RIGHT TO PROPERTY—TITLE OF CLAIMANT.

1. When, upon the trial of a claim case, the burden of proof was upon the claimant, he could not successfully carry the same by showing that the ownership of the property, though not in himself, was in a person other than the defendant in execution.

2. No error was committed on the trial, and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Trial of right to property between Johnson & Harris, as plaintiffs, and James R. Stirks, as claimant. From a judgment for plaintiffs, claimant brings error. Affirmed.

Jas. A. Thomas, for plaintiff in error. S. A. Reid, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 296)

**ANDERSON et al. v. JENKINS et al.**

(Supreme Court of Georgia. Aug. 10, 1896.)  
NEW TRIAL—REFUSAL ON CONDITION—PROPRIETY—COSTS.

This being an action of trespass, in which the evidence, though decidedly conflicting, warranted a verdict for the defendants, save only as to one item of damages, amounting to at least six dollars, the court did not abuse its discretion in refusing to grant a new trial, based on the general grounds that the verdict was contrary to law and the evidence, on condition that the defendants would pay to one of the plaintiffs entitled thereto the amount above mentioned; but the court ought to have annexed, as another condition to its refusal of a new trial, that the defendants should also pay the costs. This omission has been cured by appropriate direction.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Trespass by James L. Anderson, administrator, and others, against Ostella Jenkins and others. From a judgment for defendants, plaintiffs bring error. Affirmed, with direction.

Steed & Wimberly, for plaintiffs in error.  
Minter Wimberly, for defendants in error.

**PER CURIAM.** Judgment affirmed, with direction.

(99 Ga. 321)

**MOSS v. LOVETT.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**VENDOR AND PURCHASER — DEED — EXECUTION — PROPERTY SUBJECT — APPEAL — REVIEW.**

1. Where the vendor of land, who had given to the vendee a bond for titles, obtained against the latter a judgment upon notes for a balance of the purchase money, and for the purpose of having the land levied upon and sold under such judgment undertook to comply with the provisions of section 3654 of the Code, and in so doing filed and had recorded a deed which did not contain the name of any grantee, and therefore did not convey title to the defendant in execution, but afterwards had the latter's name inserted in the deed and in the record of the same, and also executed, filed, and had recorded another deed which ratified and confirmed the first, and in connection therewith operated to pass a good and sufficient title to the vendee, a levy of the execution thereafter made was valid and legal.

2. Points made in the record, but which are neither argued nor insisted upon in this court, will not be considered.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action between H. B. Moss and R. W. Lovett. From a judgment for the latter, the former brings error. Affirmed.

H. B. Moss, for plaintiff in error. W. S. Cheney and R. O. Lovett, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 321)

**RILEY v. ECHOLS.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**BILL OF EXCEPTIONS — SERVICE.**

Service of a bill of exceptions before it has been certified by the judge is equivalent to no service at all. *Shealy v. McClung*, 50 Ga. 485.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action between Mattie F. Riley and T. G. Echols, administrator. From a judgment for the latter, the former brings error. On motion to dismiss. Granted.

Henry Walker, for plaintiff in error. J. M. Mozley, for defendant in error.

**PER CURIAM.** Writ of error dismissed.

(99 Ga. 316)

**FULLER v. STUMP et al.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**APPEAL — REVIEW — BILL OF EXCEPTIONS — CERTIFICATION.**

There being no exception to nor assignment of error upon the final judgment overruling a motion for a new trial, and the only exceptions taken or errors assigned relating to rulings made at the trial, and the bill of exceptions not having been certified within the time prescribed by law after the adjournment of the court at which the rulings excepted to were made, no questions are presented which this court has jurisdiction to consider, and the writ of error is accordingly dismissed.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action between W. J. Fuller and Stump & Son. From a judgment for the latter, the former brings error. On motion to dismiss. Granted.

W. T. Crane and C. H. Sutton, for plaintiff in error. J. O. Edwards and Jones & Bowden, for defendants in error.

**PER CURIAM.** Writ of error dismissed.

(99 Ga. 312)

**BROWN v. BROWN et al.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**RES JUDICATA.**

There was no error in dismissing on demurrer the plaintiff's petition, it appearing from its allegations that the matters therein set forth were adjudicated against him by a final judgment of the superior court, which was affirmed by this court, in consequence of his voluntarily withdrawing a writ of error sued out for the purpose of reviewing the action of the trial court in overruling a motion for a new trial in the case in which such judgment was rendered, and it not appearing that this motion was well founded, or that the plaintiff in the present action might not, by the exercise of proper diligence, have obtained in the supreme court a hearing of his case upon its merits.

(Syllabus by the Court.)

Error from superior court, Towns county; J. J. Kimsey, Judge.

Action by J. J. Brown against Harmon Brown and others for injunction. From a judgment for defendants, plaintiff brings error. Affirmed.

The following is the official report:

The petition of J. J. Brown against Harmon Brown et al. was demurred to by the defendants, on the grounds (1) that there is no equity in the petition; (2) that the parties have no joint interest in the subject-matter of the litigation, and are therefore improperly joined; (3) that all of the matters complained of have been fully and finally determined between Harmon Brown and J. J. Brown in the suit mentioned; and (4) for all the injuries complained of, the plaintiff has a complete remedy at law. The demurrer was sustained, and the petition dismissed. It alleges that plaintiff is the owner and in ac-

tual possession of 100 acres of land given to him by his father, Harmon Brown, in 1878; that he immediately went into possession of the same, and has remained in possession to the present time (July, 1895), using and cultivating the land as a farm; that relying on said gift, in good faith, he has gone on from year to year placing thereon valuable improvements, at a cost of \$1,000 or more; that Harmon Brown is now about 80 years of age, an imbecile, and insolvent; that the other defendants, brothers of plaintiff, and sons of Harmon Brown, wrongfully and maliciously induced Harmon Brown to sue plaintiff in ejectment for the recovery of the land, which cause was tried, and a verdict rendered against plaintiff; that he at once and in due time moved for a new trial, which was denied, whereupon he carried the case to the supreme court. At the time said cause was tried, one Ledford, attorney at law, was acting as deputy clerk of the superior court, and was also one of the attorneys of Harmon Brown in said ejectment cause. Ledford had the entire management of the business pertaining to the office of clerk of said court. Plaintiff is informed and believes that in transmitting said case to the supreme court, in dereliction of duty, he only sent up to said court the original bill of exceptions, refusing and neglecting to send up the motion for new trial, and sending, as a transcript of the record, the original petition, original pleas, and original brief of testimony; whereupon plaintiff was forced to withdraw said case from the supreme court, and pay the cost there. Said failure on the part of said deputy clerk was brought about by the collusion of said brothers of plaintiff to injure and damage him, and to force him to withdraw said case from the supreme court. All of said parties are insolvent and unable to respond to plaintiff in an action for damages. He is informed and believes that, prior to the term of court at which the ejectment case was tried and the verdict rendered against him, his said brothers procured a list of the traverse jury drawn to serve at said term, and, by themselves and through friends, had them interviewed as to what their feelings were towards plaintiff and his interest and right in said case, and in various and improper ways influenced and prejudiced said jury against plaintiff, all of which rendered the verdict void and not binding. He prays that the same be declared void; that he recover of Harmon Brown \$1,000 for the improvements placed on the land, and be decreed a special lien on the same for that amount; that defendants be enjoined from enforcing said verdict; and that the same be set aside, and general relief be granted to plaintiff.

W. T. Crane and W. E. Candler, for plaintiff in error. W. F. Findley, J. H. Davis, and S. M. Ledford, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 302)

### BROWN v. USRY.

(Supreme Court of Georgia. Aug. 18, 1896.)

#### PLEADING AND PRACTICE.

This was a rule against a sheriff. His answer was traversed by the movant of the rule, but no evidence was introduced in support of the traverse. The court therefore properly disposed of the case upon the facts set forth in the answer, and the judgment rendered thereon was correct.

(Syllabus by the Court.)

Error from superior court, Glascock county; Seaborn Reese, Judge.

Rule sued out by W. E. Brown against G. W. Usry, sheriff. From a judgment against him, movant brings error. Affirmed.

R. H. Lewis and Jas. W. Whitehead, for plaintiff in error. E. P. Davis, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 319)

### DODD v. NORMAN et al.

(Supreme Court of Georgia. Aug. 18, 1896.)

#### ACTION ON NOTE — RIGHT TO OPEN AND CLOSE — APPEAL — REVIEW.

1. This being an action by the plaintiffs upon a promissory note, as bearers of the same, against three persons as joint makers, one only of whom made defense, his admission that he had executed the note did not deprive the plaintiffs of their right to open and conclude the argument. In order to make out a prima facie case for them, there should, at least, have been a further admission that they were the owners of the note.

2. It appearing that the evidence upon every material issue in the case was conflicting, this court will not overrule the discretion of the trial judge in refusing to set the verdict aside, upon the general grounds that it was contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Milton county; George F. Gober, Judge.

Action by Norman, Barnwell & Co. against E. S. Dodd and others on a note. From a judgment for plaintiff, defendant Dodd brings error. Affirmed.

Jas. A. Dodgen and J. P. Brooke, for plaintiff in error. T. L. Lewis and B. F. Simpson, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 306)

### LITTLE v. STOKELY.

(Supreme Court of Georgia. Aug. 18, 1896.)

#### GAMBLING TRANSACTIONS.

1. A promissory note given for money lost at a game of cards is void, and cannot be collected by the payee, although the latter accepted it in settlement, not of his winnings from the maker, but of his winnings from another engaged in the same game, to whom the maker was indebted for losses therein. Such a transaction cannot be legalized even by adopting the "clearing-house system" in adjusting the gains and losses of the game.

2. There was no error at the trial, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; Seaborn Reese, Judge.

Action by George Little against R. D. Stokely on a note. From a judgment for defendant, plaintiff brings error. Affirmed.

H. McWhorter, for plaintiff in error. W. M. Howard, for defendant in error.

**PER OURIAM.** Judgment affirmed.

(99 Ga. 307)

**COFER et al. v. BARNETT.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**LANDLORD'S LIEN—FORECLOSURE—CONSTRUCTION OF STIPULATION.**

1. There being a controversy between a landlord and another concerning certain cotton raised by a tenant of the former, and which had been delivered to him by the tenant (the landlord contending that he had a lien upon the same for supplies furnished the tenant, and the other person contending that he was entitled to this cotton under a bill of sale from the tenant), and these contestants having agreed that the landlord might retain and dispose of the cotton, and that he should pay the other contestant its value, if indebted to him, "in a settlement of this matter before the court" (the question of the landlord's liability to depend upon whether or not his lien was, in law, superior to the bill of sale), it was error, on the trial of an action of trover for the recovery of the cotton, subsequently brought by the holder of the bill of sale against the landlord, at which the above-recited facts indisputably appeared, and at which the existence, validity, and superiority of the landlord's lien, though the same had not been foreclosed, were shown, to direct a verdict for the plaintiff.

2. Under the circumstances above stated, the respective rights of the parties did not depend upon the question of foreclosure, but upon the question of legal superiority as between the lien and the bill of sale; and, under the evidence submitted, the verdict should have been for the defendant.

3. The effect of the agreement between the parties was to take this case out of the rule laid down in *Duncan v. Clark*, 22 S. E. 927, 96 Ga. 263, and the cases upon which it rests.

(Syllabus by the Court.)

Error from superior court, Wilkes county; Seaborn Reese, Judge.

Bail trover by E. A. Barnett against C. R. Cofer and others. From a judgment for plaintiff, defendants bring error. Reversed.

The following is the official report:

E. A. Barnett brought his action of bail trover against C. R. Cofer for the recovery of 2,622 pounds of lint cotton, of the value of \$150. Cofer pleaded the general issue, and as follows: "He is informed that this suit is for certain cotton received by him of Tom Spratling for the year 1894, plaintiff claiming the same under a bill of sale from Spratling. Defendant avers that whatever cotton he received from Spratling was claimed by him, as landlord, from Spratling, and for supplies and necessities to make his crop on his land for said year, and that his claim was superior to

Barnett's." On the trial, after the introduction of evidence by both parties, the court directed the jury to find for the plaintiff the highest proved value of all the cotton claimed; that is, for 2,622 pounds, amounting to \$229.42. Defendant made a motion for a new trial, upon the hearing of which the court ordered, that, upon plaintiff writing off from the verdict and judgment all except \$150 principal, a new trial should be denied. This plaintiff did, and defendant excepted to the refusal to sustain the motion on the grounds taken therein. These grounds are that the verdict is contrary to law and evidence; that the court erred in directing a verdict, and erred in admitting, over defendant's objection, conversations and admissions of W. W. Cofer, he not being a party to the case, and defendant claiming that no agency on his part was shown at the time of said conversations and admissions. Plaintiff introduced in evidence a bill of sale from Tom Spratling to plaintiff, dated May 11, 1894, and recorded June 16, 1894, for face consideration \$500, covering 55 acres in cotton and 12 acres in corn, and all other crops planted by Spratling in the year 1894 on lands of W. W. Cofer, about seven miles west from Washington, Wilkes county. It contains the statement: "This is all the crop I crop." The defendant claimed that he was entitled to the cotton sued for, to satisfy his lien as landlord, and for supplies and necessities advanced to Spratling to enable him to make his crop. It does not appear that defendant foreclosed a landlord's lien.

There was testimony by the plaintiff as follows: "The paper presented is a statement that defendant gave me of the amount of cotton he received from Spratling. The whole amount is 5,322 pounds. It was made on this 53 acres described in the bill of sale. This suit is for the balance after giving him 2,700 pounds, the amount of his rent. The item marked 'Cash' is cash he received, that was taken by a boy, as I understood, that he agreed to give him the \$35 for it. He put that there himself, and I estimated the cotton to be worth that amount, the price it was then selling at,—5 cents per pound,—and inserted 700 pounds. It was in money, and not in cotton. He told me that it paid him \$35 on the account, and he didn't follow it up any further. It was the understanding all around that he was to receive 2,700 pounds of lint cotton. I think Mr. Irwin put down that 700 pounds there. These items in pencil were not presented to me by defendant. The only charges he put there are in ink. The 400 pounds was at the gin, and I agreed that he should take it. I did not give it to him, but agreed that the value of it should await the result of the litigation between us. That was the agreement in regard to all of it. I claimed it was mine, and he claimed that he had a landlord's lien for supplies, which was superior to my bill of sale. The agreement was that he should repay to me, if he was indebted to me, on a settlement of this matter before

the court. The 2,700 belonged to me in case it went to me. I left it to the court to decide. We had no understanding about the price of cotton. He had already sold it, and the agreement was that he should respond to me when he had the trial, if the cotton were found to be mine. I just estimated the cotton at the value of other cotton,—that is, the 700 pounds,—just to see what the cotton would have brought at the price at that time. The best price this 2,700 pounds was worth since the sale, I think, was about eight and three-quarters. I knew at the time that he had already sold a portion of this cotton at the close of our transaction, when I made this agreement with him, and I knew the negro was delivering the cotton; and we both agreed that he should retain what he had, and I should retain what I had, and each should settle with the other upon the result of the trial before the court. I got a good part of the cotton. I went to see defendant. I didn't get any cotton without his permission. He told me I could get it. I got a good deal of cotton after that. Then he told me he wished I would not take any more. This cotton at the gin, I didn't think I had any right to get that. W. W. Cofer let me know about this cotton being taken away; that is, the 700 pounds estimated by me as rental. He found it, and got the money before I knew it. He did not turn it over to me, but put it as rental on his own account,—the account that defendant held against this boy. That was this negro's cotton, so they told me. W. W. Cofer told me. I did not credit it on this negro's account. Defendant got it, and credited it on his own account. I did not get any of that cotton the \$35 was paid for, nor the money. I found another lot, four or five hundred pounds. They assisted me in finding it. They sent me word. This bill of sale was given to secure a debt for 1893, and advances for 1894. Cofer did not state the amount, but said these negroes owed him for the year. Possibly it is put down in that paper. He told me the negroes owed him, for running them, the amounts named in this bill, and wanted the cotton to secure that; and the agreement was that if they owed it he was entitled to it,—if his claim was better than mine, it was to be his cotton. Joe was a boy who worked with Tom. W. W. Cofer acted as agent on this farm in 1894, as I understood it,—agent for defendant. I think defendant recognized W. W. Cofer as his agent, in talking to me afterwards. I don't remember that positively. My best recollection is that he did. I don't know who managed that farm in 1894. This boy Tom rented it. I do remember very distinctly that defendant told me that when his brother, W. W. Cofer, failed in business, he took in charge the land, and that he paid the parties that he owed—Hull & Tobin, among them—interest on money that he was owing them, and that Web Cofer was attending to the business for them. Web Cofer came to me, and told me, if he rented this negro the land, would I let him keep the

mules. I asked him upon what condition. He said the negro would owe him 2,700 pounds for rent. I asked him, would there be anything else he expected to come out of the crop. He said there would not. I told him that this negro was then in a suit with Waller about some corn, and I was not willing for anybody else to make any advances to him. He agreed to it, and said he would help me to keep up with anything that went wrong with the cotton. I do not remember the date of this conversation, but I agreed to Web Cofer's proposition, and agreed to let the negro keep the mules and run the land. When afterward I found out that he was selling goods to this boy, I asked him if he did not remember his agreement with me. He said he did, but was acting as agent for his brother, and said, 'Don't you remember that on another piece of land you gave the rent notes to O. R. Cofer?' When he first came to me, in the fall of 1893, he did not tell me he was acting as agent. He made the trade that he would see that the negro did not get anything else. Defendant's name was not mentioned in it, but when I asked him about not standing up to his agreement he said, 'Don't you remember you have been giving notes for my place I rented to you myself, to my brother, O. R. Cofer? I am acting as his agent.' That was several years previous that I gave my note to defendant, the year before this negro gave this other note, and I supposed he gave it to W. W. Cofer. I have been giving it to defendant for rent of the W. W. Cofer land. This last conversation I had was just before Christmas, in 1894, when we were discussing the rights of the cotton. He said W. W. Cofer had been acting as agent for him, and had this land in charge. I do not remember that he ever stated that he was agent for him in making this other agreement with me. Web Cofer's statement about his never having made an agreement with me is just not so. The conversation took place at my store. He knew those were my mules. He came and asked me, would I let him have the mules before he would rent to the negro. I told him about the corn. I don't know whether he knew about the guano. Defendant did. I told them I did not want anybody else to advance those negroes but me; that I would advance to them, and get all the cotton except the 2,700 pounds for rent."

Defendant testified: "I rented these lands from Hull & Tobin, through Colley & Sims, because they refused to rent to my brother, to whom they had been renting it the year before. He had rented it in 1893, and expected to hold it at the same price for 1894. They refused to rent it to him, and I rented it for 1894. The conversation plaintiff had with W. W. Cofer was some time in December, 1893. I had not then rented the land. W. W. Cofer was not my agent at that time. I did not authorize him, in any way, to make a trade with plaintiff. The first I knew of such a trade was the next September, when plaintiff

told me about it. I then gave him an exhibit of everything he received. A part of the cotton belonged to this boy, Joe; one-fourth of a certain field; about 35 acres in the field. I received this cotton, a part of which is the cotton named there. These entries in my books of account were all made by me, except a few items in the daybook made by W. W. Cofer. I advanced these goods to this man. He rented the land from me, I advanced Joe and Tom both. Enough of this cotton to pay Joe's account came from his part, and from the other all the amount that was paid. I did not get quite enough cotton to pay the whole account. The way I came to advance these goods to these men,—I had a landlord's lien, and thought it was superior to anything. These were articles of necessity to make the crops. There may have been some little things that were not. I knew nothing about plaintiff's claim until he told me he had bought his guano from plaintiff, but had bought nothing else. In the statement that W. W. Cofer was my agent, I referred to the year before, when he had been renting the place. I rented it from him in 1893. He rented it from Colley & Sims, and I rented it from him, and lived on the place. In 1894 he moved on the place, and I moved over to the store, about a mile away. In 1894 he attended to the business for me. That was the same year I had the conversation with plaintiff. It is true my brother attended to my business in 1894. It is not true he made the trade with the negroes. I made the trade in 1893, and continued the trade with them in 1894. I knew these were plaintiff's mules they were working. I knew he let the negro bring a lot of corn there to feed himself and the mules. In 1893 I attended to the plantation myself. I agreed with the negro that he was to pay 2,700 pounds of lint cotton in 1894. It was made on a part of the land that I rented him. W. W. Cofer was at the store then, I suppose. He was not with me. I do not know that plaintiff advanced this negro supplies to live on. I know he furnished his guano, because he told me that. He furnished the mules and the corn. I knew that in 1894. Did not know he had taken a lien on his crop. The negro told me on the 21st of June, 1894, that he had not given him a paper, and gave me a mortgage on the crop that day. The reason I wanted a mortgage,—I ran out of money, and the warehouse refused to take a transfer of a landlord's lien. I explained to the negro that I took the mortgage for that purpose. When I found out plaintiff had advanced to the negro was after I had advanced all my bill, except for bagging and ties. I did not know whether the corn was plaintiff's or the negro's. I knew the mules were plaintiff's. I knew the guano was his before I took the mortgage. In regard to this \$35 in cash, the boy had carried some cotton off, and I traced it up, and he just paid me the money for it. It had been sold, and he paid me what he supposed it was worth. He

paid that on the account. It was my understanding that I took the cotton that I got as a part of the cotton that was raised by him and Joe. My books will show that I credited it on this account as cash."

W. W. Cofer testified: "I recollect the conversation between the plaintiff and myself. I went to him in 1893. This boy came to me to rent a field I had rented from Colley & Sims the year before, and expected to rent again. I had heard he was owing plaintiff, and I asked plaintiff how much he was owing him. He said his books were not in such shape as to tell. I asked him if he was going to take the negro's stock or let him keep them. He said that depended on circumstances, and asked if the negro owed me anything. I said, 'No.' He said, 'I believe, if you will look after the negro's crop, and if he wastes it let me know, I will let him keep them.' I called a week or two after that, and he said still that his books were not in sufficient shape to tell how much he owed him. Later on I was informed by Colley & Sims that parties were not willing to rent to me, and I dropped out of the case. I was acting for myself at the time. The negro came to the store to see me about renting the place. I told him, if he wanted to go and look over the place, my brother was living over there, and would show him over the land. The reason my brother showed him over it was that he was living there, and I was at the store and could not leave. I had this conversation with plaintiff in November, 1893, and my brother did not rent the place until January, 1894. He did not authorize me to act for him. I did not agree as plaintiff said. On the contrary, he and I had a private conversation about it, and I told him at the time there was nothing of the sort. I stated to him how much rent was due. He mentioned this thing to me before I told him I had no recollection there was no understanding to that effect. I do not know what time the negro moved in the house. My recollection is, he moved there in the Christmas, or a very short time afterwards. When Colley & Sims refused to rent me the place, I told the negro he could make a trade with my brother, and I know he stayed there. He told me he only owed plaintiff \$8. I do not know about any corn he carried over there to plaintiff. Did not know about any guano plaintiff let him have. I attended to the business on the farm in 1894. Do not know where the wagons went to get the guano, but know where Tom Spratling got his. He owned his own wagon and mules. I did not agree with plaintiff that the negro should not take up anything over there, only the rent of the land. I never made any such agreement as that."

It was admitted that Tom Spratling owed Cofer \$68.06, and Joe owed him \$44.15. There was conflicting testimony as to whether W. W. Cofer stated to one Williamson, late in the fall of 1894, that he and plaintiff had

agreed that if plaintiff let him have the mules and the corn he would only have his rent, and see that plaintiff got the balance of the crop.

Colley & Sims, for plaintiffs in error. W. M. & M. P. Reese and Irvin & Wynne, for defendant in error.

PER CURIAM. Judgment reversed.

(99 Ga. 302)

#### EVANS v. HART.

(Supreme Court of Georgia. Aug. 18, 1896.)  
HOMESTEAD OF MINOR—EXPIRATION—EQUITY JURISDICTION—PLEADING—AMENDMENT.

This case is controlled by the decision of this court in the case of Tate v. Goff, 15 S. R. 80, 89 Ga. 184.

(Syllabus by the Court.)

Error from superior court, Tallahassee county; Seaborn Reese, Judge.

Action between Martha L. Evans and John C. Hart. From a judgment for the latter, the former brings error. Affirmed.

H. M. Holden, for plaintiff in error. H. T. Lewis and S. H. Sibley, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 302)

#### TUCKER v. BANKS.

(Supreme Court of Georgia. Aug. 18, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

The only question in this case being whether or not the judge erred in overruling a certiorari brought to set aside a verdict rendered in a justice's court, on the ground that it was contrary to evidence, and there being sufficient evidence to support the verdict, this court will not interfere.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Action between W. I. Tucker and Satterfield Banks. From a judgment for the latter, the former brings error. Affirmed.

O. C. Brown and Ira C. Van Duzer, for plaintiff in error. A. G. McCurry and J. H. Skelton, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 185)

#### BRIESENICH v. BRIESENICH.

(Supreme Court of Georgia. July 20, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

The evidence, though decidedly conflicting, warranted a finding that the plaintiff was entitled to alimony, including attorney's fees. The charge, as a whole, very fully and fairly submitted to the jury the issues in controversy, and even if it was, in some respects, not entirely accurate, it contained no error which would justify this court in setting aside the verdict, the amount of which was not so large as to necessitate a holding that it was excessive.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Elsa Briesenich against Ernest Briesenich for a divorce. From a judgment for plaintiff, defendant brings error. Affirmed.

Symmes & Bennet and Harrison & Peeples, for plaintiff in error. Atkinson & Dunwoody, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., being disqualified, Judge CALLAWAY, of the Augusta circuit, was designated to preside.

(99 Ga. 301)

#### WILLIAMS v. WEBB et al.

(Supreme Court of Georgia. Aug. 18, 1896.)

MARRIED WOMEN—RIGHT TO HOMESTEAD.

1. A married woman who was not living separate and apart from her husband was not, under the constitution of 1868 (article 7, § 1), entitled to have a homestead set apart to herself out of her own property. *Bechtoldt v. Fain*, 71 Ga. 495.

2. This being so, proceedings instituted in her behalf for setting apart such a homestead were, though carried to final approval by the ordinary, absolutely void, and constituted no obstacle to a sale, under an execution against her, of the property sought to be exempted.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Action by L. R. Williams against W. P. Webb and another. From a judgment for defendants, plaintiff brings error. Affirmed.

The following is the official report:

Mrs. L. R. Williams filed her petition against W. P. Webb and J. T. Pinkston, sheriff, praying for injunction, etc. The petition was demurred to, and the hearing was had upon the petition and demurrer. The demurrer was sustained, and the restraining order dissolved. To this ruling petitioner excepted. The petition alleged: Petitioner is the defendant in a *fi. fa.* issued from the superior court of Hancock county, in favor of Webb, upon a judgment founded on a suit upon a note signed by petitioner in 1889. The execution has been levied by the sheriff on a tract of land in said county containing 226 acres, and the land is advertised for sale by the sheriff. Said land was conveyed by deed by Isaac Blount to T. M. Turner, as trustee for petitioner, on September 8, 1863,—she being then and ever since a married woman, the wife of W. P. Williams, then a resident of Hancock county,—and the deed is duly recorded. On December 13, 1869, the land was set apart to her, upon the application by said trustee, as a homestead, under the constitution and laws then of force. Copy of the application and homestead is attached. From the date of the order setting apart the land to her as a homestead, down to the present time, the same has been held and treated by her as her homestead. No affidavit was

made or filed by plaintiff, prior to the levy, that the property was subject to the levy, as required by section 2028 of the Code. Her trustee is dead, and there is no trustee succeeding him in the trust. Being the sole beneficiary in the homestead, and defendant in the *fi. fa.*, the remedy by claim does not give to her as ample protection of her rights as an appeal to the equity side of the court. She prayed that the sheriff and Webb be restrained from proceeding against the homestead property, and for process. It appears from the copy of the homestead proceedings attached that the petition for homestead was by Turner, who alleged that he was the trustee of Mrs. Williams, "whose husband, W. P. Williams, he was the head of the family, who is entitled to a homestead out of the lands owned by the said Louisa R. Williams, and held by your petitioner as trustee as aforesaid," under the act of October 3, 1868; that said W. P. Williams neglects and refuses to apply for said homestead; that the lands belonging to petitioner's *cestui que trust*, which consist of 300 acres lying in Hancock county, adjoining lands of certain persons mentioned, "and is likewise the owner of the personal property embraced within this petition, and contained in the schedule herewith filed," and that petitioner, as the next friend of said Mrs. Williams, prayed the appointment of a surveyor to lay off the homestead to which said head of family was entitled under said act; and that the personalty embraced in the schedule be set apart for the use and benefit of the family. There was attached a schedule of personalty. Also direction to the surveyor to survey and value a homestead for Mrs. Williams. Also plat of the land, and return by the surveyor, and approval by the ordinary December 13, 1869. The demurrer was general. Also, because the homestead claimed by plaintiff was upon its face invalid and void, because the homestead, under the constitution and laws of Georgia, was not within the jurisdiction of the ordinary granting the same.

Lewis & Moore, for plaintiff in error.  
 Ryals & Stone, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 306)

**BROWN et al. v. CLEVELAND et al.**  
**HARPER v. GEORGIA, C. & N. RY. CO.**  
 et al.

(Supreme Court of Georgia. Aug. 18, 1896.)

**JURISDICTION ON ERROR.**

This court has no jurisdiction to entertain a writ of error from the city court of Elbert county. See *Telegraph Co. v. Jackson* (decided at this term) 25 S. E. 264.

(Syllabus by the Court.)

Error from city court of Elbert county; P. P. Proffitt, Judge.

Action between S. V. Brown & Co. and P. W. Cleveland and others. From a judgment

for the latter, the former bring error. Action between one Harper and the Georgia, Carolina & Northern Railway Company and others. From a judgment for the latter, the former brings error. On motion to dismiss both writs. Granted.

A. G. McCurry, for plaintiffs in error. J. N. Worley, for defendants in error.

**PER CURIAM.** Writs of error dismissed.

(99 Ga. 322)

**CARR et al. v. NEAL LOAN & BANKING CO.**

(Supreme Court of Georgia. Aug. 24, 1896.)

**HUSBAND AND WIFE—ESTOPPEL—ACQUISITION.**

1. The evidence introduced at the last trial was not materially or substantially different from that which appeared in the record when this case was here at the March term, 1894 (20 S. E. 243, 94 Ga. 714); and it was then adjudicated that under that evidence, and the law applicable, the defendant in error was entitled to a verdict for the land in controversy. It results that the trial judge did not err, when the case came on for another hearing, in directing the jury to find accordingly.

2. There was nothing in the exceptions to the auditor's report which authorized a trial of Mrs. Carr's claim against the executors of John Neal for money alleged to have been paid by her to their testator upon her husband's debts, and therefore no such trial could have been lawfully had.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action by the Neal Loan & Banking Company against B. F. Carr and others to recover land. From a judgment for plaintiff, defendants Mary E. Carr and others bring error. Affirmed.

A. M. Speer and J. R. Irwin, for plaintiffs in error. A. C. McCalla, (Geo. Westmoreland, and Geo. W. Gleaton, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 269)

**SMITH v. ATLANTA CONSOL. ST. RY. CO.**

(Supreme Court of Georgia. July 20, 1896.)

**APPEAL—HARMLESS ERROR.**

The verdict in this case was demanded by a strong preponderance of the evidence; and, if any error at all was committed, it affords no reason for disturbing the judgment denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; H. Van Eppe, Judge.

Action between F. B. Smith and the Atlanta Consolidated Street-Railway Company. From a judgment for the latter, the former brings error. Affirmed.

Longino & Golightly, for plaintiff in error. N. J. & T. A. Hammond, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 187)

WESTERN & A. R. CO. v. STAFFORD.

(Supreme Court of Georgia. July 27, 1896.)

RAILROADS — CROSSING ACCIDENT — DIAGRAM OF CROSSING — NEGLIGENCE — RATE OF SPEED — EVIDENCE — HEARSAY — INSTRUCTIONS — HARMLESS ERROR.

1. There was no error in allowing a physician to testify that one who had received violent personal injuries, and who was under treatment in a boarding house on the day upon which he was hurt, did not know he had previously, on the same day, after receiving the injuries, been in the physician's office; it not appearing upon cross-examination, or otherwise, that the physician's knowledge on this subject was not derived from personal observation of the patient's condition, or that it depended solely upon statements made by the latter.

2. Under the evidence in this case, the court did not err in charging that a failure of the defendant's servants to comply with a city ordinance regulating the speed of trains within the corporate limits was negligence, nor in failing to submit to the jury the question whether such ordinance was reasonable, or unreasonable, with reference to the locality where the injury was inflicted.

3. The court erred in not allowing a diagram of the place where the collision occurred to be sent out with the jury; it having been prepared by a civil engineer, who testified to its correctness, and having been admitted in evidence.

4. The charge of the court to the effect that if the defendant's agents were guilty of willful negligence in running the train, or did so "in reckless disregard of the life or safety of people," the plaintiff was entitled to recover, and his recovery should not be lessened, notwithstanding the jury might believe that by exercising ordinary care he might have avoided the consequences of the defendant's negligence, even if correct in the abstract, was not appropriate in this case. For this reason, if not for others as well, it was error to give in charge section 3066 of the Code. *Atkinson, J., dissenting.*

5. Notwithstanding the errors above indicated, the reasonableness of the verdict in amount, in view of the character of the plaintiff's injuries, shows that these errors resulted in no harm to the defendant; and, as the evidence was amply sufficient to authorize a recovery, there should be no new trial. *Atkinson and Lumpkin, JJ., dissenting.*

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Henry M. Stafford against the Western & Atlantic Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Stafford sued the railroad company for damages from personal injuries, and for damages to his wagon, alleging: Waugh street, one of the public streets of Dalton, crosses the railroad nearly at right angles. On the east side of the railroad, and immediately north of the street, is a large building, hiding from the view of those looking from the railroad track persons approaching the railroad

from the east on said street; and at the side and west of and close to said building were standing cars, extending down close to the wagon way, and still further obstructing the view northward up the railroad track until persons so approaching the railroad are within a few feet of the track. On July 10, 1893, he was approaching said railroad on this street cautiously from the east, sitting upon a load of wood on his wagon. As soon as he reached a point from which he could look northward up the track, he did so, and seeing no train approaching, and hearing no whistle or ringing of a bell, attempted to drive across the track. As soon as his team got on the track, he saw defendant's passenger train approaching (around a curve) the crossing, from the north, at the high and dangerous speed of 25 miles per hour. When he first saw or could have seen the train, it was within two or three hundred feet from him. Before he could turn his team from the track, or urge it across the track, or leap from his wagon, the engine struck his wagon, hurling it into the air, and throwing him violently upon the ground beside the track. His wagon was destroyed, to his damage \$100; and he was knocked senseless, and remained unconscious for 10 hours. The bones of one of his hands were broken; his head was cut, gashed, and bruised; the crest of one of his pelvic bones was broken off; his thighs, back, and hips were greatly bruised and lacerated; his face and breast were cut and bruised in many places; and from these injuries his nervous system was greatly shocked, from which shock he has not yet recovered, and fears he never will recover. He suffered great mental and physical pain from the injuries for many weeks, and still suffers such pain, and has reason to fear he never will be free from pain from these injuries. He has been wholly unable to walk since the occurrence, and fears he never will be able to walk as before. He has been unable to do any labor, and will be unable for many months, and fears he never will be able to labor as before. His injuries are permanent. There are two other public crossings within 300 yards north of that at which he was injured. Defendant's agents were negligent in running over both these at said high rate of speed, and in not sounding any whistle or ringing any bell as required by law, and by the ordinances of the city. They were negligent in running around said curve and approaching the Waugh street crossing at said high rate of speed, and in not blowing the whistle or ringing the bell, or giving other signals of approach of the locomotive, and were grossly negligent in not checking and continuing to check the train as it approached the crossing. On October 17, 1894, plaintiff obtained a verdict for \$1,850. Defendant's motion for a new trial was overruled, and it excepted. The motion was upon the following, among other, grounds: The court erred in admitting in evidence, over defendant's ob-

jection, the following testimony of Dr. Wood: "I remember very distinctly asking plaintiff, after we moved him to the boarding house, some time in the afternoon, not later than two o'clock, something, and he didn't know that he had been in my office at all. He thought we had brought him from where he was injured to the boarding house." The objection to this testimony was that it was simply the sayings of plaintiff some five hours after the occurrence, and too far off to be a part of the *res gestæ*. Error in excluding from the jury a diagram of the place where plaintiff was injured, which had been prepared by Whorley, civil engineer, and was sworn to by him as being a correct representation of the surroundings; the court ruling that counsel might use it before the jury, but that it could not be sent out as evidence. Error in charging: "You look to the evidence, and see where on the line of railroad the injury occurred. Was or was it not within the corporate limits of the city of Dalton? What speed was the engine running after it reached the corporate limits of Dalton? Was it, or not, a greater rate of speed than allowed by the law and the ordinances of the city of Dalton? The ordinances of the city of Dalton are in evidence before you, and you will see, by regarding that ordinance, that it requires the engineer of a train to check the speed of the train down to four miles an hour. A failure to comply with this ordinance of the city of Dalton would be negligence." Alleged to be error, because not a proper way of submitting this question to the jury, because the ordinance might be reasonable as applied to one locality, and unreasonable as applied to another. It might be reasonable as to populous parts of a city, and not reasonable with reference to uninhabited districts near the corporate limits. And the jury should have been instructed as to the conditions under which the ordinance would apply, and those under which it would not, and leave it to the jury to say whether or not the ordinance was reasonable and applicable, according as they might find these conditions to exist, or not. Error, further, because it made defendant negligent for running faster than four miles an hour after its train reached the corporate limits of Dalton, regardless of the locality where the accident occurred. The evidence showed that several public crossings within the corporate limits of Dalton had to be passed by defendant's train before the crossing was reached where the accident occurred, and that the corporate limits were a considerable distance from this place; and, if the statute and city ordinances were violated in regard to the speed of the train before this crossing was reached, the law is that this is a circumstance showing negligence at the time of the accident, which may go to the jury, but not negligence *per se*.

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as charged by the court. Error in charging: "If the plaintiff was injured by negligence of defendant's agents in running its trains in violation of law, and if such negligence was willful on the part of defendant or its agents, or was done in reckless disregard of the life or safety of people, then the plaintiff would be entitled to recover; and his recovery would not be lessened, even though plaintiff might, by ordinary care, have avoided the consequence of defendant's negligence." Alleged to be error because there was no evidence to justify or authorize it, and the facts made it peculiarly inapplicable. Further, because not the law in a case of this character, where the facts show anything but a reckless disregard of human life by defendant's agents.

R. J. & J. McCamy and Payne & Tye, for plaintiff in error. Maddox & Starr and McCutchen & Shumate, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J. I concur in all the headnotes announced by the Chief Justice, except the fourth and fifth. There was not, in my opinion, any error in giving the charge referred to in the former. If there had been, a new trial ought to be granted.

LUMPKIN, J. (dissenting). I concur in all the headnotes announced by the Chief Justice, except the last. In my opinion, a new trial should be granted because of the errors mentioned in the fourth headnote, and I therefore dissent from the judgment of affirmance.

(93 Va. 623)

CRAUFORD'S ADM'R v. SMITH'S EX'R.  
(Supreme Court of Appeals of Virginia. Oct. 1, 1896.)

On rehearing. Denied.

For former report, see 23 S. E. 235.

HARRISON, J. This case is before us on a petition for a rehearing of the decree of this court entered on the 3d day of October, 1895, in so far as it holds the estate of Treadwell Smith, deceased, liable for the value of the slave Sandy Shorter. I have carefully reviewed and reconsidered the evidence upon which this liability rests, and have been unable to come to a different conclusion from that heretofore reached. The court therefore adheres to the opinion formerly delivered.

KEITH, P. (dissenting). I concur in the conclusion announced in this case, except that I am of opinion that the decree appealed from should be reduced by crediting thereon the sum for which it is alleged the former slave, Sandy Shorter, was sold.

**KIRSCHBAUM et al. v. COON.**

(Supreme Court of Appeals of Virginia. Sept. 17, 1896.)

**VENDOR AND PURCHASER—BILL TO RESCIND—  
EQUITY—RETENTION OF JURISDICTION  
—ACCOUNT.**

1. On a bill by a vendee to rescind a contract to purchase land because of the vendor's refusal to convey after full payment of the price, it was asked that the vendor be required to refund the price, together with the moneys expended by complainant for the benefit of the property, including taxes thereon paid by him. Defendant denied full payment of the price, and showed a certain balance due by exhibits, for which he asked a decree against complainant, offering to execute a deed on payment thereof. Upon a hearing on the pleadings and exhibits, the bill was dismissed, without prejudice, however, to complainant's right to sue for specific performance on payment of the balance of the price. *Held*, that the dismissal was error, since, having taken jurisdiction, the court should have had an account taken, and given the parties full relief.

2. A contract for the sale of an undivided one-ninth interest in land in which the vendor retained an interest provided for a conveyance free of incumbrances, but after its execution the vendee authorized the vendor to take a loan on the property for the purpose of erecting a building thereon. A part only of the loan, however, was used in the building, the balance being applied by the vendor to discharge previous incumbrances on the land. *Held*, that the vendee was entitled to a conveyance on payment of the price, upon assuming payment of one-ninth of that part of the loan only which was used in the building, though the vendor credited him, as having paid it on the price, with one-ninth of that part of the loan used in discharging the prior incumbrances.

Appeal from hustings court of Roanoke; John W. Woods, Judge.

Bill by Ab Kirschbaum and others, partners as Ab Kirschbaum & Co., against J. W. Coon, for rescission of a contract of sale of real estate and for an accounting. From a judgment dismissing the bill, complainants appeal. Reversed.

Phlegar & Johnson and Wright & Hoge, for appellants. Penn & Cocke, for appellee.

CARDWELL, J. The appellee, J. W. Coon, owned, with S. J. Green and B. Blanton, certain real estate with some improvements thereon, situated on Campbell street and Salem avenue in the city of Roanoke, each of these parties owning a one-third undivided interest in the property. In August, 1890, Coon sold to A. J. Sims a one-ninth interest in this property for the sum of \$3,333.33½, upon the terms of one-fourth of the purchase money to be paid in cash, and the balance in three equal annual installments; Coon entering into a written contract with Sims at the time whereby he agreed to convey this one-ninth interest to Sims free from all incumbrances when the whole of the purchase money was paid. Sims made the cash payment and sundry payments thereafter on account of the deferred payments, and on the 14th of September, 1893, he conveyed the interest in this property purchased

of Coon to Ab Kirschbaum and others, composing the firm of Ab Kirschbaum & Co. The deed of conveyance from Sims to Ab Kirschbaum & Co., after reciting that the property conveyed was the same that Sims purchased from Coon, contains the following provisions: "And whereas, the said J. W. Coon has, since the purchase of the said one-ninth interest by said Sims therein, placed a loan on said property for the purpose of erecting a new building thereon, but said Sims claims that he is not legally bound therefor: Now, in the event that said J. W. Coon shall establish the fact that said loan is just, and is an incumbrance on said property, and that he was authorized to place said incumbrance on said property under his contract with said Sims, then said parties of the second part hereby assume, as testified to by their acceptance of this deed, to pay whatever of said incumbrances said Sims may be liable for." Shortly after obtaining this deed, Ab Kirschbaum & Co. filed their bill of complaint against Coon in the hustings court of the city of Roanoke, averring that Sims had paid the whole of the purchase money due to Coon, as shown by receipt made exhibits with the bill, but Coon had refused to convey the one-ninth interest in the property to the complainants; that Coon, without the knowledge or consent of Sims, removed the buildings on the property situated on Campbell street, and also without the knowledge or consent of Sims had borrowed the sum of \$7,500, and erected a three-story brick building on this lot, securing the loan by a trust deed thereon; that this sum of money to a considerable extent was used by Coon in the payment of prior incumbrances on the property due by Coon, and not by Sims; that the building erected did not cost as much as claimed by Sims, and that some portion of the money was also used by Coon in the payment of charges or expenses for which Sims was in no way bound; that Coon had received rents from the property for which he refused to account, although complainants had demanded of him an account of not only the rents, but showing the disbursements of the money received by him on the loan secured on the property, etc. The prayer of the bill is that the contract of sale to Sims be rescinded, and Coon be required to refund to the complainants the purchase money paid by Sims on his purchase, with legal interest; that Coon be required to refund also all the money paid by Sims in taxes or insurance on the property, or in any way expended for the benefit of the property, the complainants offering to refund all rents received by Sims from the property, and to execute to Coon a release of all their claim upon the property by reason of their deed from Sims when Coon shall have paid back to them the purchase money paid to him by Sims, etc.; and that the cause be referred to one of the commissioners of the court to take an account

of the matters and things stated in the bill, etc. Coon answered this bill, admitting the contract made with Sims, but denying emphatically that Sims had paid the whole of the purchase money for the one-ninth interest in the property sold to him, and enters into an explanation of the receipts exhibited with the complainants' bill, filing with his answer a statement of the rents and collections from the property, and showing the expenditures of money for the new building and other expenses connected with the property, and finally claims that Sims owed him on the purchase money a balance of \$861.95, with interest from the 10th of July, 1898. The respondent further admits that he was bound by his contract with Sims to convey to him a good title to the interest in the property sold him, free from all incumbrances, when the whole of the purchase money therefor was paid; but with reference to the incumbrance put on the property by the respondent and his co-owners, Green and Blanton, after the sale to Sims, respondent says that: "After it was determined that it would be wisest to borrow the sum of \$7,500, pull down the buildings on the property, and erect a new one in their stead, in order that the rents for the same would yield a fair return on the cost of the entire property, he obtained the consent of Sims, to whom the proposed investment was entirely acceptable." With this part of his answer respondent makes the statement as to how the loan of \$7,500 was expended, and by this statement it appears that \$3,463 of this sum was used in the payment of a balance due on the purchase money for the entire property, for which respondent, Coon, as he admits, is responsible, and not Sims; but claims that Sims had been credited by respondent for one-ninth of the loan secured on the property, so far as it was used to pay off the prior liens on his purchase money due for the one-ninth interest sold him. It was asked by respondent that his answer be read as a cross bill, and that a decree be awarded him against the complainants for the sum of \$861.95, the amount he claims that was due from Sims on his purchase, with interest from the 10th day of July, 1898; and respondent offered to execute a deed to the complainants for the one-ninth interest in the property when this sum, with interest, was paid, and the complainants assumed the payment of one-ninth of the \$7,500 secured on the property. To this answer the complainants filed a general replication, and the cause was heard on the bill and the exhibits therewith, the answer of the defendant, and the general replication of the complainants thereto; whereupon the hustings court of Roanoke dismissed the bill at the costs of the complainants, but without prejudice to their rights to bring a suit for the specific performance of the contract between Coon and Sims when the balance of \$861.95, with interest, as claimed by Coon,

was paid by the complainants. From this decree an appeal was obtained to this court.

The court below having taking jurisdiction of this case, it should have done complete justice between the parties, and given full relief. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165; *Kane v. Mann*, 24 S. E. 938, 93 Va. —. The case should have been referred to a commissioner to make the inquiries and to state the accounts called for by the bill, and, before the court proceeded by its decree to fix the amount of purchase money due to Coon from Sims or the complainants, there should have been a full and complete account of the transactions between Coon and Sims. This seems to be conceded by counsel for appellee. In the answer of the defendant he does not claim that Sims authorized the loan on the property for any other purpose than the erection of the building thereon; therefore neither Sims nor his assignees, the complainants, could be held responsible for the incumbrance put on the property, as to which Sims never consented, and it is not sufficient for Coon to say that, while it is true that he owed this incumbrance, he had given Sims credit for one-ninth of the money not used in the erection of the building, but in the payment of the prior debts secured on the property. To the extent that Sims consented to the incumbrance on the property he and his assignees are bound for the payment of one-ninth thereof, and for a like proportion of all proper charges and expenses incurred in making the loan, but beyond this they are not bound; and upon the payment of the whole of the purchase money that may be found to be due to Coon from Sims the complainants are entitled to a conveyance from Coon of one-ninth interest in the property in question free from all incumbrances, except in so far as Sims had authorized the incumbrance; and, if Coon cannot convey such a title, then the complainants would be entitled to a rescission of the contract of sale entered into between Coon and Sims, and to have refunded to them by Coon the money paid by Sims on his purchase, with interest from the date of the payment. For the foregoing reasons, the decree of the hustings court of Roanoke is reversed and annulled, and the cause will be remanded for such further proceedings therein as may appear proper in accordance with this opinion.

HARRISON, J., did not sit in this case on account of absence.

(93 Va. 769)

#### WILLIAMS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

HOMICIDE—PRESENCE OF PRISONER IN COURT—RECORD—VIEW BY JURY—IRREGULAR ADMISSION OF EVIDENCE—WAIVER OF OBJECTION.

1. From the record of a murder case, reciting that the prisoner "was this day again led to

the bar, in the custody of the jailer, \* \* \* and thereupon renewed his motion to set aside the verdict of the jury and grant him a new trial, \* \* \* and, the motion being argued, the court takes time to consider," it will be presumed that the prisoner remained in court till adjournment for the day, though the record for the day does not conclude, "and the prisoner was remanded to jail."

2. That on a view of premises by the jury in a homicide case a witness pointed out where the blood was, and explained that it could not be seen, because it had been painted over, while no evidence of the painting had been given in the case, cannot be complained of for the first time after verdict; defendant having been present, and the witness having, on return into court, been offered to defendant's counsel for cross-examination, after counsel was informed of all the circumstances, except perhaps the statement in regard to paint.

Error to corporation court of Norfolk.

Charles Williams was convicted of murder, and petitions for writ of error. Denied.

P. J. Morris and H. G. Miller, for petitioner.

KEITH, P. This case is before us upon the petition of Charles Williams for a writ of error to the judgment of the corporation court of the city of Norfolk, rendered on the 23d day of June, 1896, by which he was sentenced to be hanged for the murder of one George Bess. The petition presents two assignments of error:

1. It is alleged that the record fails to show that, when the prisoner renewed his motion to set aside the verdict of the jury and grant him a new trial, he was personally present, in that it fails to recite that the petitioner was remanded to jail at the conclusion of the proceedings on said motion. The order recites that "Charles Williams, who stands convicted of murder in the first degree, was this day again led to the bar, in the custody of the jailer of this court, and thereupon renewed his motion to set aside the verdict of the jury and grant him a new trial, on the ground that the said verdict was contrary to the law and the evidence, and on the further ground of the misconduct of the jury on the trial; and, the said motion being argued, the court takes time to consider." The precise error assigned is that the record for that day does not conclude with the statement, "and the prisoner was remanded to jail," from which it is sought to be inferred that he was not personally present in court during the whole of the proceedings which affected him. The words, "the prisoner is remanded to jail," are, without doubt, usual, and have been relied upon by the court to supply proof, in the absence of other more specific averments, of the presence of the prisoner during his trial; but we know of no case in which their omission from the record has received the construction contended for here. The record for the 1st day of July shows that the prisoner "was this day again led to the bar, in the custody of the jailer of this court, and thereupon renewed his motion to set aside the verdict of the jury and grant him a new trial." No action was taken upon

that motion, but the decision of the court was reserved. It therefore does affirmatively appear, in the most formal manner, that the prisoner was present when the only step was taken by the court which could by possibility affect his interest; but, apart from all this, the record having recited that he was present in court, the presumption would be that he remained until the court adjourned for the day, unless the contrary is made to appear, either directly, or by necessary intendment.

The second assignment of error is based upon the following state of facts. During the progress of the trial the jury was taken to the scene of the alleged homicide, at the request of the attorney for the commonwealth. While visiting the locality the jury was placed in charge of Alphonzo Mercer, a deputy for John E. Burks, sergeant for the city of Norfolk, to whom was administered the following oath: "You shall well and truly, to the best of your ability, keep this jury together, and neither speak to them yourself, nor suffer any other person to speak to them, touching any matter relative to this trial, until you bring them again into court; so help you God." The jury thereupon retired in charge of the said deputy, the prisoner going with them, and after some time were again brought into court, and the evidence fully heard. It appears that the jury was accompanied by the attorney for the commonwealth, and that the counsel for the prisoner were invited to be present, but declined. After the jury reached the scene of the homicide, one of the jurors asked the attorney for the commonwealth to have the location of the spots of blood that had been testified to pointed out on the deck of the ship where the killing was alleged to have taken place. Thereupon the attorney for the commonwealth called upon Mr. Linthicum, who pointed out where the spots of blood were alleged to have been, and explained how the blood had run around the ship, and that the reason the jury could not then see it was that the deck of the ship had been painted since the occurrence of the alleged homicide. It appears that the fact that the ship had been painted had not been testified to by any witness during the trial. It appears that the sergeant in charge instructed the jury not to communicate with any one, but that the attorney for the commonwealth stated that Mr. Linthicum might make an explanation, and thereupon the sergeant made no further objection. It further appears that upon the return of the jury, the prisoner, and the commonwealth's attorney into court, the attorney for the commonwealth informed the court what had taken place, and said that the witness Linthicum was present, if the counsel for the prisoner wished to ask him any question; but neither the prisoner nor his counsel raised any objection, or asked any question. These are the facts, as appears from the affidavits of the prisoner as to what occurred upon the boat, and from the affidavits of Mercer and White, the deputy sergeants, as to what occurred, not

only upon the boat, but in the court after the return of the jury. The counsel for prisoner admit in their affidavit the foregoing facts, except that they both say that while they were informed that the commonwealth's attorney accompanied the jury to the scene of the killing, and had requested Linthicum to point out the premises, they were not aware that anything more had been said by Linthicum, and especially that they were not aware that any statement had been made to the jury by Linthicum in respect to the painting of the boat. All the facts occurred in the presence of, and were known to, the prisoner. The affirmative evidence is that the whole transaction was brought to the attention of the court in the presence of the jury, of the prisoner, and of his counsel. No exception was filed at the time to what had been done, or any objection noted to any part of the proceedings. So far from it, the fact that the jury had been taken to view the premises was not stated in the record until after the verdict had been rendered, when the court was requested to spread it upon the record, in order that it might be made the ground of a motion for a new trial. It further appears that Linthicum was offered for examination as to what had taken place out of court, but this privilege or right was not availed of by the prisoner or his counsel, though the fact that the witness was offered for cross-examination is nowhere contradicted.

In 1 Blish. New Cr. Law, § 997, subd. 4, it is said: "A defendant who does not object to illegal evidence, but permits it to go to the jury, can claim nothing afterwards on the ground of its admission." In the facts as they appear, we see no ground for the imputation of misconduct to the jury, nor, indeed, to any party concerned. It was, at the utmost, an inadvertence,—a mistake which might have been corrected if the court's attention had been called to it in time, which was known to the prisoner, and which indeed occurred in his presence; and, while we do not doubt the truth of what is contained in the affidavits of the prisoner's counsel, the facts were as accessible to them before as after the rendition of the verdict. Of what occurred, the most that can be predicated is that the evidence was irregularly placed before the jury. In *Perry's Adm'r v. Perry*, 28 Grat. 324, it is said, "Notice must be given at the time of the ruling of the court, or at least before the verdict, that the point will be saved, though the bill of exceptions may be drawn up and signed at any time during the term." See, also, *Whalen v. Com.*, 90 Va., at page 549, 19 S. E. 182; *Trumbo's Adm'r v. Street-Car Co.*, 89 Va. 780, 17 S. E. 124. While in *Grayson's Case*, 6 Grat., at page 723, it is said: "Motions for new trials are governed by the same rules in criminal as in civil cases." The authorities above cited, and the practice thereby approved, apply to the admission of illegal and improper testimony. In the case before us the testimony objected to was entirely pertinent and proper, the objection being merely

to the irregularity of its introduction. To this case, therefore, the law as above stated applies with still greater force and propriety. If the prisoner, after the verdict has been rendered, cannot for the first time object to the introduction of illegal testimony, how can it be contended that he can for the first time after the verdict object to legal testimony irregularly introduced? The prisoner in a criminal case will not be allowed, any more than a party in a civil case, to sit mute in the presence of the court, with the knowledge that some mere irregularity has taken place during the trial, ready to take advantage of it in case of an adverse verdict. Having knowledge of such irregularity, it is his duty to bring it to the attention of the court, which may correct it, or in some way obviate its effects; but neither a party to a civil case, nor the prisoner in a criminal case, will be permitted to play fast and loose with the court. The petition for a writ of error is refused.

(93 Va. 634)

## DIDIER et al. v. PATTERSON et al.

(Supreme Court of Appeals of Virginia. Sept. 17, 1896.)

## FRAUDULENT CONVEYANCE — RESERVATION — ATTACHMENT — RESIDENCE OF DEFENDANT.

1. An assignment, absolute on its face, to a bank, by a contractor, of moneys due and to become due the contractor under a construction contract, though intended merely as security for moneys loaned and to be loaned by the bank to enable the contractor to carry on the work, with an agreement that the bank shall collect the monthly payments on the work, credit the contractor therewith, and charge him with the amount then due the bank, is not void as to creditors because of the further agreement that any balance, from month to month, in the contractor's favor, shall be subject to his check; there being no fraudulent intent.

2. One who is dwelling in the state, with no intention of leaving, being engaged in constructing public work under a contract that will occupy him for an indefinite period, is not a non-resident, within the attachment laws.

Appeal from corporation court of Roanoke; John W. Woods, Judge.

Action by Didier and others against Patterson and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Scott & Staples, for appellants. Watts, Robertson & Robertson and Hansbrough & Hall, for appellees.

RIELY, J. An intent on the part of a debtor, in making a conveyance or transfer of his property, to delay, hinder, or defraud his creditors, renders the conveyance or transfer void as to them, except as against a purchaser for valuable consideration and without notice of the fraud. This is the case both by the common law and under the statute. Wait, *Fraud*. Conv. § 16; Code Va. § 2458. Fraud may appear from the provisions of the instrument itself or be proved by evidence aliunde. Whenever it is apparent on the face of the instrument, it is called constructive or legal fraud; and in

such case the fraud is adjudged by the law to be conclusively established by the provisions of the conveyance itself, and cannot be disproved by other evidence. *Gordon v. Cannon*, 18 Grat. 387; *Hughes v. Epling* (Va.) 25 S. E. 106; and *Bump, Fraud. Conv.* (4th Ed.) § 338. But mere badges of fraud, whether they appear on the face of the instrument or from evidence allunde, may always be repelled by other evidence. *Gordon v. Cannon*, supra; *Hickman's Ex'r v. Trout*, 83 Va. 478, 3 S. E. 131. While an instrument which is fraudulent on its face is conclusive of the question of fraud, and the contrary cannot be shown by extrinsic evidence, no appearance of fairness on the face of a conveyance, if executed with a fraudulent intent, will exclude evidence of the fraud (1 *Greenl. Ev.* § 284; 2 *Minor, Inst.* 336, 690; and *Starke's Ex'r v. Littlepage*, 4 Rand. 368), or give validity to the conveyance if it be proved to be fraudulent. An instrument which on its face is an absolute conveyance may be shown by evidence allunde to be in fact a mortgage, or only a security for a debt or for money lent. Taking an absolute conveyance as a security for a debt or for money lent is not, however, conclusive evidence of fraud. It is only a badge of fraud, and, if it be shown that there was no fraud in taking the security, it will be held to be valid and be enforced. *Walt, Fraud. Conv.* § 238; *Bump, Fraud. Conv.* § 55; *Bank v. Haskins*, 3 Metc. (Mass.) 332. The instrument which it is here sought to impeach on the ground of fraud is an assignment made by W. F. Patterson on December 17, 1892, to the Fidelity, Loan & Trust Company of Roanoke City, of all moneys due and to become due to him from the said city for work done and materials furnished and to be done and furnished under his contracts with the city for public improvements. On its face it is an absolute conveyance, and no unfairness is disclosed by its provisions. But while, on its face, it is an absolute conveyance, the testimony shows that it was only intended as a security for moneys already borrowed by Patterson from the said company to enable him to carry on the work under his contracts with the city, and for future loans or advances to be made to him for the same purpose. The testimony shows that the assignment was free from any intentional fraud. This, indeed, was conceded, but it was claimed by the counsel for the appellants that the effect of the agreement was, nevertheless, such as to constitute fraud in law. One may not only convey or transfer a chose in action or any other property to secure an existing indebtedness, but it is also well settled that he may likewise do so for the purpose of securing future loans and advances. *Institution v. Thomas*, 29 Grat. 483; *U. S. v. Hooe*, 3 Cranch, 89; *Shirras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How. 14; *Walt, Fraud. Conv.* § 217; *Bump, Fraud. Conv.* § 210.

The evidence discloses that Patterson had undertaken large contracts with the city of Roanoke for public improvements, and that the city was to pay monthly for the work as

estimated by its engineer, less 10 per cent., which amount was to be reserved until the work was completed, and accepted by the city, in order to insure the faithful performance of his contracts. The work required a large and continuous expenditure of money for machinery, materials, and labor, which necessitated some arrangement, especially in consequence of the amount reserved by the city until the completion of the work, by which Patterson could command sufficient means for these purposes, and prevent delays and disaster. He had been at work under his contracts for several months prior to the execution of the assignment which is the subject of this controversy, and at first obtained from the said bank the moneys he needed upon notes indorsed by J. A. McConnell and discounted by it. Subsequently, additional security being required for the moneys he was borrowing from the bank, he assigned to it on October 12, 1892, the moneys payable on the monthly estimates for September and October, 1892, for work done. It collected the same, and placed it to his credit, and charged up to him his notes as they became due. During the month of December, 1892, Patterson had needed, and the bank had lent to him, more money than would be coming to him upon the estimate for that month, and it asked for additional security. Accordingly he made to it the assignment of December 17, 1892. This was intended to secure not only what he then owed the bank, but also future loans or advances. In addition to securing his existing indebtedness to it, the understanding and agreement was that it would continue to lend or advance to him money to carry on the said work, taking his notes therefor, payable on the pay day of the city, which was the 15th of each month; collect and place to his credit the amount due according to the monthly estimates; charge up to him his notes which were then payable; and hold the balance or surplus, if any, subject to his check. The right to check upon or use such balance or surplus is the matter relied upon to avoid the assignment as fraudulent in law. It was insisted that it violated the principle of law that the grantor or assignor in a conveyance or assignment cannot reserve any benefit to himself under the conveyance or assignment, or make any stipulation in his own favor which is inconsistent with its absolute character. *Bump, Fraud. Conv.* § 377; *Walt, Fraud. Conv.* § 326; 2 *Minor, Inst.* 679. While the law condemns and declares fraudulent and void a conveyance under which any pecuniary benefit is reserved by the debtor, this principle applies to the case of a general assignment by an insolvent debtor of all his estate for the benefit of his creditors, or where such benefit is an object of the conveyance, and is reserved for the use of the debtor at the expense of his creditors, where the intent is to screen the property from them, and prevent it from being taken for his debts. It does not apply where the conveyance is of a part

only of the estate of the debtor, and was made in good faith, for the purpose of raising money or securing one or more creditors, and the reservation is incidental, and what the law would imply in the absence of such a provision. *Bump, Fraud. Conv.* § 383; *Leitch v. Hollister*, 4 N. Y. 211; *Curtis v. Leavitt*, 15 N. Y. 9; *Baldwin v. Peet*, 75 Am. Dec. 806.

The case under consideration, as disclosed by the evidence, does not violate this principle. It was not an assignment by a debtor in failing circumstances for the benefit of his creditors generally, nor an assignment of all his estate, but simply an assignment of a chose in action—of the money due and to become due for work Patterson had contracted to perform—for the express purpose of raising the necessary funds to carry it on, and meet his liabilities. There was no reservation of benefit in the sense contemplated by the principle of law referred to. The evidence discloses no purpose to shield from his creditors any of the money to which the Fidelity, Loan & Trust Company would not become entitled under the agreement, or to prevent it from being subjected to the payment of any debts he might owe or incur. It was only the reservation of the balance of the monthly collection from the city which might remain after discharging the amount then due and payable to the bank. Such a provision, or reservation, if it may be so called, in no wise defeated or tended to defeat the purpose of the assignment, or to withdraw the security from its operation. The bank would receive payment of its debt, and the balance would be liable for any other debts of the assignor; to be reached, according to its nature, either by execution or bill in equity, as well as be subject to his check for his own use. No party to the assignment falsely claimed or pretended that the assignment was anything more than a security for existing indebtedness and for loans or advances to be made in the future, nor concealed or attempted to conceal its real purpose and character, nor was there shown any agreement or purpose to conceal such surplus from creditors. Actual fraud not being shown, the result is the same as if it had been provided in the assignment in terms that the moneys due upon the monthly estimates should be applied by the assignee, when collected, to the payment of the indebtedness of Patterson to it, and the balance, if any, paid over to him. The effect of such provision would only be what the law would imply without it. The surplus would equally go to him under the law without such provision as well as with it. Such a stipulation does not vitiate the conveyance or assignment. *Harvey v. Anderson* (Va.) 24 S. E. 914; *Dance v. Seaman*, 11 Grat. 778; *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271; *Bump, Fraud. Conv.* (4th Ed.) § 383; *Wait, Fraud. Conv.* (2d Ed.) § 327. From the moneys Patterson had obtained from the company prior to the assignment in question he

had regularly paid the expenses and liabilities incurred by him in the prosecution of the work he had undertaken to perform for the city. He had regularly and promptly paid, month after month, at the time of the collection of the amount due him from the city, or within a few days thereafter, the amounts due from him to his employes, and also to the appellants, to whom he had sublet a part of the work; and he had done this notwithstanding the assignment made of the amounts due under the estimates for the months of September and October, so that nothing was due to the appellants when the assignment of December 17, 1892, was made, nor would be due until the next pay day, the 15th of January following, except, perhaps, a small sum to one of them for extra work, which had been overlooked in past settlements. Patterson had paid the appellants in their monthly settlements by checks on the Fidelity, Loan & Trust Company, and they knew that it was with it that he made his deposits and kept his bank account. They were cognizant of the previous arrangement he had with it for getting money to carry on his operations, and of the assignment of October 12, 1892. They neither complained nor had cause to complain of it. Neither have they just cause to complain of the assignment of December 17, 1892, nor good ground for essaying to impeach it. Nor was Patterson a nonresident of the state, so that the plaintiffs might lawfully sue out attachments against his estate. Although his family lived in Washington City, in order that his children could be educated at its schools, he himself had dwelt for a year or more at Roanoke city, and was still dwelling there, amenable to the service of legal process, when the attachments were sued out, with no intention of leaving, being engaged in constructing public improvements under contracts with the city that would occupy him for an indefinite period. He had registered as a voter in the month of May preceding, and done many other acts evidencing his residence at Roanoke city. Under a like state of facts, it was held by this court in *Long v. Ryan*, 30 Grat. 718, that a party who, like Patterson, was a contractor, was not a nonresident of the state, within the meaning of the attachment law; and under the principles there laid down the like conclusion must follow in this case. There is no error in the decree of the hustings court, and it must be affirmed.

(99 Ga. 318)

WESTERN & A. R. CO. v. LEDBETTER.  
(Supreme Court of Georgia. Aug. 18, 1896.)

CARRIERS—ACTION FOR ERECTION FROM TRAIN—  
EXEMPLARY DAMAGES—MISCONDUCT OF COUNSEL—INSTRUCTIONS—HARMLESS ERROR.

1. That portion of the argument of the plaintiff's attorney of which complaint is made contained nothing which would require the ordering of a mistrial. In so far as it was irrelevant or inappropriate the reprimand administered by the judge was a sufficient correction.

2. While it may not, as a general proposition, be true that every illegal expulsion of a passenger from a train will entitle him to exemplary damages, the charge to that effect given in the present case is not cause for a new trial, because it plainly appears from the evidence that, if the plaintiff was entitled to recover at all, it was a case for the allowance of such damages.

8. There was no error in the other charge complained of, nor in admitting nor in rejecting evidence. The requests to charge were, so far as legal and pertinent, covered by the general charge given; and though the evidence for the defendant, if accepted by the jury, might have entitled it to a verdict, yet, as that introduced for the plaintiff, and which the jury evidently believed, made out a case against the company, this court cannot, after its approval by the trial judge, set the verdict aside, either upon the ground that it was excessive in amount or that it was unwarranted by the evidence.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action by James E. Ledbetter against the Western & Atlantic Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Ledbetter sued the Western & Atlantic Railroad Company for damages from personal injuries, alleging in brief: On April 4, 1893, while so enfeebled and emaciated (having been sick for eight months) that his illness was apparent to the most casual observer, he secured tickets from defendant, and boarded its train at Atlanta for the purpose of being carried to Marietta, and thence to Ball Ground, to which last-named place via Marietta the ticket was bought for him. When three or four miles out of Atlanta, the conductor approached him for his ticket, and petitioner felt for it, and did not find it. He told the conductor that he had a ticket, but the conductor hurried him up, and he was unable to put his hand upon his ticket at that moment. He asked for time in which to search for his ticket, and told the conductor that if he could not find his ticket he would pay his fare. Petitioner pulled out his pocketbook to look for his ticket, and the conductor remarked that "there was not money enough in there to carry a man anywhere." He assured the conductor it was not all the money he had, and that he had plenty to pay his fare. The conductor notified him that he must get off the train, and, without giving him time to find his ticket or pay his fare, seized him, and forced him to the door, and off the train, out in the open country, and he was there left helpless, among strangers, and away from friends and relatives. After some hours of suspense, suffering, and exposure, he was put on the train of another railroad, and sent back to Atlanta. When he reached there he was taken by some one—he knows not who—to a hospital, where he remained for 18 days, unable to leave his bed, and in an exceedingly dangerous condition. His ejection from the cars of defendant was wan-

ton, wicked, and malicious. He had on his person at the time the ticket and ample money to have paid his fare. He assured the conductor of these facts, and asked time in which to find his ticket or pay his fare, both of which he was ready and trying to do, but, in utter disregard of humanity and his dangerous condition, he was shoved from the train in a most brutal manner. On account of his enfeebled condition, he could not make a rapid search for the ticket, but found it in a very few moments after his ejection. He did nothing to authorize or excuse the treatment he received. He was scarcely able to walk, and when put off the train was not able to take care of or protect himself. He informed the conductor that he was sick, and the conductor could not help seeing that he was seriously sick, and that his life would be greatly endangered by being ejected from defendant's cars in such a place. Because of being thus ejected he was mortified, excited, and so exposed that he suffered a relapse which endangered his life, and from which he has not recovered. He has been unable to do any work since, in consequence of the severe attack brought on by the exposure and injuries, etc. There was a verdict for plaintiff for \$2,500, and, defendant's motion for new trial being overruled, it excepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the verdict is excessive, and indicated that the jurors were influenced by bias, prejudice, and passion. Because of the improper remarks made by plaintiff's counsel George R. Brown in his concluding argument to the jury, and which were called to the attention of the court at the time so made by movant's counsel, and a request made of the court that the case be continued or a mistrial be ordered because of the prejudicial effects the remarks had on the jury. The following were the remarks made by plaintiff's counsel, and to which objection was made to the court by movant's counsel, as above stated: "They have this man's money in their coffers today, and without excuse or provocation they turn him out to die. Gentlemen of the jury, I never saw or heard in the courthouse such brazen effrontery and audacity as these gentlemen have demonstrated to this court and to this jury. They have got this man's money. He paid for his right to travel. They kept the money, gentlemen, that he paid them, and turn him out into a ditch in his helplessness. Gentlemen, the highway robber who is detected with goods that do not belong to him does not have the audacity to stand and keep them. He is put off there, one-half mile from Atlanta, and allowed to stagger around alone, with nobody to help him or protect him. Talk to me about human sympathy! No wonder they ask you to shut your ears to the facts of this case. Gentlemen, there is not a man on that jury

that would not have taken the last dollar out of his pocket and paid the fare of the stranger before they would have seen him left there, and stagger around alone, and lie down on the cold ground to die. What did Bell care? He went off and left him. He did not even see him to a place of safety. Bell rode off in that magnificent train of cars, the complete master of the situation. I want it distinctly understood that I am begging nothing for this man. I say the evidence in this case calls for it at the hands of men who desire to administer justice when this man was put off the train in that ditch to die. My friends, when Mr. Tye associates with the people of Cobb county longer, he will find that the jurors of Cobb county are more honest than he thinks them now to be. If you cannot give this man but a little pittance,—a few dollars,—I say, let us know it now, and let this man go home to work out the money to pay the costs. We do not want any small verdict. I say if he is entitled to recover at all, he is entitled to a verdict which will compensate him for the injuries he has received. Let him, gentlemen of the jury, in the remaining years of his life, afflicted and diseased as he is, let him enjoy some of the fruits they deprived him of on the 4th day of April, 1893. The plaintiff is my personal friend, and I have a personal interest in this case. I intend to fight this case for him as long as I live, and when I die I leave it as a heritage for my children. I will go into any forum to advocate his cause and uphold your verdict." As to this ground the judge below states: Counsel for movant allowed counsel for plaintiff to go on without the objection to what is set out, as appears to me from the reporter's notes and statements. When objection was made as set out in this fifth ground, the presiding judge reprimanded counsel for the plaintiff, and told him that the argument was outside of the rules, and told him that he must argue the case, which he did from that time on. The court did this when his attention was first called to it, the presiding judge being busy with his charge. The jury was retired, and a motion made to continue the case, and refused.

Error in the following ruling: Plaintiff was testifying, and was asked the following questions, and made the following answers: "Q. Why didn't you give him the money to pay your way to Marietta when you could not find your ticket? A. He said there was not enough there to pay my way anywhere. Q. Did you have enough? A. Yes, sir. Q. What is the reason you did not give it to him? A. He did not give me time. Q. Didn't give you time to do what? A. To give it to him." Defendant objected to the last two questions and answers, because the answers were conclusions of the witness. The objection was overruled, which is alleged as error. In reference to this ground, which was the sixth ground of the motion, the judge below states:

"The question was asked, 'Didn't give you time to do what?' He (witness) answered, 'To give it to him.' Counsel for movant said: 'I object to the conclusion of the witness. He can state what passed between them.'" The presiding judge stated that he would let the testimony come in, and that counsel for defendant could find the length of time by cross-examination, if they wished. This was the ruling, and this is what happened with reference to the sixth ground, and nothing except what appears herein is approved in connection therewith.

Error in the following ruling: Plaintiff's counsel asked plaintiff the following questions: "Q. What is the reason you did not go to work sooner than that [referring to the fact that it was a month or two after he was ejected from the train before plaintiff was able to work]? A. I was not able, and was not able to work when I did go to work. Q. What was the matter? A. I was sick. Q. What caused your sickness? A. Exposure. Q. What exposure? Mr. Tye: I object to that, if your honor pleases. I think that is a question purely for the jury, as to what exposure caused his sickness. Mr. Brown: He has a right to insist before the jury that is what caused it. The Court: He can give an opinion after giving the facts. Q. State that, Mr. Ledbetter,—your opinion about what caused it. A. I think it was caused by the exposure of putting me off the train in my weak state of health." Alleged to be error (1) because the opinion testified to by the plaintiff was a question of fact to be passed on by the jury, and was one of the issues that the jury was to try; (2) facts and not conclusions should be given in evidence.

Error in ruling: Dr. W. S. Kendrick, defendant's witness, was asked by defendant the following question by interrogatory, and made the following answer by interrogatory: "Q. State anything else that you know that will benefit defendant. A. In my opinion, when he was put off the train he was crazy and delirious with pneumonia, for when he was admitted to the hospital he was in the second stage of the disease; that is, he was when I saw him. There are three stages in the disease." On motion of plaintiff, and over objection of defendant, the court excluded the following portion of said answer, "In my opinion, when he was put off the train he was crazy and delirious with pneumonia." Alleged to be error because this was the opinion of an expert witness, and of a physician who actually treated plaintiff while at the hospital for pneumonia, and should have gone to the jury as evidence bearing on his condition at the time he was put off the train.

Error in refusing to charge the following written requests: "If you believe from the evidence that the conductor, Bell, demanded of plaintiff his ticket or the cash to the point he was going, and plaintiff was given a reasonable time for this, and failed to do either,

and then the conductor endeavored to ascertain from plaintiff the point to which he was going, and plaintiff, by reason of being unable to talk, or out of his mind so as to be unable to give intelligent information, the conductor had the right to put him off his train, provided he put him off at a place where he could receive care and attention, and be carried back to the city of Atlanta. If you believe from the evidence that at the time plaintiff was ejected from defendant's train he was then suffering from pneumonia, and that his subsequent confinement and illness and the results therefrom came from this disease, then on him, and not by reason of any exposure in being put off of defendant's train, then I charge you plaintiff cannot recover. I further charge you that if you believe from the evidence that plaintiff was ill, that he had a right to enter the train of defendant, and that defendant could not legally prevent it, but that in so doing there was no enhanced duty imposed upon defendant to the plaintiff, if he was unable to care for himself, as railroad cars are not traveling hospitals, nor their employes nurses; it being the duty of plaintiff, if he were ill, to provide proper assistance for himself. A railroad company has a right to employ a colored train hand, and a conductor may properly call upon him to assist in ejecting a passenger who ought to be ejected from the train. If a white passenger is wrongfully ejected from a train, the fact that a colored train hand was called upon to assist in so doing will not make the company liable for greater damages than should be recovered if the train hand had been a white man." As to these requests the judge below states that it will be found they are mostly covered in the charge given, especially those in reference to the right of the conductor and the one in reference to the colored porter.

Error in charging: "Ledbetter insists, as a result of what he insists was an unlawful expulsion, that he was made sick, and suffered subsequently, and he insists that upon this state of facts he is entitled to recover damages from the defendant company." Alleged to be error (1) because the court erred in stating incorrectly the contention of plaintiff, plaintiff not alleging in his declaration that he was made sick as a result of this expulsion, but the petition averring that he suffered a relapse, being already sick,—so sick it was apparent to a casual observer,—and the evidence also showing that at the time of his ejection he was sick; (2) because, if the court undertakes to state the contention of the parties, it must do it correctly.

Error in charging: "I charge you, if he was illegally expelled from the train, he would be entitled to exemplary damages, and the measure of damages in such a case as that is the enlightened consciences of impartial jurors. The law fixes no measure, and it is for the jury, looking at the facts, to say, as honest men, what amount the plaintiff is entitled to

under the law. I am not saying that it was an illegal expulsion. You are to say how that is under the rules I give you." Alleged to be error: (1) Because the court should have explained to the jury what were exemplary damages, and the circumstances under which the same should be awarded. (2) Because the measure of damages in this case is not solely the enlightened consciences of impartial jurors. The rule applies where the entire injury is to the peace, happiness, or feeling of the plaintiff. The pleadings and evidence in this case both claim and show actual damage for lost time, hence the charge is inapplicable. (3) Because the charge given was calculated to mislead the jurors, and induce them to believe that the whole case was thrown open to them, and that they had the right to fix the damages according to their enlightened consciences without reference to the actual damages which were shown by the evidence. (4) Because, when the court undertook to charge on the subject of damages, he should have charged the following Code section (3068): "In every tort there may be aggravating circumstances, whether in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff;" and his failure to so charge did not present to the jury the law of the case. (4a) Because the court should have charged the following Code section (3065): "Damages are given as compensation for the injury done, and generally this is the measure where the injury is of a character capable of being estimated in money. If the injury be small, or the mitigating circumstances be strong, nominal damages only are given." But particularly should it have been charged as the court charged on exemplary damages. The defendant was certainly entitled to this charge, and the failure of the court so to charge did not present to the jury the law of the case. (5) The measure of damages the court charged improperly in saying: "It was the enlightened consciences of impartial jurors." In cases of this character the law is, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. (6) Because the court erred in charging on the subject of exemplary damages, there being no evidence of aggravating circumstances in the act or the intention, or gross negligence on the part of defendant. (7) Because this portion of the charge intimates an opinion on the facts that plaintiff is entitled to recover damages. (8) Because, as the court had charged on the subject of exemplary damages if the expulsion was illegal, in the same connection he should have charged the converse of this proposition,—that is, if he was legally expelled, he could not recover any damages; and his failure so to charge prejudices defendant in this case.

As to the exceptions taken to the charge on

the court the judge states that the portions of the charges set out are excerpts from the charge, and are approved, taken in connection with the entire charge, and refers to various portions of the charge.

Payne & Tye and Sessions & Sessions, for plaintiff in error. Brown & Hutcherson, H. W. Newman, and Olay & Blair, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 307)

McCORD v. McGINTY et al.

(Supreme Court of Georgia. Aug. 18, 1896.)

VENDOR AND PURCHASER—EXECUTION—PROPERTY SUBJECT.

1. Where the vendor of land who retained the title obtained against the vendee a judgment for a balance of the purchase money, and had the land levied on and sold under an execution issued upon such judgment, without first filing and having recorded a deed conveying the land to the vendee, the sale was void; and one who bid off the land could not be compelled to pay the amount of his bid, and accept the sheriff's deed to the property. See *Parks v. Bailey*, 22 Ga. 116; *Harvill v. Lowe*, 47 Ga. 214; *Brunson v. Grant*, 48 Ga. 394; *Upchurch v. Lewis*, 53 Ga. 621.

2. This was a money rule which was tried by the judge, without the intervention of a jury, and he, under the facts presented, disposed of the case in accordance with the law as above announced.

(Syllabus by the Court.)

Error from superior court, Warren county; Seaborn Reese, Judge.

Rule sued out by Harriet A. McCord, executrix of Z. McCord, deceased, against the sheriff and C. S. McGinty, executor of F. H. McGinty, deceased, to compel the application of the proceeds of an execution sale to the payment of movant's judgment. From a judgment discharging the rule, movant brings error. Affirmed.

The following is the official report:

On May 2, 1892, execution was issued from a judgment in Lincoln superior court, in favor of Harriet A. McCord, executrix of Z. McCord, against Elisha McCord, and on the same day execution was issued from another judgment in the same court in favor of Lewis F. McCord, surviving partner of Z. McCord & Son, against Elisha McCord. On April 25, 1893, execution was issued upon a judgment in Warren superior court, in favor of C. S. McGinty, executor of F. H. McGinty, against Elisha McCord. The record of the suit in which this last judgment was rendered shows that it was based upon two notes, with usual process, and judgment rendered by the court; and upon this record appeared an entry by the sheriff that the defendant Elisha McCord was not in Warren county, dated March 19, 1892, and an entry bearing the same date, acknowledging due and legal service of the suit, and waiving process and all other service, and consenting to the jurisdiction of Warren superior court, signed by Elisha McCord. The execu-

tion from the McGinty judgment was levied upon 200 acres of land in Warren county, which was sold by the sheriff under this execution, and was bid off at \$500 by C. S. McGinty; this amount being much less than the amount of any one of the executions referred to. Harriet A. McCord, executrix of Z. McCord, brought a rule against the sheriff to require him to pay over the \$500 to her upon the executions first above named, upon the grounds that they were of older date than the one in favor of McGinty, executor, and that the judgment and execution in favor of McGinty, executor, were void as against movant for want of jurisdiction in Warren superior court. The sheriff answered that McGinty, executor of F. H. McGinty, claimed the right to apply the \$500 to his *fi. fa.*, and refused to comply with his bid, because he says the sale of the land was void, and he got no title thereto, because the title was in the estate of F. H. McGinty at the time of the sale; that, after the land was sold, respondent offered McGinty a deed in due form, but McGinty's counsel told respondent to keep the deed until it was decided to whom the purchase money of the land should be paid, if to any one, and then McGinty would pay respondent the amount that might be adjudged against him in this matter in favor of any one; and that respondent still has the deed in his possession, and McGinty is ready and willing to comply with his agreement. The movant traversed the sheriff's answer to this extent: that, at the time he tendered McGinty the deed, McGinty did not refuse to accept it and pay the money on the ground that the sale was void, and set up no claim that the sale was void, but claimed that his *fi. fa.* was a superior lien upon the fund, and that he would produce the fund when the court should decide as to which *fi. fa.* was entitled thereto. C. S. McGinty was made a party, and pleaded that the title to the land at the time of the sale was in the estate of F. H. McGinty, and never was in Elisha McCord; that F. H. McGinty sold the land to Elisha McCord, and took his note for the purchase money, which note was unpaid at the death of McGinty, and his executor sued the note in Warren superior court, and obtained judgment, McCord not being a resident of that county; that no deed of conveyance was executed by the executor of F. H. McGinty, and filed in the clerk's office, putting title to the land in said defendant, prior to the levy and sale, and since the sale respondent has learned the foregoing facts, and for that reason has never paid the \$500. He submits that he got no title to the land at the sale, and, in equity, should not be compelled to comply with his bid, but that the land should be sold again, as the title thereto is still in the estate of F. H. McGinty. The case was submitted to the judge, without a jury. Movant's traverse of the sheriff's answer was admitted to be correct. It was also admitted that, when the suit of McGinty v. McCord was filed, McCord was a resident of Lincoln county; that the notes

sued upon by McGinty, executor, against Ellisha McCord, were given for the purchase money of the land levied upon and sold; and that no deed had been made to defendant in f. fa. to the premises levied upon. The judge ordered that the rule be discharged, holding that the sale of the land was void. To this judgment, movant excepted.

G. Z. McCord, J. T. West, and W. M. Hawes, for plaintiff in error. Jas. Whitehead, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 276)

### JONES v. SNIDER.

(Supreme Court of Georgia. July 27, 1896.)

CONDITIONAL SALE — REMEDY OF VENDOR — BAIL TROVER — DEFENSES.

1. The seller of personality, who reserved the title, could, after obtaining a judgment against the buyer for the price, and collecting a portion of the same, nevertheless, without canceling the judgment or paying or tendering back what had been received, maintain against the buyer an action of bail trover for the purpose of collecting the balance of the purchase money, with interest thereon. *Dykes v. McVay*, 67 Ga. 502; *Bowen v. Frick*, 75 Ga. 786.

2. The defendant could defeat the action by tendering the balance due; or he could, by pleading and proving the facts as they existed, limit the plaintiff's recovery as above indicated. *Morton v. Frick*, 13 S. E. 463, 87 Ga. 230, 233.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by L. Snider against Watson Jones, in justice's court, in which there was a judgment for defendant. Plaintiff brought certiorari to the superior court, where it was sustained, and defendant brings error. Affirmed.

The following is the official report:

From the petition for certiorari brought by Snider against Jones, and from the answer of the magistrate, the following appeared: At the April term, 1894, of the magistrate's court, there came on to be tried a suit in bail trover brought by Snider against Jones, for the purpose of recovering a gold-headed cane. The defendant pleaded former recovery, and there was judgment for defendant, and Snider appealed to a jury. On the trial before the jury, Snider introduced a contract between him and Jones, dated September 28, 1893, by which, on Thursday of each week for 18 weeks, Jones promised to pay Snider \$1, for value received in the gold-headed cane, agreed value of \$20, together with interest, attorney's fees, etc. The contract contained a waiver of garnishment, etc.; that the title to the property should remain in Snider until the note was paid; that failure to pay any of the installments when due should cause maturity of all the payments, or in case of the removal of the maker or of the property from the county, or if the property should not be properly cared for, then Snider

might declare the note or contract at once due and payable, and proceed to collect the same. Snider testified that Jones signed this contract, and, upon the contract being signed, he delivered Jones the cane. He admitted that he had theretofore collected on the contract \$18.55, and testified that the amount due on the contract is the difference between the contract amount and said amount collected; and there was evidence that demand had been made, and there was a refusal to pay or surrender the property. It further appeared that the demand was made before the suit, and after the note or contract was past due. Defendant introduced copy of a suit brought by Snider against him prior to the bringing of the present suit, said suit being in an action of debt due by defendant on the same note or contract; also, garnishment proceedings under said suit against one Carraway, from which it appeared that Carraway admitted indebtedness of \$18, which Jones claimed as wages; that there was a judgment for plaintiff against the garnishee for \$18 and costs; that there was a judgment for plaintiff against defendant for \$17 principal, and \$2.10 costs; that, applying the \$18 paid by the garnishee to the judgment against the defendant, there was left a balance of \$1.45 due on said judgment, February 12, 1894. To the introduction of all these papers as to the former suit, Snider objected, upon the ground that they showed upon their face that they were evidence of a suit upon a debt for the contract; that the present suit is a bail trover, by reason of the retention of the title in the property; and that suit upon the contract, not involving the title of the property, would not be a bar to the suit for recovery of the property. This objection was overruled. According to the petition for certiorari, Snider then testified that the question of title to the cane was not in issue in the former suit, but it was a suit to recover the amount due to him by Jones on the contract, and not a suit to recover the property. Thereupon defendant moved to rule out the testimony of Snider, on the ground that he could not show by parol what was the real issue between the parties in the first suit, certified copy of which had been introduced by defendant. The magistrate ruled out this testimony of Snider, and as to this Snider alleges that he erred. According to the answer of the magistrate, Snider, being again put upon the stand, acknowledged that the suit and judgment were upon the same contract. During the trial, Snider insisted that under the case of *Bowen v. Frick*, 75 Ga. 786, the previous suit would be no bar to the trover suit. The magistrate charged the jury that said case had no relation to this case, and that the former suit would be a bar to the latter suit. The jury found for the defendant. The petition for certiorari alleged that the verdict was contrary to law, evidence, etc.; and that the magistrate erred in not excluding the evidence of the former suit, in ruling out said

testimony of Snider, and in said charge to the jury. The judge of the superior court held that the first suit on the promise to pay was not a bar to the action of trover for the property, and that the security by reservation of title could be enforced by the action of trover (defendant's remedy being to pay the balance of the debt, or stop the suit, or by some plea touching the merits), and remanded the case, with instructions that it be tried in accordance with this ruling. To this ruling, defendant excepted, and also alleged that the judge erred in not overruling the petition, and in not passing an order making the judgment of the court below final.

Glenn & Rountree, for plaintiff in error.  
Roeser & Carter, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 306)

**GEORGIA RAILROAD & BANKING CO.  
v. KEATING.**

(Supreme Court of Georgia. Aug. 18, 1896.)  
**ACTION FOR PERSONAL INJURIES—MEASURE OF  
DAMAGES—INSTRUCTIONS—VERDICT  
—EXCESSIVENESS.**

1. The action being for personal injuries actually received by the plaintiff, it is not cause for a new trial that the court gave in charge to the jury so much of section 3067 of the Code as is embraced in the following words: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened consciences of impartial jurors,"—it appearing that in other portions of the charge the judge properly instructed the jury in what particulars they should find only the actual damages sustained, and that he confined the application of the rule embraced in the above-quoted language to the damages resulting from pain and suffering, and the like.

2. There being sufficient evidence to warrant the verdict, this court will not set it aside after its approval by the trial judge; and, though for a very large sum, it is not so excessive as to authorize a suspicion of bias or prejudice on the part of the jury.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; Seaborn Reese, Judge.

Action by Edward Keating against the Georgia Railroad & Banking Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Edward Keating sued the railroad company for damages resulting to him by a fall from its train on which he was a passenger, whereby his left foot was thrown under the wheels of a car and cut off. He obtained a verdict for \$9,000, and defendant's motion for a new trial was overruled. The motion alleges that the verdict is contrary to law and evidence, that the amount is excessive, and that the court erred in refusing to grant a nonsuit, and further erred in

charging: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened consciences of impartial jurors." The plaintiff alleged that the company's servants were negligent in failing to provide any light at or near the station where he was leaving the train, and in suddenly starting the train with a jerk before he had reached the ground, without having given him sufficient time to leave the car. The testimony shows that the plaintiff, with his wife and two children, went upon an excursion train from Sharon to Atlanta, and returned on the same train, reaching Sharon about 9 o'clock at night. When the train stopped there, plaintiff directed his wife to take the younger child, and go out one end of the car with one Kendrick, who he expected would help them off, while plaintiff took the older child, a girl of eight years, and immediately went out the opposite end. This child was helped off by one Johnson, who was standing on the steps of the car, plaintiff being behind her. He started to the steps to get off, but just as he was in the act of stepping to the ground, holding to the banister with his left hand, the train moved and jerked him down, throwing his left foot upon the track rail, where it was run over by the car wheels before he could extricate it. In another part of his testimony plaintiff says: "My child was ahead of me. When she was taken off, I do not think the cars were in motion. I think they were started just as she was taken off. I got off after she got off. The cars moved when my little girl got off. They were in motion when I attempted to get off." It further appears that the train did not stop longer than half a minute, and, according to some testimony, not over 15 or 20 seconds; that several persons fell over each other in attempting to get off; and that plaintiff's wife was upon the platform of the car when the train started to move, and would have fallen, had she not been caught and held by a man on the ground. There was no light at or near the station. The conductor of the train was sitting down in the car where plaintiff was at the time the train stopped. Plaintiff was a farmer 40 years of age, with a wife and six or seven children, whom he supported by his labor on land which he rented. He made about \$500 a year. He had taken some whisky during the day preceding the injury, but was not affected thereby so as to be otherwise than in full possession of his faculties.

Jos. B. & Bryan Cumming and M. P. Reese, for plaintiff in error. Wm. M. Howard and H. M. Holden, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 316)

**McCONNELL v. KIMSEY.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**APPEAL—HARMLESS ERROR.**

If any error at all was committed at the trial, it was immaterial and harmless; and the verdict was not only in accord with the substantial justice of the case, but fully warranted by the evidence.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action between J. O. McConnell and A. L. Kimsey. From a judgment for the latter, the former brings error. Affirmed.

Jones & Bowden, for plaintiff in error. Geo. P. Erwin and J. B. Estes, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 317)

**EDWARDS v. RAMSAY.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**APPEAL—SUFFICIENCY OF EVIDENCE.**

In view of the evidence disclosed by the record, the verdict rendered in the justice's court was warranted, and the superior court did not err in refusing to sustain a certiorari brought to set the same aside.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action between D. W. Edwards and A. H. Ramsay. From a judgment for the latter, the former brings error. Affirmed.

Jones & Bowden, for plaintiff in error. John W. Owen, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 265)

**STANDARD CARBONATING & SUPPLY CO. v. CAPITAL CITY GUARDS.**

(Supreme Court of Georgia. July 20, 1896.)

**JUSTICE'S COURT—APPEAL BY PARTNERSHIP—CERTIORARI—AFFIDAVIT IN FORMA PAUPERIS—AMENDMENT—SUFFICIENCY.**

1. Where a suit was brought in a justice's court against a partnership, the names of the persons constituting its membership being set forth in the summons, an appeal in forma pauperis, entered by one of these persons for and in the name of the partnership, was amendable so as to make it recite that the person entering it was in fact a member of the partnership; and such amendment should have been allowed, although in offering the same it was not expressly stated that material words had, by accident or mistake, been omitted from the appeal affidavit.

2. An affidavit made by a member of a partnership for the purpose of obtaining a certiorari, in forma pauperis, averring that the affiant is such a member; that he is advised and believes that the defendant partnership has good cause for certiorari; and "that, owing to their poverty, they are unable to pay the costs and give the security required by law."—is sufficient as to the advice and belief under which the defendant acted, and as to its poverty. A member

of a partnership may in such case swear for it as to these matters.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Standard Carbonating & Supply Company against A. A. Craig and others, partners as the Capital City Guards, in justice's court. There was a judgment for plaintiff, and defendants entered an appeal to a jury, which was dismissed, and they brought certiorari to the superior court. From a judgment sustaining the same, plaintiff brings error. Affirmed.

The following is the official report:

A petition for certiorari was brought by "the Capital City Guards, a firm composed of A. A. Craig and others." The affidavits to the same were made by A. A. Craig, viz.: "I, A. A. Craig, a member of the Capital City Guard, and secretary and treasurer of same, do solemnly swear that the foregoing petition for certiorari is not filed in this case for the purpose of delay, but I verily believe the defendants have good cause for certiorari," etc. The pauper affidavit was: "Personally appeared before the undersigned, A. A. Craig, a member of the firm of the Capital City Guard, and secretary and treasurer of the same, who upon oath says that the foregoing petition for certiorari is not filed in this case for the purpose of delay only; that he is advised and believes that said Capital City Guard has good cause for certioraring the proceedings to the superior court; and that, owing to their poverty, they are unable to pay the costs and give the security required by law," etc. A motion was made to dismiss the certiorari, on the grounds that the pauper's affidavit is insufficient, in that (1) it does not state that the Capital City Guards are advised and believe that they have good cause for certioraring the proceedings to the superior court; and (2) it is made by only one member of the firm, instead of each and all the constituent members of the firm composing the Capital City Guards; also, upon the ground that the other affidavit does not state that the Capital City Guards verily believe that they have good cause for certiorari. The motion was overruled. The suit was brought in a justice's court against the Capital City Guards, a partnership composed of A. A. Craig and 66 others, whose names are stated in a list attached to the summons. Judgment for the plaintiff was rendered, and an appeal was entered in the following words [after stating the case]: "The defendant, being dissatisfied with judgment rendered against them therein, \* \* \* demands an appeal of said case to a jury in said court. Further, affiant, who is secretary and treasurer of said Capital City Guards, says on oath that defendant is advised and believes that they have good cause for an appeal of said case; that this appeal is not made for delay only; and that said defendants are unable, from their poverty, to pay the cost and give the

security required by law in cases of appeal. [Signed] A. A. Craig, Sec. & Treas. Cap. City Guard." On motion, the justice dismissed the appeal, upon the grounds that A. A. Craig, as secretary and treasurer of a firm, could not make an affidavit for the firm; that he did not set up that he was a member of the firm, nor did he make it to appear who the defendants in the judgment were, or that he had authority to sign for any of them. The justice further held that the paper was totally defective as an affidavit, and could not be cured by amending. The superior court sustained the certiorari, and remanded the case, with direction to allow the affidavit to be amended by supplying words showing that the affiant was a partner, and acting as such. To each of the rulings of the superior court the plaintiff excepted.

J. C. Jenkins, for plaintiff in error. J. M. Robinson, for defendant in error.

PER OURIAM. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 675)

# COMER et al. v. FOLEY.

(Supreme Court of Georgia. Aug. 24, 1896.)

CARRIERS—CONNECTING LINES—ISSUANCE OF TICKETS—PURCHASER FROM TICKET BROKER—RIGHTS—EJECTION FROM TRAIN—DAMAGES—VERDICT—EXCESSIVENESS.

1. Although a railroad company in Illinois may be the agent of the receiver of a railroad in Georgia to sell in Chicago tickets from that city to Jacksonville, Fla., and return, with coupons thereon for passage over the railroad operated by the receiver, each of such tickets having upon it a special contract, to be signed by the original purchaser, and stipulating that the ticket should be used by him only, there is no presumption that the Illinois company was authorized by the receiver, directly or indirectly, to place in the hands of a ticket broker, or "scalper," for sale, in Atlanta, Ga., tickets of this kind, stamped at the Chicago office of the Illinois company, but with the contract thereon unsigned by any purchaser, and with the coupons for the railroads between Chicago and Atlanta detached. Atkinson, J., dissenting.

2. Where a ticket broker in Atlanta sold one of these tickets, it being at the time in the condition just described, and also bearing the signature of an agent of the Illinois company, preceded by the word "witness," this signature being placed upon the ticket exactly as it would have been had this agent, as a witness, actually attested the signature of a purchaser of the ticket in Chicago, the real purchaser from the broker in Atlanta had no right, under these circumstances, to assume that the sale to him by the broker was regular and authorized, or to occupy the position of a bona fide first and original purchaser. Atkinson, J., dissenting.

3. In a case involving the validity, upon the railroad operated by the receiver, of such a ticket, sold and purchased as above indicated, it was incumbent on the plaintiff, who asserted that the ticket was good over that railroad, to show affirmatively that he was entitled to use it as an original purchaser, by proving that the sale by the broker was authorized, or at least connived at, by the receiver. Atkinson, J., dissenting.

4. The plaintiff was not entitled to recover; and, even if he had been, the amount of the

verdict was grossly excessive, and ought, for this reason, if for no other, to have been promptly set aside by the trial judge.

5. I concur in the judgment of reversal for one of the reasons expressed in the last preceding note, viz. that the verdict was excessive, and for that reason only. I dissent from the views of the majority as stated in the first three notes; the true law of the case being, in my opinion, as follows. Per Atkinson, J.

6. Where one of a number of connecting lines of railway issues passenger tickets of a particular class, purporting to entitle purchasers thereof to transportation as passengers over each of such lines, the customary acceptance of such tickets by another of such lines for passage upon its trains will, in the absence of evidence to the contrary, authorize the presumption that the line issuing the tickets had a general authority as agent of the line so accepting the same to issue the tickets of that class. Per Atkinson, J., dissenting.

7. If the railway company assuming to exercise such right to issue tickets be under a duty to its connecting lines to issue tickets of a particular class, and drawn according to a particular formula only, but in dealing with such tickets neglects to conform in all respects to the requirements of the formula prescribing how and in what manner they shall be emitted, a failure to perform this latter duty, resulting in damage to one of the connecting lines, makes a question between such connecting line and the line issuing the ticket, and persons purchasing such tickets from one having the apparent right to sell will be protected. Per Atkinson, J., dissenting.

8. Where, in such a case, a number of such tickets are issued, and according to the printed contract appearing thereon it is required that an intending purchaser shall sign the same in the presence of the agent selling, who shall subscribe his name as a witness to such signature, and it is further provided that such tickets shall be good in the hands of the first purchaser only, if the company by which such tickets are issued permits its usual and selling agent to sign in blank a number of such tickets, and emit them without requiring the purchaser to sign the special contract thereon as required by the prescribed formula, and in this condition sells them, either singly or in quantities, to third persons, who purchase for the purpose of selling again to any person who may chance to come along, it will be presumed, in favor of an innocent purchaser of one of such tickets, without further notice as to any limitation upon the authority of the company issuing the same than that conveyed by the tickets themselves, that such action was duly authorized, and that the companies upon whose account they were issued intended to waive the signing of the name of the purchaser for passage in the actual presence of the agent whose name is subscribed as a witness for the company, and as well the condition restraining their negotiability in the hands of the persons to whom they have been sold for the purposes aforesaid. Per Atkinson, J., dissenting.

9. The mere fact that the tickets so issued and emitted purport to be through tickets, with separate coupons for each connecting line, does not render their actual sale to an intending passenger at the initial point indispensable to their validity, and such a ticket, emitted under the circumstances indicated, whether purchased at the initial point or elsewhere by an intending passenger, entitles him to transportation upon any one or more of the intermediate connecting lines, if offered in connection with the appropriate coupon. Per Atkinson, J., dissenting.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by James Foley against H. M. Com-

er and others, receivers of the Central Railroad of Georgia, to recover damages for ejection from a train. From a judgment for plaintiff, defendants brings error. Reversed.

Lawton & Cunningham, for plaintiffs in error. Barrow & Osborne, for defendant in error.

SIMMONS, C. J. It appears from the record that in 1894 there were in use tickets issued by the Chicago & Eastern Illinois Railroad Company, in the form of a "round-trip ticket," for passage over that road and connecting railroads from Chicago, Ill., to Jacksonville, Fla., and return, there being for each railroad a separate coupon upon which appeared the names of the places between which it was good for passage, together with the names of the other railroads, and the statement that it was issued by the Chicago & Eastern Illinois Railroad Company. Among these coupons was one for passage over the Central Railroad of Georgia from Atlanta to Savannah. The ticket stated that it was "good for one first-class passage to Jacksonville, Florida, and return, when officially stamped, subject to the following conditions: \* \* \* It is not transferable. \* \* \* I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which the ticket reads. \* \* \* The purchaser's signature must be in manuscript, and in ink. \* \* \* Unless all the conditions on this ticket are fully complied with, it shall be void. In consideration of the reduced rate at which this ticket is sold, I agree to the above contract." A number of these tickets, purporting to be signed by the purchasers in the presence of C. C. Hill, agent of the Chicago & Eastern Illinois Railroad Company, at Chicago, were presented for passage on the Central Railroad of Georgia, and accepted. About April 1, 1894, about which time several of these tickets were presented and accepted on the Central Railroad, a ticket of the same class, but not signed by any person as purchaser, though, under the blank space intended for the signature of the purchaser, the name of the above-mentioned agent at Chicago purported to be signed as "witness," was presented on a train of the Central Railroad for passage from Atlanta to Savannah, but the holder was refused passage thereon, and was required by the conductor to pay his fare. The holder, who had bought the ticket from a "ticket scalper" at Atlanta, returned it to the "scalper," and the latter, on April 4, 1894, sold it to James Foley. Foley signed the contract upon the ticket as "purchaser," and presented it to the conductor on a train of the Central Railroad for passage from Atlanta to Savannah. The conductor, after tearing off the coupon for passage between these points, inquired of him where he had purchased the ticket. Foley replied that the conductor

could see that on the face of the ticket. The conductor told him it was a bad ticket, and he would have to pay his fare, or be put off. He declined to pay his fare, saying that he was unable to do so, and the conductor required him to leave the train at the next station. Upon leaving the train he found at the station a train which was on its way to Atlanta, and he returned on that train. Subsequently he sued the receivers of the Central Railroad for damages, alleging that he was a bona fide purchaser of the ticket, and had a right to ride thereon. At the trial the facts above stated appeared in evidence. It also appeared that when the plaintiff bought the ticket the coupons for passage between Chicago and Atlanta had been torn off, that it purported to have been sold on March 28, 1894,—several days before the date on which he purchased it,—and that he had examined and read the ticket. He testified, however, that he did not know that any other person had used it before he bought it, and that the "scalper" told him that this and similar tickets which he had for sale were issued in blank to him by the Chicago & Eastern Illinois Railroad Company. The "scalper" was introduced by the plaintiff as a witness, and testified that he did not receive the ticket directly from the Chicago & Eastern Illinois Railroad Company, but that his agent in Chicago bought it from the company, and there sold it to a passenger, with a rebate on him (the witness), and that the passenger turned it over to him in Atlanta in the condition it was in when sold to the plaintiff. The defendants introduced no evidence. There was a verdict for the plaintiff for \$1,800, and the defendants made a motion for a new trial, which was overruled, and they excepted.

Although the evidence may have been sufficient to establish the agency of the Chicago & Eastern Illinois Railroad Company to issue in behalf of the defendant tickets of this kind to persons purchasing and signing the same at Chicago (see *Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836), the evidence does not warrant the inference that the company at Chicago was authorized by the defendant, directly or indirectly, to dispense with such signing, and to issue such tickets with the understanding that they were to be transferable. So far as appears, all tickets of this kind which were accepted on the Central Railroad purported to have been signed by the original purchaser in the presence of the agent at Chicago, and the defendants and the conductors who accepted the same did not know that any of them were signed elsewhere, or that the persons using the same were not the original purchasers. Moreover, it does not appear that the company at Chicago, or its agent who sold the ticket in question, knew that the purchaser was a dealer in tickets, or that it was bought for the purpose of being sold again, or used by more than one person. It appears that other tickets in the same condition came

into the hands of the "scalper," but it does not appear that they were bought from the company at one time, nor under what circumstances they were bought. Assuming, however, that the company at Chicago sold with full knowledge of the facts, and consented to the use of the ticket by others than the original purchaser, and that the signing at Chicago should be dispensed with, were the receivers of the Central Railroad, in the absence of any proof that this was either directly or indirectly authorized by them, bound by such knowledge and waiver? So far as the evidence discloses, the authority of the company at Chicago was at most that of a special agent, and was confined to the issuing of a particular form of ticket, to be good only under the conditions, stated therein; and in special agencies the rule is that, if the agent exceeds the special and limited authority conferred upon him, the principal is not bound by his acts, but they are mere nullities, so far as he is concerned, unless he has held the agent out as possessing a more enlarged authority. Story, Ag. § 126; Code, § 2196. Moreover, in order to hold the defendants bound, the plaintiff must have acted in good faith himself, and must have relied upon the apparent authority of the agent. Here was a ticket which expressly stated that it was "not transferable," and which purported to have been sold at Chicago on the date stamped thereon, and which was offered for sale by a person who was not an agent of the railroad company, but a "scalper,"—a dealer in tickets originally purchased by others; and when the plaintiff signed the conditions of the ticket, knowing, as he did, that the signer was described therein as the original purchaser, and that it purported to have been signed at Chicago, in the presence of the agent whose name appeared thereon, he did so evidently under the impression that, in order to use the ticket on the railroad operated by the defendants, it was necessary that it should appear that he was the original purchaser, and had signed it in Chicago in the presence of the agent. Why should he do this, and why should he attempt to mislead the conductor by telling him, when asked where he had purchased the ticket, that he (the conductor) would see by looking at it, unless he supposed that the conditions stated therein would be insisted upon, and that he would be refused passage on it if the facts were not as they appeared to be from the ticket? It seems clear to us, under these circumstances, that the plaintiff was not entitled to be treated as a purchaser in good faith and without notice, but, on the contrary, that the facts were such as to put him on notice that the sale was irregular, and unauthorized by the defendant. Upon the whole, therefore, we think the plaintiff failed to make out his case. See, on this subject, the following authorities cited by counsel: *Drummond v. South-*

*ern Pac. Co. (Utah)* 25 Pac. 733; *Post v. Railroad Co. (Neb.)* 15 N. W. 225; *Railroad Co. v. Ford*, 53 Tex. 364; *Frank v. Ingalls*, 41 Ohio St. 560.

The retention of the coupon by the conductor, if it afforded any ground for a recovery at all, did not render the defendants liable for the refusal to allow the plaintiff to ride on it,—the only ground upon which damages are sued for in this action.

Moreover, if the plaintiff had been entitled to a verdict in his favor, he was not entitled to one for \$1,300. This was grossly excessive. There were no aggravating circumstances. His person was not touched, and there was no insulting language or other improper demonstration on the part of the conductor or any other employé of the defendants. The conductor simply informed him that the ticket was bad, and that he would have to pay his fare, or be put off, and, upon his declining to pay, insisted that he should get off at the next station, which he did. As already stated, upon his leaving the train he met another on its way to Atlanta, and returned on it; and on the next night he resumed his journey to Savannah. There was no evidence as to any pecuniary loss outside of the amount paid for his fare. It is manifest, therefore, that the amount of the recovery is out of all reasonable proportion to the extent of the injury. See *Railroad v. Jett*, 95 Ga. 237, 22 S. E. 251; *Railroad v. Eskew*, 86 Ga. 648, 12 S. E. 1061; *Railroad Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352.

Judgment reversed.

(99 Ga. 324)

WRIGHT et al. v. WRIGHT et al.

(Supreme Court of Georgia. Aug. 24, 1896.)

DEEDS—CONSTRUCTION—DEVISE UNDER WILL.

A testator devised to his wife, during her widowhood, with remainder to their four children, a tract of land. One of the latter died after the testator, leaving his widowed mother and the other three children as his only heirs at law. Two of these three, while the widow was in life and in possession of the land, signed exactly similar instruments, each of which purported to have been executed upon a valuable consideration, and the material parts of which were as follows: "I \* \* \* have this day relinquished all my right, interest, and title vested in me by virtue of a right vested in me by my father, N. K. Wright, deceased, to Robert J. Wright, to a tract of land whereon S. A. Wright [the widow] now lives, known as the 'N. K. Wright, Dec'd, Land,' all my interest and title that I have or may have, into the hands of R. J. Wright." After the death of the widow the grantee sought to recover from each of the grantors an undivided one-third of the land described. *Held*, that while these instruments were, in effect, deeds, and operated to convey to the grantee therein an undivided interest in the land, this interest could not amount to an undivided one-third of the entire tract, even if it was the intention of each grantor to pass all his interest in the land to the grantee. Each grantor took by the devise, under the will, an undivided one-fourth of the land, and by inheritance from the deceased co-devisee an undivided one-sixteenth thereof, with the right to possess

mon upon the death or marriage of the testator's widow; and the sum of these fractions, five-sixteenths (which is less than one-third), represented the whole of each grantor's remainder interest in the land at the time the above-mentioned instruments were executed. The interests which each subsequently inherited from their mother upon her decease did not pass under these instruments.

(Syllabus by the Court.)

Error from superior court, Hall county; J. J. Kimsey, Judge.

Action by N. K. Wright and others against R. J. Wright and others. From the judgment, N. K. Wright and others bring error. Reversed.

H. H. Dean, for plaintiffs in error. Perry & Craig, F. M. Johnson, and J. B. Estes, for defendants in error.

PER CURIAM. Judgment reversed.

(99 Ga. 325)

#### AYERS v. AYERS.

(Supreme Court of Georgia. Aug. 24, 1896.)

##### DIVORCE—ALIMONY.

This being an application for temporary alimony, founded on a libel for divorce brought by the husband, and the evidence showing that he was a chronic invalid, with a diseased spine, incapable of performing physical labor, without means and out of employment, save only as to a situation in an hotel at nominal wages, which he held more as a matter of charity on the part of the proprietor than because of any real ability to render services, it was an abuse of discretion to require him to pay \$105 in cash, and \$30 per month additional until the termination of the divorce case.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Libel for divorce by W. J. Ayers against Myrtle D. Ayers. From an order granting temporary alimony, plaintiff brings error. Reversed.

The following is the official report:

W. J. Ayers brought a libel for divorce to the March term, 1896, of the superior court; and on March 5th Mrs. Ayers brought her petition for temporary alimony and expenses of litigation, for herself and two children, girls of ten and six years. The alleged ground for divorce was cruel treatment. On the hearing of the petition for alimony the evidence for the petitioner was her own affidavit, and an affidavit by D. A. York, M. D. He swears that he had treated her since February 15, 1896, and within that time she has been dangerously ill; that she is under his treatment at present (April 8, 1896), and in his opinion it will take from 6 to 12 months persistent treatment to build her general health up, which is in a very bad state, and, to do herself justice, she cannot perform her domestic duties; and that his professional bill up to present is \$50, and it will take \$10 a month, if not more, for her future attention. She swears: She is renting a house at Cor-

nella, boarding and clothing herself and two children. She is sending them to school, and paying for their tuition, books, etc. She has been sick for the last two months or more, a part of the time seriously, and is now very unwell,—not able to do her housework, if she could help it. She has been under the treatment of Dr. York and Dr. Burns, for which she is indebted to Dr. Burns \$5, and to Dr. York \$50, to date. Her husband, W. J. Ayers, is a railroad conductor on passenger trains. He usually earns and gets a salary of \$95 to \$100 a month. She is informed that he is keeping, or is general manager of, the Victoria Hotel, in Athens, Ga.,—one of the best hotels there. He owns, or did own very recently, a house and lot in Atlanta, the purchase price of which was \$1,800. She has no property, or other means of support except her work. She has been put to the expense of employing lawyers to represent her in the divorce suit, and in this claim for alimony. Her husband has not contributed anything to her and her children's support since July 20, 1895, except \$10 he sent the children about a month ago. She has been working at millinery business, teaching school, keeping boarders, and sewing for a living for herself and children, working sometimes very late at night, sometimes 1 and 2 o'clock, to make a support for herself and children.

Defendant swore: Petitioner treated him so he could not longer abide with her under the same roof, and was forced to live separate and apart from her (she having driven him away), which he has done since August 30, 1894, though he continued to support her and the children until about July 18, 1895, since which time he has still supported the children as far as he was able. He had always treated petitioner kindly, and had supplied her with a good home, and an abundance to live on and wear, and with proper medical attention. He is, and has all the time since his marriage been, a poor man, without property, or other means of support except his daily labor. Of his wages, which have been very good till he was disabled, petitioner put the whole on herself and children, except what was absolutely necessary for his needs, and to insure his life for her protection. Since he was so severely injured in November, 1894, in consequence of which he had to abandon his job, he has not been physically able to do much, and has received very little for what he has done. While he was able to earn and did receive good wages, he was liberal and generous to petitioner and the children, especially to petitioner. In March, 1890, he had his life insured in the Royal Arcanum for \$3,000, payable to her, which cost \$20 to \$25 per year to keep up the dues. In the same year he had his life insured in the Knights of Pythias, which costs from \$6 to \$10 per annum. It has funeral benefit, and the order has widows' and orphans' home for support of widows. This also is payable to petitioner. In February, 1892, he took policy in O. R. C. for \$3,-

000, payable to petitioner, which costs \$54 to \$60 per annum. He has kept all the dues paid on these policies, including some extras not mentioned above, though it has been a very hard struggle with him to do so for the last two years. He has been hardly able to labor at all, and his wages have not exceeded \$15 per month. His expenses have been very great. He had to be under the constant care and attention of a physician, and he was forced to borrow money to pay the life insurance premiums and current expenses. He has no property, and is not able to contribute to the support of petitioner, in his present condition. As long as he was able to do so, or could borrow money with which to do so, he contributed liberally to her support; but he is not now able to do so, from his wages, and he is in debt, and cannot borrow more. Since his injury he has not been able to work but six or eight months, and at present he is not able to work at all. His injuries produced a spinal affection, which, as far as he can now judge, will be permanent. He has contributed but a small amount to the support of the children since the libel for divorce was filed, for the reason that he was not able to contribute more. He has striven hard to recover his health. He has gone to considerable expense to do so, under the advice of the most skillful physicians, but it seems he will never be well again. Petitioner's treatment of him was such that a self-respecting man could no longer remain with her, as set out in the petition for divorce. She is a healthy, stout, able-bodied woman. She is well educated, and can contribute to her own support. She owns a house and lot in Augusta worth \$7 or \$10 per month rent, which, with what work she may do, will amply support her. He is not able to support her, and, under the circumstances, should not be required to do so if he were able; but he is willing to contribute whatever he may be able in the future towards the support of his children, provided he is permitted to have the care, custody, and control of them, which he prays may be granted to him. Petitioner has refused to let him see or have anything to do with them; and he should not be required to pay her to support them, when he is willing to take them and care for them as he may be able. He has nothing of this world's goods. He has poor health, and consequently poor wages; but these children are entitled to his protecting care and fatherly love, and, in the absence of kind treatment promised him in sickness and in health at the marriage altar by their mother, their kindly ministrations to him would in a measure soothe his wounds, smooth his pillow, and help to strengthen him in his purpose to battle with disease, and make an honorable living for himself and them. He ought not to pay petitioner's attorney's fees, as she has caused the whole trouble, owns property, and is able to pay said fees. Defendant introduced the affidavit of Dr. C. B.

Petrie. He is a physician of seven years' practice, and has been treating defendant since November 3, 1894, which medical attention has been absolutely necessary for the preservation of his life, and for his restoration to health. He sustained a severe injury by a jump or fall, or otherwise. Deponent examined him immediately after he received his hurt, and found that he was suffering from spinal injury, which has developed a diseased spine; and he is now suffering a partial paralysis, as the result of the injury, which will probably be permanent. On account of the injury he was unable to work for five or six weeks, and on account of his health and inability to labor he was forced to abandon his job, and is now totally incapacitated for any manual labor nearly all the time, and, when able to labor at all, it is only at light work and at short intervals; and any labor by him is injurious, for the reason that the injury to his spine is of such a nature as to endanger his life. Deponent's services for medical attention rendered to him are reasonably worth \$200. His constant attendance upon defendant in his present condition is reasonably worth from \$10 to \$20 per month; and defendant's financial condition, caused by his physical inability to earn sufficient wages, has been such that he has been wholly unable to pay him anything, and in fact can hardly live himself, as his necessary expenses for clothing, medicine, etc., more than equal his small salary, and apparently will do so for a long time, if not during his whole life. Also, affidavit of W. G. McKenzie: Defendant is now employed by him as clerk in Victoria Hotel at Athens, at a salary of \$15 per month, which is full value for his services in his present physical condition. Deponent pays said sum, not on account of the services defendant is able to render, but on account of his extensive acquaintance among traveling men and the public generally. He is in wretched health. He is physically unable to look after the affairs of the house. A considerable proportion of the time he is confined to his room and bed. He seems to suffer all the time, and frequently his sufferings appear to be intense. From deponent's knowledge, extending from the 1st of November, 1895, to April, 1896, defendant would be unable to earn a living, unless in some position similar to the one he now occupies. The court ordered that defendant be required to pay to petitioner \$55 medical expenses incurred by her to date; that he pay to her attorneys \$50, the same being their fees as her counsel in this case for temporary alimony to date; that he pay to her, as temporary alimony for herself and two children, \$30 per month, beginning with April, 1896, until final determination of the case.

W. I. Pike, for plaintiff in error. J. J. Bowden and J. C. Edwards, for defendant in error.

PER CURIAM. Judgment reversed.

(97 Ga. 497)

**DARDEN v. STATE.**

(Supreme Court of Georgia. Feb. 7, 1896.)

**RAPE—SUFFICIENCY OF EVIDENCE.**

Following the decision of this court in *Jackson v. State*, 18 S. E. 132, 91 Ga. 322, the evidence was sufficient to authorize the jury to convict the accused of an assault with intent to commit rape; and the trial judge did not abuse his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Randolph county; J. M. Griggs, Judge.

Jim Darden was convicted of assault with intent to rape, and brings error. Affirmed.

The following is the official report:

The plaintiff in error was convicted of assault with intent to rape. He moved on the general grounds for a new trial, and his motion was overruled. He is a negro, and the woman on whom the assault was alleged to have been committed was a white girl, of 20 years. According to her testimony, she was sleeping in her bedroom, and was awakened about midnight by the cover moving on her bed. She did not rise immediately, and the cover moved twice more; whereupon she became thoroughly awake, and conscious that something was wrong, and screamed for her father. As she did so, the defendant jumped out of the window, and ran away. It was dark. No lamp was burning. She testified positively that it was defendant. There was other testimony that she had spoken doubtfully on this point, and as if she did not know who the negro was. She knew defendant well. He had worked on her father's place a good deal. There was testimony, of a somewhat uncertain character, as to tracks leading from the premises, to which defendant's feet seemed to correspond. He was arrested on the same night, soon after the assault, in bed at his own house, with his head covered up, either asleep or pretending so to be.

Arthur Hood, for plaintiff in error. J. R. Irwin, Sol. Gen., and W. M. Harper, for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 792)

**LOWE v. STATE.**

(Supreme Court of Georgia. Feb. 29, 1896.)

**RAPE—EVIDENCE OF COMPLAINT—IMPEACHMENT OF WITNESS—CONTRADICTIONARY STATEMENTS.**

1. While it is competent for the state, upon a trial for rape, to prove, by way of corroborating the testimony of the person upon whom the crime is alleged to have been committed, that she had made complaint thereof at the first opportunity, the particulars of such complaint cannot be shown.

2. In this case it was error to admit, at the instance of the state, for any purpose, declarations of the person alleged to have been assaulted, made a considerable period after the time when the offense is charged to have been committed; and it was also error to permit a wit-

ness to testify that the person alleged to have been assaulted had shown to the witness "the clothes she had on at the time," such testimony being really a statement of a substantive fact resting upon hearsay alone.

3. Where it was sought to impeach a witness by proving contradictory statements made under oath at a previous trial of the same case, it was competent to sustain the witness by showing that her testimony at the first trial was in other respects entirely consistent with that given at the second. In other words, it was competent, under the circumstances, to bring out all of her testimony at the first trial, in order to show that, taken as a whole, it was not necessarily inconsistent with what she had sworn upon the trial then in progress.

4. Other than as above indicated, there was no material error committed at the trial, but, inasmuch as the evidence illegally admitted may have operated injuriously to the accused, a new trial is ordered.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

James Lowe was convicted of a crime, and brings error. Reversed.

E. T. Brown and T. F. Green, for plaintiff in error. R. B. Russell, Sol. Gen., for the State.

LUMPKIN, J. 1. It was held by this court in the case of *Stephen v. State*, 11 Ga. 226, that: "In a prosecution for a rape, the fact of the woman's having made complaint soon after the assault took place is evidence. The particulars of her complaint, however, cannot be gone into; and she will not be allowed to name the prisoner as the person who committed the injury, unless by way of information, to lead to his arrest." So far as we are aware, no material departure from this rule has ever been made by this court.

2. The alleged rape was committed in Clarke county, and the prosecutrix promptly made complaint in Athens of the outrage which she asserted had been perpetrated upon her. Some days afterwards she came to the city of Atlanta, and there gave her mother a narrative of what she claimed had occurred, in the course of which she exhibited certain garments, which she represented were on her person at the time of the alleged rape. These declarations were clearly inadmissible for any purpose. They could add nothing to the corroborative value of the complaint originally made, and were merely hearsay. Where it appears that sexual intercourse has taken place between a man and woman, her subsequent silence affords presumptive evidence of consent on her part, and negatives the idea that the intercourse was accomplished by force. This applies when the circumstances are such as to require her to speak out. In the present case the prosecutrix had already complained of her alleged wrong, in Athens, the proper place, and at the proper time. While it was perfectly natural that she should inform her mother of the injuries she claimed to have sustained, her failure to do so could not, under the circumstances, have been counted

against her, or in any way alter the fact that she had previously, at the proper time and place, made complaint. By a parity of reasoning, what she said to her mother was utterly incompetent as corroborative evidence. The mother, when offered as a witness, was further allowed to testify that her daughter showed her "the clothes she had on at the time" (meaning the time when the rape is said to have taken place). This was really permitting the mother to swear that the clothes in question were in fact worn by the prosecutrix at the time of her encounter with the accused. This certainly was not proper, because, as the mother was not present on that occasion, her only knowledge as to what clothes her daughter wore at the time must have been derived alone from the latter's statements.

3. The rule is well settled that, where an effort is made to impeach a witness by proving contradictory statements made in a conversation which occurred previous to the trial, it is competent to sustain the witness by bringing out the whole of that conversation, in order that the true drift and meaning of what was then said by him may be correctly understood. The same rule is applicable where it is sought to impeach a witness by proving contradictory statements made by him when testifying under oath. In such case it is competent to bring out all of the testimony given by him at a former trial upon the point in question, in order to show that, taken as a whole, it is not necessarily inconsistent with what the witness has sworn upon the trial in progress. So far as this rule is concerned, in principle it makes not a particle of difference whether the alleged contradictory statements previously made were under oath or otherwise.

4. We have not specially noticed several of the grounds of the motion for a new trial. Except as above indicated, no material error was committed by the trial judge. As to the merits of the case, we express no opinion; but, inasmuch as the evidence illegally admitted may have operated injuriously to the accused, a new trial is ordered. Judgment reversed.

(96 Ga. 688)

#### PEEPLS et al. v. BYRD.

(Supreme Court of Georgia. April 13, 1896.)

SUPREME COURT REPORTS—PUBLICATION—AWARD OF CONTRACT—LOWEST BIDDER.

1. The law requires the reporter of the supreme court to advertise for bids for the printing and binding of the Supreme Court Reports, and gives him the power, with the consent and approval of the governor, to award the contract for the publication of these Reports. In making such award, the governor and the reporter are invested with a very broad discretion. They are not "limited to the lowest bidder, but may take into consideration the responsibility of such bidder, and his capacity and ability to perform such contract, in all cases making such award as will promote the best interests of the state, and secure the cheapest and most prompt and efficient performance of said contract."

They may reject any and all bids, especially where the advertisement for the same distinctly reserves the right to do so.

2. Such contract may, within reasonable limits, be awarded for the publication of more than one volume; but the number of volumes to be embraced in the contract should be specified in the advertisement calling for bids.

3. Where bids were advertised for pursuant to law, several were made, and all rejected, and the reporter, with the approval and consent of the governor, thereupon awarded the contract to a competent and qualified contractor, who made no bid at all, but at the price named in the lowest of the bids submitted, this was a substantial compliance with the requirements of the law; and the lowest bidder, whose bid had been rejected, did not, because of a supposed right to have the contract awarded to him, have any legal cause of complaint as to the action taken in the premises by the governor and the reporter.

4. No citizen or taxpayer, as such, has the right to institute in his own name an equitable petition against the reporter and the person with whom he, under the governor's approval, has made a contract to publish the Supreme Court Reports, for the purpose of testing the legality of that contract, or of interfering with the carrying out of the same, because the state, being a party to the contract, would be a necessary party to the case, and, as it cannot be subjected to an action of any kind without its own express consent, such a petition cannot be maintained. Even if the state was not an essential party, or if it could be made a party, a proceeding of the nature indicated would not lie at the instance of a taxpayer who was in no wise injured as such. If, in any given instance, the public interest should require the annulling or cancellation of such a contract, for illegality or any other sufficient cause, the proper proceeding for this purpose can and ought to be instituted by the attorney general.

(Syllabus by the Court.)

Error from superior court, Fulton county; George F. Gober, Judge.

Action by C. P. Byrd against Henry O. Peebles and others. From an order granting an injunction, defendants bring error. Reversed.

Harrison & Peebles, for plaintiffs in error. Anderson, Felder & Davis, for defendant in error.

LUMPKIN, J. The reporter of this court published a notice that bids would be received by him up to the 25th of November, 1895, for the printing, binding, and electrotyping of the Reports of the Supreme Court of Georgia, reserving the right to reject any and all bids, and also the right to contract for one or more volumes. Several bids were submitted, the lowest of which was made by C. P. Byrd. Subsequently, all the bids were rejected, and the contract for publishing five volumes of the Reports, from 96 to 100, inclusive, was on December 31, 1895, awarded by the reporter, with the approval and consent of the governor, to the Franklin Printing & Publishing Company, which had made no bid at all, but at the price named in Byrd's bid. The latter sought, by mandamus, to compel the awarding of the contract to himself, and also to enjoin the reporter and the Franklin Company from carrying out the contract which had been awarded to it; prayers for both of the above-

mentioned remedies being embraced in the same petition. At the hearing of the same, the trial judge refused the mandamus, but granted an order enjoining "the parties to the contract of December 31st, 1895, \* \* \* from the execution of said contract, as prayed." This order was subsequently amended, by providing that it should have no application to the ninety-sixth volume of the Reports. The reporter and the Franklin Company excepted to the granting of the injunction, and brought the case to this court for review. It is not now necessary to decide whether or not the two remedies above mentioned could be properly applied for in the same petition. We shall simply deal with the case as presented without determining this question.

1. By the act of August 23, 1879, the office of public printer was abolished, and it was declared that, after the expiration of the then-existing term of the incumbent of that office, the public printing of the state should be let to the lowest bidder or bidders; the secretary of state, the comptroller general, and the treasurer, as commissioners, to advertise for sealed proposals to do the public printing. Acts 1878-79, p. 37; Code, § 1040a et seq. On October 20th of the same year, the general assembly passed an act to regulate the publication and sale of the Supreme Court Reports, etc.; and it provided that the printing and binding of these Reports should be done upon the terms and in the manner that other state printing was done. Acts 1878-79, p. 158; Code, § 228c. Then came the act of September 26, 1883, "to regulate the publication of the Supreme Court Reports, and for other purposes," the second section of which provides "that the reporter of the supreme court, with the consent and approval of the governor, shall have power to award the contract for the publication of the Supreme Court Reports in the same general manner as the contract for other public printing is now awarded; but, in making such award, the said governor and the reporter shall not be limited to the lowest bidder, but may take into consideration the responsibility of such bidder, and his capacity and ability to perform such contract, in all cases making such award as will promote the best interests of the state, and secure the cheapest and most prompt and efficient performance of said contract." Acts 1882-83, p. 77. In view of the above-recited legislation, we have no difficulty in reaching the conclusion that it is the duty of the supreme court reporter to advertise for bids for the printing and binding of the Supreme Court Reports. As will have been seen, the act last cited provides that the contract shall be awarded "in the same general manner as the contract for other public printing," and the existing law relating to "other public printing" manifestly required that bids for doing the work should be called for by public advertisement. It will be observed, however, that the second section of

the act of 1883 distinctly declares that the governor and the reporter shall not be limited to the lowest bidder, and confers upon them a very broad discretion in this regard, the scope and extent of which are sufficiently apparent from the language of the statute. Undoubtedly, then, it is their right, under the law, to reject any and all bids. The advertisement published in the present instance distinctly reserved this right, and we are therefore decidedly of the opinion that their authority to exercise it was beyond question.

2. We see no good reason why the reporter, with the consent and approval of the governor, may not, within reasonable and proper limits, award a contract for the publication of more than one volume of the Reports. It is not to be supposed that these officials will abuse the discretion conferred upon them by law by letting out a contract for so large a number of volumes as would, in effect, create a monopoly, or deprive the state of the benefit which might accrue from a decline in prices for work of this kind. With reference to this matter, the chief executive and the reporter may safely be trusted, we think, to look well to the interests of the state. At any rate, the general assembly were evidently of the opinion that they were entitled to confidence in attending to this business. At the same time, there is a manifest advantage to the state in allowing the contract to embrace more than one volume, for the simple reason that a contractor could well afford to bid lower and do the work cheaper upon a large job than upon a small one.

3. In awarding the contract to the Franklin Company at the price named in Byrd's bid, though this company had itself submitted no bid at all, the governor and the reporter substantially complied with the requirements of the law. There was no question but that this company was fully competent and qualified to do the work in a satisfactory manner. The governor and the reporter were authorized to make such an award as, in their judgment, would "promote the best interests of the state"; and, not being bound to accept the lowest bid tendered, they had express authority of law to, pursue the course which they believed would secure the end indicated in the language last quoted. What they actually did is sustained by the principle ruled in *Crabtree v. Gibson*, 78 Ga. 230, 8 S. E. 10. It appears in that case that the ordinary had advertised for bids for the building of a county bridge, and finally, without readvertising, awarded the contract to one who was not the lowest bidder. The point was made that the ordinary did not have the power to accept any bid other than the lowest, without readvertisement. The supreme court made no distinct ruling upon this point, but held squarely that, even if the ordinary did not have such power, it was within his au-

thority "to have the bridge built at the price at which the lowest bidder had offered to build it." It results as a logical sequence from the foregoing that Byrd had no shadow of right to have the contract awarded to him; and therefore, in his attitude as a disappointed bidder, he had no legal cause of complaint with reference to the action taken in the premises by the governor and the reporter. Statutes requiring the letting of contracts to the lowest bidder are designed for the benefit and protection of the public, and not that of the bidders, and do not confer upon the latter a right to enforce, for their benefit, the letting of a contract after it has already been awarded to another. *High, Extr. Rem. (3d Ed.) § 92*. After public officers who are intrusted with the duty of awarding contracts for the benefit of the state "to the person whose offer shall be most advantageous to the state" have finally made an award, they have no further authority in the matter, and cannot be compelled to enter into another contract for the same services. *Id. § 93*. In section 94 of the same work it is said: "The authorities cited in support of the preceding sections leave no room for doubt as to the settled rule that the lowest bidder acquires no such rights by making his bid as to entitle him to the writ of mandamus before the contract has actually been awarded him. The power conferred upon boards or officers authorized to contract with the lowest bidder necessarily involving the exercise of discretion, the general principle denying relief by mandamus to control the discretionary powers of public officers applies, and the courts refuse to interfere." Where "a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not." *Heard's Short, Extr. Rem. \*260*. See, also, *People v. Canal Board of City of New York*, 13 Barb. 432.

4. The only remaining question is: Did Byrd, in his capacity as a citizen and taxpayer, have the right to institute in his own name an equitable proceeding against the reporter and the Franklin Company for the purpose of testing the legality of the contract which the reporter, with the governor's consent and approval, had made with that company, or of obtaining an injunction preventing such contract from being carried into effect? He could not do this, for several reasons. In the first place, the state, being a party to the contract, would be a necessary party to such a case; and it could not, without its own express consent, be subjected to an action of any kind. It is hardly necessary to cite authority for the proposition that a sovereign state is not liable to suit at the instance of a citizen, unless permission to sue has been expressly granted. It is true

that in the case of *Wright v. Railroad Co.*, 64 Ga. 795, it was held that an injunction would lie against mere ministerial officers who were seeking illegally to enforce a process against the property of the railroad company; but that case differs essentially from the case at bar, for in the present instance no officer of the state is in any manner attempting to interfere with Byrd or his property. A contract to which the state is a party cannot be annulled without having the state before the court; and, as Byrd could not make the state a party to his proceeding, this would be sufficient to end the matter. But, secondly, the injunction granted necessarily operates against the governor of the state; not eo nomine, because he is not a party to the record, but practically, because it suspends the operation of a contract which he participated officially in making. In *Mayo v. Renfro*, 66 Ga. 427, this court said: "The governor could not be made a party. Being the head of a co-ordinate branch of the government, the courts may not well enjoin him. Equity, as well as law, would seem to forbid it. The process of the courts is directed to the subordinate officers of the executive and those agents who are illegally using the authority of the state to oppress the citizens." This accords with the universal trend of authority as to cases in which an executive function involves the exercise of judgment and discretion, as distinguished from mere ministerial action. "With respect to the power of the courts to control the action of the governor of a state, many cases have arisen thereupon. It is entirely clear that the executive of a state is not subject to control from the courts with respect to the exercise of his political powers, or his powers in any other matter where his action is left to be guided by his own judgment and discretion." *Throop, Pub. Off. § 795*. The same doctrine is, in effect, laid down in 2 *High, Inj. § 1323*, from which we make the following extract: "Delicate and interesting questions have frequently arisen touching the extent to which the judiciary may interfere with the executive department of the government, either state or national, and the jurisdiction of equity to enjoin the acts of officers whose duties partake of an executive or quasi executive character. The true test in all such cases is as to the nature of the specific act in question, rather than as to the general functions and duties of the officer. If the act which it is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer, as distinguished from a merely ministerial duty, its performance will not be prevented by injunction." And, thirdly, even if obstacles above pointed out were not in Byrd's way, he was not, as a mere taxpayer, entitled to maintain his petition, because he utterly failed to show that, as such, he was in any way injured by the letting of the contract to the Franklin Company. It was, in any event, absolutely essential for him to show that, in consequence of the action taken by the

governor and the reporter, he, as a private citizen, sustained some injury. It is difficult to conceive how, in this capacity, he could have been injured at all, except by an increase in the amount of his state taxes; and as to this there was no contention, nor even a pretense, that the publication of the Supreme Court Reports by the Franklin Company would cost the state a single cent more than would have been the case if the contract had been awarded to Byrd himself or to some one else. He was not in a position to insist, and did not insist, that the state could, in any event, get the work done at a price less than his own bid. It has been held that one not an owner of real estate, and therefore not liable to a tax upon realty, would not be allowed the aid of an injunction to prevent the enforcement of such a tax, because he had no interest in the matter. 1 High, Inj. § 573. Again, one seeking to enjoin a public nuisance must show some special injury peculiar to himself, and independent of the general injury to the public. Id. § 762. Taxpayers of a city, in the absence of any special or personal interest in the matter, are not entitled to invoke equitable relief against misconduct on the part of the municipal authorities. See 2 High, Inj. § 1301; *Roosevelt v. Draper*, 23 N. Y. 318. "He who seeks to restrain improper or unlawful conduct on the part of public officers must allege sufficient facts to show that he has such an interest in the public welfare as to make him a proper party to prevent the commission of a public wrong. It will generally suffice that the persons seeking the injunction are residents and taxpayers. . . . But, to warrant the relief in behalf of citizens and taxpayers against acts of public officers, it should be shown that plaintiff's rights will be greatly and irreparably injured by the acts which it is sought to enjoin, and, unless this is shown, the relief will be denied." 2 High, Inj. 1321. "It may be premised, generally, that the jurisdiction will be exercised only in behalf of parties interested in the transaction or subject-matter of the proceedings which it is sought to enjoin, and that one who has no personal interest in the matter is not entitled to the relief, even though he may have been a party to the proceedings at law which he seeks to restrain." Id. § 1547. See, also, *Throop*, Pub. Off. §§ 549, 816. "And, to sustain an action by a private individual against a public officer, it must not only appear that the duty violated was one owing to individuals, but the individual suing must show some reason why he singles himself out as the party injured. In other words, he must show that he, as distinguished from individuals in general, has suffered some special and peculiar injury from the wrongful act of which he complains." *Mechem*, Pub. Off. § 600. The doctrine thus laid down by the text writers is supported by *Sherman v. Bellows* (Or.) 34 Pac. 549. And, without searching for other decisions of this court, we have before us at the moment that of *Reid v. Mayor*, etc., 80 Ga. 755, 6 S. E. 602, the principle of which is

likewise applicable, it being there held that a taxpayer of a town had no right to call in question the constitutionality of an act authorizing an issue of bonds, when in his petition he entirely failed to allege any damage or injury that would accrue to him by reason of the issuance and sale of such bonds.

We will not further prolong this discussion. Unless the conclusions we have reached are correct, any taxpayer of the state could set himself up as the censor morum of the governor and other public officers of the state, and undertake to supervise their official action as to matters in which he had no personal interest whatsoever. As already intimated, it is to be presumed that the state's officers will take the proper care of her interests as to affairs with the disposition of which they are specially intrusted. If, in any given instance, through inadvertence or an omission to observe legal requirements, an unlawful or improper contract has been made in behalf of the state, resulting to her disadvantage, it can be set aside at her instance upon proper proceedings instituted for the purpose by the attorney general. 10 Am. & Eng. Enc. Law, p. 793.

We have omitted to mention some minor points for the reason that the case is absolutely controlled by the principles which we have endeavored to discuss. The court was right in refusing the mandamus, but erred in granting the injunction. Judgment reversed.

(99 Ga. 35)

#### CARROLL v. STATE.

(Supreme Court of Georgia. April 13, 1896.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS OF DECEASED—INSTRUCTIONS—HOMICIDE.

1. Though, upon the trial of an indictment for murder, certain declarations made by the deceased may not have been admissible in evidence, at the instance of the state, as a part of the res gestae of the homicide, yet where counsel for the accused, in cross-examining the witness to whom the declarations were made, with a view to discrediting him, questioned him as to his testimony delivered at the coroner's inquest, concerning what the deceased had said to him, thus making it proper and fair to allow the witness to testify to all he had stated on that occasion, and in this manner bringing out the declarations in question, there was no error in allowing them to go to the jury.

2. According to the previous adjudications of this court in *Irby v. State*, 95 Ga. 468, 20 S. E. 218, and the cases there cited, the presiding judge is not bound, upon the trial of a criminal case, to charge the jury concerning the law relating to a given question, which, though pertinent to the issues involved, is not raised by the evidence, and is presented only by the statement of the accused, unless an appropriately worded request in writing so to charge is submitted to the judge.

3. The evidence fully warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; John S. Candler, Judge.

John Carroll was convicted of murder, and brings error. Affirmed.

Glenn & Rountree, for plaintiff in error. C. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

**LUMPKIN, J.** 1. John Carroll was indicted for the murder of his mistress, Maggie Donahoo. Jennings, a policeman of the city of Atlanta, was a witness for the state. In his direct examination he gave no testimony at all as to any declarations of the deceased. Upon cross-examination he stated that she had told him John Carroll shot her, and that he lived at No. 87 Garibaldi street. He then stated several times—evidently in answer to pressing questions—that this was every word she said to him, and that she had made no other statement in his presence or hearing. He was then questioned as to his examination before the coroner's jury, and again repeated, in substance as above, the declarations which the deceased had made to him; and, after still further examination, he admitted swearing at the inquest the following, "She said he wanted to stay with her, and she refused, and that he shot her," and then added: "I swear that now. I think that is the way. She said, 'He wanted to stay with me, and he shot me.'" The evident object of this cross-examination was to discredit the witness by showing a conflict between his testimony at the trial then in progress, and that which he had given before the coroner. The motion for a new trial alleges error in admitting, over objection of counsel for the accused, the following testimony of Jennings: "I saw Maggie Donahoo a few minutes after the shooting. She appeared perfectly conscious. She told me that John Carroll, who lived at 87 Garibaldi street, did the shooting. She said he wanted to stay with her, and she refused, and that he shot her." It is obvious from the foregoing recital that the testimony thus objected to was not offered by the state in the first instance, but was brought out by the counsel for the accused on cross-examination. The portion of this evidence which counsel really desired to exclude was the expression contained in the last sentence of the above quotation. While it is usually the right of counsel cross-examining a witness to object to irrelevant and improper answers, the right should not be so extended as to allow counsel to draw from a witness a recital of statements made by him on a previous occasion, and then object to a portion of these statements, when it is manifestly fair to the witness to allow a full disclosure of all he stated on that occasion. See *Lowe v. State* (decided at the last term) 25 S. E. 676.

2, 3. Requests to charge, in order to be binding upon the judge, must be reduced to writing. Code, § 3715. We have in the present case followed the previous adjudications of this court, in holding as announced in the second headnote.

The evidence discloses the perpetration of a wanton and unprovoked murder, and the record affords no good reason for setting the verdict aside. Judgment affirmed.

(99 Ga. 208)

## WILLIAMS v. STATE.

(Supreme Court of Georgia. May 4, 1896.)

## ASSAULT—SUFFICIENCY OF EVIDENCE.

Where, upon the trial of an indictment for an assault, there was no evidence either of an intention or an attempt upon the part of the accused to commit a violent injury upon the person alleged to have been assaulted, a verdict of guilty is contrary to law.

(Syllabus by the Court.)

Error from superior court, Floyd county; G. A. H. Harris, Judge.

William Williams was convicted of assault, and brings error. Reversed.

The following is the official report:

William Williams was indicted for an assault upon Mrs. Mary Arwood. He was found guilty, and his motion for new trial being overruled, excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Upon the trial, Mrs. Arwood testified: "I was at my father's home on the evening of November 26, 1895, in the back room with Mrs. Whitfield, when some one at the back door called, 'Miss Mary.' He called three times. I got up, and went out to the back porch. I saw Bill Williams standing in the back yard, near the porch. He looked dreadful. He showed the Old Scratch in his face. I said to him, 'Bill, you scared me.' He said, 'Well, Miss Mary, if I scared you, I will leave.' I said, 'No; if you have got anything to say to me, say it.' He said, 'No;' he would leave. I told him to say what he had to say. Then he said, if he were to say what he had to say, the white people and black people would be after him with shotguns. I said, 'If you say anything you ought not to say to me, I would shoot you myself.' Then I started in the house, and he said, 'O, Mary, don't go.' I said: 'You call me Mary? Get out of this yard.' Then he said: 'I will go out as I came in; I will walk out.' There are about six houses occupied by families within 100 yards of where I live. One of them is about 30 steps from our house. One is just across the street. I married in Birmingham. Don't know where my husband is now." Mrs. Whitfield testified, corroborating Mrs. Arwood as to the conversation between Mrs. Arwood and defendant, except that according to Mrs. Whitfield's version, when defendant said, "O, Mary, come back!" Mrs. Arwood said, "You call me Mary?" Defendant replied, "O, excuse me, Miss Mary; I did not mean to say it." And Mrs. Arwood then told him to get out of the yard, and defendant said he would get out when he pleased. Mrs. Whitfield testified, also, that after Mrs. Arwood told defendant, if he said anything to her he ought not to say, she would shoot him herself, she (Mrs. Whitfield) started to look for a gun she knew was kept in the house, but it was gone. Mrs. Hammock, mother of Mrs. Arwood, testified: "That evening I left home a little while before the negro went to our house. On the road I

saw defendant come meeting me. He looked like he was drunk. When he got to me, he said: 'Miss Hammock, Miss Mary is your daughter. Would you object to my having a private talk with your daughter? I think more of her than I do of anybody.' I walked off from him, and he kept repeating this. I walked on, and the last thing I heard him say was, 'Say, Miss Hammock!' Our house, where Mary was, was between where Bill lived with his wife and children. I knew Bill. He had been living in West Rome a long time. I did not go back to my home then, because I thought, if he did anything, it would be some time when he met her alone away from home." Defendant made the following statement: "I was in Rome that evening. A man met me at Chamberlee's store. He said he was Miss Mary's husband. He said he knew me. I did not know him. He told me to tell Miss Mary he was coming after her and his baby. He said old man Hammock and his wife did not like him, so he could not see her himself; and this was the message I wanted to deliver. I went out that evening, and, as I went to Miss Mary's house, I stopped at the front entrance to the yard, and called, but the door was shut, and she could not hear me; so I went around to the back porch, and called, 'Miss Mary!' She came out, and said, 'Bill, you scared me.' I said, 'If you are afraid, Miss Mary, I will go.' She said, 'No;' say what you have got to say.' Then I called to her, and said, 'Mary.' She got mad, and said, 'Did I call her Mary?' I said, 'O, excuse me, Miss Mary.' She said she had a gun, and would kill me. She told me to get out from there. I told her I would go as I came,—through the front gate,—and I would walk out. I just went to deliver the message. I carried a letter to another lady in West Rome, and like to got shot for it. I have lived in West Rome a long time, and never had anything against me before."

Seaborn Wright, for plaintiff in error. W. J. Nunnally, for defendant in error.

PER CURIAM. Judgment reversed.

(99 Ga. 205)

#### MEANS v. STATE.

(Supreme Court of Georgia. May 4, 1896.)

##### FORNICATION—EVIDENCE—INDICTMENT.

1. Where an indictment charged that Sam Means had sexual intercourse with Frances Slaton, that said Sam Means was an unmarried man, "and the Slaton an unmarried woman," the words "the Slaton" obviously refer to the Frances Slaton above mentioned.

2. There was sufficient evidence to warrant the jury in finding that the sexual intercourse took place; and as the evidence also warranted the conclusion that on the 9th day of March, 1893, the accused, he being a negro man, was living with two women as his reputed wives, and had never selected either and made her his lawful wife, as required by the act passed on the date above mentioned, the jury were authorized in finding that he was an unmarried

man. See *Comer v. Comer*, 18 S. E. 300, 91 Ga. 814.

(Syllabus by the Court.)

Error from superior court, Newton county; George F. Gober, Judge.

Sam Means was convicted of fornication, and brings error. Affirmed.

E. F. Edwards, for plaintiff in error. W. T. Kimsey, Sol. Gen., and Geo. W. Stevens, for the State.

PER CURIAM. Judgment affirmed.

(99 Ga. 280)

#### CHEATHAM v. EHRLICH et al.

(Supreme Court of Georgia. Aug. 3, 1896.)

##### REVIEW ON APPEAL—NEW TRIAL.

This being the second verdict in the plaintiffs' favor upon conflicting evidence, and no material error of law, if any at all, having been committed, this court will not reverse the judgment of the trial court, refusing to grant a second new trial.

(Syllabus by the Court.)

Error from superior court, Jefferson county; E. H. Callaway, Judge.

Action by Max and Joseph Ehrlich against L. A. Cheatham. Judgment for plaintiffs. Defendant brings error. Affirmed.

The following is the official report:

Max and Joseph Ehrlich, composing the firm of Ehrlich Bros., brought their petition against L. A. Cheatham, alleging as follows: In April, 1893, they were in the mercantile business at Wadley. On July 14th, following, they purchased of Cheatham a stock of merchandise and store fixtures, giving therefor their note for \$1,780, secured by a mortgage on said stock of goods, of the value of \$2,225, also covering the stock of merchandise owned by them, of about the same value, aggregating about \$4,000. To better secure Cheatham, they agreed with him to have said stock of goods insured against loss in case of fire, and, in terms of said agreement, did pay to him \$112.50 to pay as a premium for said insurance policy, which was to be for \$3,000. It was further agreed between them and him that in case of fire the unpaid part of the mortgage should be paid by them, the remainder of the policy to inure to their benefit. At that time they knew nothing of insurance, not even the mode of obtaining a policy; and having great confidence in the integrity, honesty, and business sagacity of Cheatham, they paid him the \$112.50, to be applied to securing him and them against loss in case of fire. He did obtain from the Home Insurance Company, of this state, a policy of fire insurance on said stock of goods and store fixtures, for \$3,000; representing to said company that said stock of goods was the property of him (Cheatham), which was absolutely untrue, and known by him to be untrue. They were assured by him that he would protect them against loss, and that he was responsible to them for the balance of the policy after his mortgage was paid, whereas they,

having great confidence in him, gave themselves no more concern about the matter. Between the date of the mortgage and December, 1893, they paid thereon over \$1,000, taking his receipts therefor, and proceeded, in the best of faith, to perform their obligations. On the morning of December 9, 1893, the stock of goods was totally destroyed by fire, and in a few days thereafter they were approached by Cheatham, and told that if they would give him \$1,500 he would collect the balance of the policy for them; stating to them that he would be compelled to employ counsel, and that he had been a very heavy loser. Whereupon they offered to allow him \$1,000, with the balance due him on the mortgage, and insisted on securing a lawyer at once to advise them, whereupon they were persuaded not to see a lawyer, as he would protect them, which advice they disregarded after the unscrupulous proposition made them, when they were advised that said policy was worthless, under the false statements made to secure it by Cheatham. He compromised the policy for a sum unknown to them, and refuses to answer to them for the difference due on the policy after the mortgage has been satisfied.

Defendant demurred on the grounds that the petition set forth no cause of action, that it did not distinctly and plainly set forth the plaintiff's case, and that it joined actions arising on an alleged contract and on a tort. The demurrer was overruled, and defendant excepted. He answered, denying all charges of wrongdoing or misrepresentation on his part, or that the stock of goods ever amounted to \$4,000, or that the policy was for the mutual benefit of plaintiffs and defendant, and setting up that subsequent to the execution of the mortgage, and independent of it, the plaintiffs agreed to insure the goods for the purpose of securing him against fire, they to pay the premium, but the policy to be in his name, and solely for his benefit, plaintiffs being present with the insurance agent, and fully understanding the whole matter, they having no property other than the goods on which he could rely; that the goods were insured for \$3,000, but solely to secure him against loss, and he was to have all his indebtedness paid out of the policy in case of fire, and, if any more was collected thereon than sufficient to pay said indebtedness, then the balance was to be turned over to plaintiffs; that he did not compromise with the insurance company, but collected all he could get from it, \$655, when plaintiffs were still due him \$328, and were in default in their payments, but he gave them up their mortgage and note, although unpaid by over \$207, etc.

Plaintiffs obtained a verdict for \$1,872, this being the second verdict in their favor. Defendant's motion for a new trial was overruled, and he excepted.

The mortgage given by plaintiffs to defendant was dated July 19, 1893. It covered the

stock of goods in the storehouse at Wadley occupied by plaintiffs, and was made to secure a note of even date for \$1,780, given for the purchase money of the stock of goods, which was to be paid in weekly installments of \$100. This mortgage contained the clause: "And the said Ehrlich Bros. further agree that the said L. A. Cheatham shall retain all insurance policies upon said stock of goods, with the full power, in case of loss by fire, to collect said insurance policies, and apply the same to the payment of the amount due upon said note and this mortgage, turning over the excess to the said Ehrlich Bros." The insurance policy was dated August 17, 1893. In consideration of \$112.50, and of the conditions and agreements therein contained, it insures L. A. Cheatham, to the amount of \$2,800, on the stock of merchandise in the store at Wadley, and \$200 on store furniture, fixtures, and safe, against loss by fire, not exceeding the sum insured, nor the interest of the assured in the property; the amount of loss to be estimated according to the actual cash value of the property at the time of the fire, and the company not to be liable for more than three-fourths of the actual cash value of the property insured. The policy contains this clause: "Or if there be a mortgage, bill of sale, or other lien upon the property hereby insured, or any part of it, either prior or subsequent to the issuance of this policy, without the fact being indorsed hereon, then and in every such case this policy shall be void; or if the assured is not sole, absolute, and unconditional owner of the property insured, and this fact is not expressed in the written portion of the policy, then the policy is void." The application for this policy was in evidence, signed by "L. A. Cheatham, Applicant." It states: "I hereby make application to you to insure me against loss or damage by fire for the term of 12 months from the 17th day of August, 1893, on my stock of merchandise, the true present value of which, as closely as I can estimate it, is \$4,000.00. The sum which you are requested to insure is \$3,000.00." It further states, in answer to questions therein, that the date of the last inventory was May, 1893, and the amount of it \$4,000; that it was taken by detail; that no per cent. on invoice cost was added to the stock for profit; that the applicant agrees to keep the last two inventories in a fireproof safe; that he is interested in no other store; and that his average gross profits are 20 per cent. Cheatham testified that the following, which was printed in the application, was not read to the parties: "I am the sole and undisputed owner, absolutely and in fee simple, of the whole of said property. The said property is free from incumbrance of any kind whatever. I have, within the last twelve months, taken a complete inventory of my stock of merchandise in thorough and correct detail. I also keep a good, secure, iron safe, in which, locked, are deposited for safe-keeping my books and inventories at all times when my store is not

open for business. I warrant the truth of each and every of the foregoing representations, and agree that they shall constitute the basis of the insurance hereby applied for. To your questions following I answer as follows: I warrant the truth of each answer. \* \* \* I reaffirm and warrant that the foregoing representations and answers are, all and singular, true, and I agree that they shall constitute the basis of insurance hereby applied for."

The testimony on the respective contentions outlined in the statement of the pleadings was voluminous and conflicting. The motion for new trial alleges that the verdict is contrary to law and evidence, and that the court erred in admitting in evidence four accounts in favor of Edelstein & Co. against Ehrlich Bros., dated September 20, October 9, and November 22 and 29, 1893. The headings of them were in English, and the amounts were in Arabic numerals, but the items were written in Hebrew characters. Defendant objected that they were unintelligible without being translated. The court ruled that they were inadmissible without translation. Plaintiffs' counsel then stated that they would have them translated, and the court said that if they would have them translated they could go in. They were not afterwards translated, but went to the jury, and were commented on by counsel for both sides. Other accounts in English were offered with them, and objected to by defendant, whose counsel afterwards stated that they withdrew objection to these accounts (referring to the English accounts). In overruling the motion for a new trial the judge says: "In the light of the court's previous ruling, counsel for defendant could easily have excluded them from the consideration of the jury, and from the argument. The failure of counsel for the defendant to insist upon either their interpretation, or their exclusion from evidence, when taken in connection with the misunderstanding occasioned by their language used in withdrawing the objections to the other accounts, to my mind destroys the force of this ground of the motion." It seems that the accounts were introduced upon the issue raised in the evidence as to the amount and value of the stock of goods at the time of the fire. Defendant, in his testimony, contended that the stock was greatly reduced by plaintiffs during the period from July to December, 1893, they having sold or otherwise disposed of the better part of it; that what remained was not worth over \$600 or \$700, etc. He introduced several witnesses who gave their estimates as to the worth of the stock. Besides their own testimony, plaintiffs introduced 10 bills (apart from the 4 written in Hebrew) made out against them in favor of various persons, ranging in date from July 28 to October 23, 1893, and in amount from \$3 or \$4 to \$39, except one which was for \$164.65, dated August 4, 1893. There were also 12 bills made out against L. A. Cheatham, bearing various

dates from July 19 to October 13, 1893, and ranging in amount from \$6.15 to \$47.85. As to these, it appears from Cheatham's testimony that he made the purchases in his name for the plaintiffs, and held the bills until they paid the same, they having no credit. The amounts of the bills written in Hebrew were \$398.74, \$355.87, \$14.15, and \$423.68.

The court charged the jury "that where a party is charged and intrusted by another with the accomplishment of some business transaction for the benefit of the party intrusting him, accepts the trust, and undertakes to carry out such transaction, and in the execution thereof makes willful misrepresentation or false statement as to some material matter connected with such transaction, unknown to the party intrusting him, and loss and damage are thereby sustained by the party intrusting him, the party making such false or untrue statement is liable to the other for the amount of his loss or damage occasioned by such false statement." This charge is assigned as error, because it is not law, because there is no evidence on which to base it, and because it rests upon an assumed state of facts. The court charged: "If you find in this case, and the evidence satisfies you, that Ehrlich Bros. and Cheatham agreed together that a policy of insurance should be taken out on a certain stock of goods owned by Ehrlich Bros., a portion of which had been purchased from Cheatham, which should be insured for \$3,000, for the purpose of securing Cheatham for the purchase money due him on a mortgage for 1,780-odd dollars, and for the protection of Ehrlich Bros. for the excess over said indebtedness, and Ehrlich Bros. paid the money to Cheatham to pay the premium, and the understanding was that Cheatham was to take out the policy in his name, and, should loss occur, Cheatham was to collect the policy, reserve enough to pay the balance due him on the mortgage, and pay the balance over to Ehrlich Bros., and, in pursuance of this agreement, Cheatham took out a policy of fire insurance on said stock of goods in his own name, but, in making application to the insurance company for such insurance, Cheatham, without the knowledge or consent of Ehrlich Bros., willfully made a misrepresentation or false statement as to his interest or title in the property, and the insurance company, ignorant of the truth, acted upon such misstatement, and the policy for such reason became void and worthless, and Ehrlich Bros. sustained loss thereby, without negligence on their part, they would be entitled to recover from Cheatham the amount of such loss." Assigned as error for the reasons given in the assignment last above stated, and because it tended to confuse and mislead the jury. The court charged: "Or if you should find that no false statement was made by Cheatham as to his interest in the property to the agent of the company, or, if made, that the agent of the company at

the time was informed and knew what the truth was as to ownership, and the policy was a valid policy, and a loss occurred by destruction of the property insured by fire, and after the loss Cheatham, without the consent of Ehrlich Bros., settled and surrendered said policy to the company for an amount less than his debt, and also less than three-fourths of the cash value of the property destroyed by fire, and there was no gross negligence on the part of Ehrlich Bros. at the time of the fire in protecting the property, they would be entitled to recover from Cheatham the difference between Cheatham's debt and three-fourths of the cash value of the goods destroyed." Error, because it is not a correct statement of the law, because without evidence to support it, and because it lays down the wrong measure of damages. The court charged: "Ehrlich Bros. were bound at the time of the fire to exercise ordinary diligence in protecting the goods from fire. Gross negligence on the part of Ehrlich Bros. in protecting the property from destruction at the time of the fire would defeat their rights to recover." Error, because, under the terms of the policy, the insurance company was not liable for loss or damage caused by plaintiffs' neglect to use all practical means to save and preserve the property from damages at and after the fire, and movant would likewise not be responsible for any loss or damage caused by such neglect. The policy imposed greater care than ordinary diligence. (It does not appear from the evidence that the terms of the policy were as here stated, or what degree of care it imposed.) Error is further assigned because the court wholly failed and omitted to charge the jury on the authority and power of Cheatham to compromise with the insurance company for a less amount than the full value of the policy, or for an amount less than three-fourths of the actual cash value of the goods destroyed, when the amount due on the policy was disputed by the company.

Cain & Polhill and Hines & Hale, for plaintiff in error. Wootten & Wootten and H. D. D. Twiggs, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(90 Ga. 281)

#### RIMES v. WILLIAMS.

(Supreme Court of Georgia. Aug. 3, 1896.)

**JUSTICES OF THE PEACE—JURISDICTIONAL AMOUNT—VALIDITY OF JUDGMENT.**

1. Where a promissory note for the principal sum of \$100, containing also a stipulation to pay 10 per cent. as attorney's fees, was sued on in a justice's court, the summons requiring the defendant "to be and appear at the next justice's court, \* \* \* to answer the complaint of [the plaintiff] in an action upon a note, a copy of which said note is attached to this summons," and a copy of the note being attached, as stated, it was an action for attorney's fees as well as for the principal sum named in the note, and there-

fore beyond the jurisdiction of that court. *Almand v. Almand*, 95 Ga. 204, 22 S. E. 213.

(a) The original record in the case of *Bell v. Rich*, 73 Ga. 240, discloses that the summons in the action there dealt with was in the form above indicated.

2. A judgment rendered in such a case in the plaintiff's favor, though not including attorney's fees, was void for want of jurisdiction; the question as to jurisdiction "being dependent upon the amount of principal claimed in the original suit, and not upon the sum for which plaintiff finally obtained a judgment." *Ashworth v. Harper*, 95 Ga. 690, 22 S. E. 670.

3. The propositions above announced are not varied because the note in question was executed after the passage of the act of July 22, 1891 (Acts 1890-91, vol. 1, p. 221), in relation to attorney's fees. Even under that act, such fees may be recovered if "a plea or pleas be filed by the defendant, and not sustained"; but, whether a plea be filed or not, the fees are sued for in an action of the kind above indicated, and it is the amount claimed in the action which fixes its status as to jurisdiction.

4. Inasmuch as the judgment to which the land involved in the present case was sought to be subjected was void for want of jurisdiction; no title passed by a sheriff's sale thereunder; and it was error to direct a verdict in favor of the plaintiff, the validity of whose title depended upon such sale.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Action by J. G. Williams against A. M. Rimes. Judgment for plaintiff. Defendant brings error. Reversed.

H. B. Strange and Hines & Hale, for plaintiff in error. R. Lee Moore and Brannen & Moore, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 285)

#### REAB v. HULL et al.

(Supreme Court of Georgia. Aug. 3, 1896.)

**GARNISHMENT—ANSWER—MONEY JUDGMENT.**

An answer to a garnishment issued upon a pending suit, which, in effect, stated that the garnishees had in their hands a specified number of bales of cotton, to the proceeds of which, when sold, the defendant would be entitled, less a stated amount which had been advanced to him thereon by the garnishees, did not authorize the entering of a money judgment against the latter in the plaintiff's favor. Section 3305 of the Code, relating to garnishments issued upon attachments, is, by section 3536, made applicable to garnishments in cases like the present.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by L. A. Reab against John D. Coxwell. Hull & Tobin were garnishees. Judgment against the garnishees set aside, and plaintiff brings error. Affirmed.

The following is the official report:

To the February term, 1893, of the county court of Wilkes county, Reab brought his action against Coxwell, of Wilkes county, and, pending the action, sued out garnishment thereon in Richmond county, returnable to the February term, 1893, of the city court of

Richmond county, and had summons of garnishment duly served upon Hull & Tobin, a co-partnership, composed of Asbury Hull and P. B. Tobin, both of Richmond county. On February 6, 1893, at the February term, 1893, of the city court, Hull & Tobin answered the summons: "That John D. Coxwell, the defendant in the within-stated case, will have coming to him the net proceeds of fourteen bales of cotton when sold, less cash drawn against same, \$408.97, and interest on said advances." On February 20, 1893, at the February term of Wilkes county court, Reab had judgment against Coxwell for \$141.25, principal, with interest and costs. At the February term, 1893, of the city court of Richmond county, on March 3, 1893, Reab had judgment against Hull & Tobin on their said answer as garnishees for \$141.25, with interest and costs. At the same term, on March 17, 1893, Hull & Tobin moved to arrest, vacate, and set aside said judgment, on the following grounds: "(1) That said judgment is void. (2) That the city court of Richmond county has no jurisdiction against them in the suit commenced in the county court of Wilkes county, but that the superior court of Richmond county alone has jurisdiction to hear and adjudge concerning summons of garnishment issued in a cause pending in a county court. (3) That there were no pleadings or proper papers before the court to authorize a judgment to be rendered against them upon said summons of garnishment. (4) That the answer filed by these movants did not admit that there was anything on hand belonging to the defendant John D. Coxwell, but stated that he had cotton, subject to a charge at that date amounting to \$408.97,"—which motion was verified by said P. Brooks Tobin, as follows, to wit: "That the answer of the summons of garnishment in the foregoing case was prepared by deponent without taking legal advice; that he had no notice or knowledge that there was any question as to the jurisdiction of the city court; that he paid no further attention to the matter after making the answer until notified that the property in his hands was claimed by a third party; that, when he learned of said claim, he also learned that judgment had been entered up against Hull & Tobin, as garnishees." On March 23, 1893, Hull & Tobin filed an amendatory answer to the summons of garnishment, in which, after reserving all benefit of exception to the jurisdiction of the said city court, they stated: At the date of the service of the summons, they had in their possession 14 bales of cotton, which they believed to be the property of John D. Coxwell, and which they so treated, and which was so entered on their books. Against this cotton they had advanced \$408, and, as cotton factors, they claimed a lien upon the cotton for such advances, and for commissions, storage, and other charges that might attach against the cotton, together with the

interest on the advances. After they answered the summons of garnishment, they learned that the property in their hands was claimed by Harriet I. Coxwell as her property, and she gave them notice thereof. At the same time they learned that a pretended judgment had been entered up upon their answer, and thereafter filed a motion to set aside said judgment. After making their answer, and before learning of said claim to wit, on February —, 1893, they sold the cotton in due course of sale, and the net proceeds left in their hands were \$149.81, which are claimed by said Harriet Coxwell as her property, and not subject to the summons of garnishment. As to the real title to said cotton and proceeds, respondents have no notice or knowledge, except as above stated, and pray that, before any judgment is entered, the title to the cotton and proceeds may be inquired into, and respondents properly protected. On the day when the summons of garnishment was served, respondents were served with a like summons issuing out of the county court of Wilkes county in the case of Phinzy & Co. v. John Coxwell, said summons being likewise returnable to the city court of Richmond county, as to which also respondents pray the protection of the court. Except as above stated, respondents, at the time of the service of the summons, were not indebted to defendant, have not since become indebted, and are not now indebted. At the time of the service of the summons they had no money, property, etc., in their possession belonging to defendant, have had none since, and have none now. After this amendatory answer was made, Reab wrote off the judgment of March 3, 1893, from \$164.23 to \$149.81, and moved to dismiss the amendatory answer. The court overruled said motion to dismiss, and overruled the first, second, and third grounds of the motion of Hull & Tobin to set aside the judgment, but granted said motion on the fourth ground thereof, and set aside the judgment accordingly. To the judgment overruling the motion to dismiss, and to the judgment granting the motion to set aside, Reab excepted.

Salem Dutcher, for plaintiff in error. J. R. Lamar, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 286)

**NATIONAL BANK OF AUGUSTA et al. v. AUGUSTA COTTON COMPRESS CO.**  
(Supreme Court of Georgia. Aug. 3, 1896.)

**INTERPLEADER—SUFFICIENCY OF PETITION.**

1. There is nothing in the record of the present case which brings into consideration the question whether or not section 1593 of the Code was repealed or in any respect modified by the act of October 3, 1887, amending section 2138.

2. An equitable petition for an interpleader does not lie unless it appears from the allega-

tions thereof that the conflicting claims of the defendants are of such character as to render it doubtful or dangerous for the plaintiff to act; and, in order to do this, it is necessary that such claims be set forth, so as to inform the court of their nature, character, and foundation, at least to the extent of enabling it to determine whether or not an interpleader is essential to the plaintiff's protection. Code, § 8235; 11 Am. & Eng. Enc. Law, 502; Story, Eq. Pl. (10th Ed.) § 292; Mitt. & T. Eq. Pl. & Prac. 235, 236.

3. The petition in the present case did not come up to the requirements above stated, and, accordingly, the court erred in overruling the defendants' demurrers to the same.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Action by the Augusta Cotton Compress Company against the National Bank of Augusta and others. Judgment for plaintiff. Defendants bring error. Reversed.

The following is the official report:

The Augusta Cotton & Compress Company, by its petition against Alexander & Alexander, Nixon & Danforth, Hull & Tobin, the South Carolina & Georgia Railway Company, the National Bank of Augusta, J. & W. Seligman & Co., and Edward H. Butt & Co., alleged: The plaintiff is a corporation duly chartered under the law of Georgia, with its principal office in Augusta. On or before November 4, 1895, Edward H. Butt, doing business as Edward H. Butt & Co., delivered to it, in the usual order of business, 54 bales of cotton, having certain marks and weights, and it issued its usual receipts in the following printed form:

"Original.

"No. B. Augusta, Ga. ———, 189—.

"Received in good order from ——— bales cotton. To be compressed and delivered to this receipt only. Fire and other unavoidable accidents excepted.

"Marks. ——— number of bales."

And said 54 bales were in plaintiff's possession on November 4, 1895, and still are. On or before that date, plaintiff's compress receipts for 14 of said 54 bales were by said Butt delivered to the South Carolina & Georgia Railroad Company, which issued its bill of lading in the usual course of business for the same, which bill of lading, in the usual course of business, came into possession of J. & W. Seligman & Co., who had advanced money thereon to said Butt. The same thing is true as to plaintiff's compress receipt for 40 of said 54 bales. On or about November 4, 1895, Butt failed in business, and on that date Alexander & Alexander filed suit in trover against petitioner to the February term, 1896, of the city court of said county, claiming title to 10 of said 54 bales delivered to plaintiff by said Butt. On the same day, Nixon & Danforth filed a similar suit, to the same term of the same court, against plaintiff, claiming title to 29 of said 54 bales. On the same day, Hull & Tobin filed a similar suit,

to the same term, against plaintiff, claiming title to 19 of the 54 bales. November 9, 1895, said railroad company filed a similar suit, to the same term, against plaintiff, claiming title to 40 of said 54 bales. Plaintiff has been notified that the National Bank of Augusta claims title through the compress receipts to 14 of said 54 bales, and said bank is now about to file suit against plaintiff for the same. Plaintiff has been notified or informed that Seligman & Co. claim title, through the bills of lading aforesaid, to 40 of said bales. It thus appears that plaintiff has already been sued by four claimants to the cotton in whole or in part, is about to be sued by two or more claimants, and that said claims are of such character as to render it doubtful or dangerous for plaintiff to act. There is no collusion between plaintiff and any one or more of said defendants regarding the filing of this petition. Plaintiff prays that all of said claimants may be required to interplead and settle among themselves the disputed questions of title, plaintiff standing ready to deliver the cotton to the proper parties upon the payment of its usual and reasonable charges thereon; and that injunction may issue against all of the defendants, except Butt, restraining each of them from proceeding further to set up their said claims to the cotton, otherwise than by interpleading under this petition. There are expense and danger from fire, and trouble attending the keeping of said cotton, and it would be to the manifest interest of all parties that the cotton should be sold, and plaintiff relieved of all further responsibility for its safe-keeping; wherefore plaintiff prays for the appointment of a receiver to take charge of and sell the cotton, under the direction of the court, and for process. Upon this petition, a temporary receiver was appointed, and temporary restraining order granted.

The railroad company demurred generally to the petition. The bank demurred generally; further, because the petition was in violation of section 5242 of the Revised Statutes of the United States; further, because there was not annexed as an exhibit to the petition a copy of the petition and order of incorporation showing petitioner's authority and its right to the control of the property in controversy. Alexander & Alexander, Hull & Tobin, and Nixon & Danforth demurred generally, and, further, because plaintiff was not entitled to a receiver. The bank pleaded that, by section 5242 of the Revised Statutes of the United States, it was enacted that no attachment, injunction, or execution should be issued against a national banking association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court, and hence this court is without jurisdiction in the premises over this defendant, and can grant no relief as prayed for in the nature of an injunction or temporary restraining order. The bank answered: It admits that plaintiff is a corporation chartered under

the laws of Georgia, but, for the purpose of clearly defining the authority granted plaintiff under its charter, it prays oyer of a certified copy of the charter. It denies that the railroad company is a corporation duly chartered by the laws of Georgia, or that its principal office in Georgia is located in Augusta. While said railroad company is amenable to suit under the laws of Georgia, it is solely and entirely a foreign corporation. It is informed and believes that Butt & Co. delivered to plaintiff, in the usual order of business, 54 bales of cotton, and that plaintiff issued its receipt therefor, but cannot state whether the form set out in the petition was used or not; averring that, of the 54 bales, there was issued a receipt for 14 bales, copy of which is annexed, and that this receipt differs from the form set out in the copy of the petition served on this defendant, in that it uses the words "to be compressed and delivered to their receipt only," instead of, as it is in defendant's receipt, "delivered to this receipt only"; and this defendant avers that such a receipt is not the usual receipt issuable by a compress company only. It admits that on or before November 4, 1895, plaintiff's compress receipt for 14 bales of cotton was by El. H. Butt & Co. delivered to this defendant, for the full value of which cotton Butt obtained money and credit at the time from this defendant, so that the title to said cotton named in the receipt became and was vested in this defendant. This defendant is informed and believes that on or before November 4, 1895, plaintiff's compress receipts for 40 bales of cotton were by Butt & Co. delivered to said railroad company. After obtaining from the railroad company bills of lading therefor, Butt & Co. drew their draft through this defendant to the extent of the value of the cotton described in said bill of lading, but, as to the bills of lading coming into the possession of Sellgman & Co., defendant does not know. It is true that about November 4, 1895, Butt & Co. failed in business; and Alexander & Alexander sued plaintiff in trover, claiming title to 10 bales of cotton delivered to plaintiff by said Butt. Whether it was any portion of the lot of 40 bales this defendant does not know, but it avers, upon information from Butt & Co. and plaintiff, that there were included in the cotton sued for by Alexander & Alexander three bales of cotton described in the receipt delivered to this defendant, and above referred to. About December 4, 1895, Nixon & Danforth sued plaintiff in trover, claiming title to 10 bales of the cotton, and whether it was any portion of the lot of 40 bales this defendant does not know; but it avers, upon information from Butt & Co. and from plaintiff, that there were included in the cotton sued for by Nixon & Danforth 10 bales described in the receipt delivered to this defendant. About the same time, Hull & Tobin sued plaintiff in trover, as alleged in the petition; and this defendant avers, upon similar information, that there was included in

the cotton sued for by Hull & Tobin one bale described in the receipt delivered to this defendant. The railroad company has sued plaintiff in trover, claiming title to 40 bales of cotton, but whether or not this comprised any portion of the cotton alleged to have been sold by Alexander & Alexander and Nixon & Danforth and Hull & Tobin to Butt & Co. defendant does not know. This defendant has notified plaintiff that it claimed the title to the property described in the compress receipt for said 14 bales. Delivery was refused to it upon demand for the cotton, and it was about to institute legal proceedings to enforce its rights, it admits. Defendant does not admit that the claims against the plaintiff are of such a character as to render it doubtful or dangerous for it to act so far as the cotton claimed by this defendant is concerned, in view of the particular statements in the receipt that it was delivered to this receipt only; this defendant insisting that any right existing which the compress company had at any time prior to the issuing of that receipt became merged therein. It does not admit, so far as its right is concerned upon the receipt which it holds, that it stands upon the footing of any other holder of compress receipts, or that any questions remain open as fixing the rights of this defendant in favor of the compress company back of or anterior to the date of said receipt; nor does it admit that this is a case where a bill of interpleader properly lies as to this defendant. Sellgman & Co. were not served, there being a return of "Not to be found" as to them.

Upon the hearing, the judge below passed an order that the demurrers be overruled, and the restraining order theretofore granted be continued of force until further order. (The hearing appears to have been had at the term to which the petition was returnable.) Defendants the South Carolina & Georgia Railroad Company and the National Bank of Augusta excepted to this decision, alleging that the judge erred: (a) Because their several demurrers were overruled, and the injunction continued of force, with the appointment of the temporary receiver as originally made. (b) Because the court held that Code, § 1593, as amended by Act Oct. 13, 1885, was not affected by Act Oct. 3, 1887, amending Code, § 2138, by the enactment that the warehouse receipts, and elevator receipts, bills of lading, and other commercial paper symbolical of property may be delivered in pledge, and that, under a bill of interpleader, the compress company can set up in one action against the railroads and the bank, holders for value of the separate receipts, claims separately asserted by Alexander & Alexander, Nixon & Danforth, Hull & Tobin, in their several actions of trover against the compress company, defendants the railroad company and the bank, insisting that Code, § 1593, if constitutional, after the amendatory act of October 13, 1885, was itself repealed by the act of October 3, 1887, as to bona fide holders of re-

ceipts issued after the passage of that act. (c) Because the court held that a petition for interpleader would lie in behalf of the compress company, although itself charged to be a wrongdoer by the railroad company and the bank, in not delivering up to them, respectively, the cotton described in the separate receipts when severally presented, and the cotton demanded; defendants insisting that, under the charter of the compress company and the character of the business transacted thereunder, it was bound by the issuing of receipts, and could not go behind them, and, as against bona fide holders thereof, raise any issue of title, the cotton being deliverable to the receipt only. (d) Because the court overruled the plea to the jurisdiction as to the issuing of an injunction against the bank when no suit had been instituted by the bank at the filing of the petition for interpleader, the bank insisting that the issuing of the original order, and continuing the temporary injunction of force against it, was in violation of section 5242 of the Revised Statutes of the United States.

F. H. Miller and Jos. B. Cumming, for plaintiffs in error. J. R. Lamar and Fleming & Alexander, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 290)

**COHEN v. TROY LAUNDRY & MANUFACTURING CO.**

(Supreme Court of Georgia. Aug. 8, 1896.)

**CERTIORARI—SATISFIED JUDGMENT—DURESS.**

1. The writ of certiorari does not lie to reverse or set aside a judgment which the defendant therein has voluntarily paid and satisfied in full, and such payment cannot be treated as having been made under duress simply because it was made to prevent a levy upon the defendant's property of the execution issued from such judgment. See *Teem v. Town of Ellijay*, 15 S. B. 83, 80 Ga. 154.

2. The defendant's remedy in such case is to apply for the writ of certiorari, and obtain a supersedeas.

3. It appearing in the present case, from the petition for certiorari, that before suing out the same the plaintiff therein, which was the defendant in the judgment, in order to prevent the levy of the execution on its property, had "paid the costs in cash, and given a note at thirty days for the balance," meaning thereby the principal and interest, and the magistrate's answer, which as to these matters was not traversed, showing that the execution had been marked, "Satisfied in full," and returned to office, it was error, upon the facts thus appearing, to overrule the motion to dismiss the writ of certiorari.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by the Troy Laundry & Manufacturing Company against Salomon Cohen. Judgment for plaintiff. Defendant brings error. Reversed.

Edward S. Elliott, for plaintiff in error.

**PER CURIAM.** Judgment reversed.

v.25s.e.no.13—44

(99 Ga. 290)

**FLORIDA CENT. & P. R. CO. v. HAYS.**

(Supreme Court of Georgia. Aug. 3, 1896.)

**INJURY TO EMPLOYEE—NEGLECT—OF MASTER—CONTRIBUTORY NEGLIGENCE—AMENDMENT TO DECLARATION.**

The questions of law presented in this case have been settled by repeated adjudications of this court. Following the doctrine laid down in the case of *Harris v. Central R. R.*, 3 S. E. 355, 78 Ga. 525, the allowance of the amendment to the declaration was proper. The trial judge committed no error, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Allen Hays against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

Hays sued the railroad company for damages, alleging: On September 17, 1894, he was employed by defendant as switchman, and while in the discharge of his duties as such, riding on an engine of defendant, and when the engine was drawing near a switch on the line and track of the railroad of defendant, it becoming necessary for petitioner to alight from the engine, and change the switch, he was struck by the framework of the switch, knocked off the engine, and his left arm crushed by the wheels of the engine, and so badly injured that it became necessary to amputate it. The injury was wholly caused by the negligence of defendant, in this: The engineer was running the engine at too high a rate of speed when nearing the switch, and thereby did not give petitioner sufficient time and opportunity to alight from the engine before it reached the switch; but the engineer should have stopped the engine before he reached the switch, or run his engine so slowly as to give petitioner sufficient time to alight therefrom before he was struck by the switch frame. On the contrary, the engineer neither stopped nor ran the engine slowly when approaching the switch, but ran the engine recklessly and at a great rate of speed, whereby defendant was guilty of great negligence, by reason of which petitioner was injured. His injury was not caused by any fault or negligence on his part. The declaration contained allegations as to age, wages, loss of earnings, loss of time, etc. By amendment, petitioner alleged: As in duty bound, he placed himself in position to be ready to alight from the engine and change the switch. It was the duty of the engineer to slow up or stop before reaching the switch, so as to give petitioner an opportunity to alight safely and change the switch. He had a right to presume that the engineer would slow up or stop, and give him an opportunity to alight for the purpose aforesaid, and fully expected and believed that the engineer would do so before reaching the switch; but the engineer, wholly unmindful of his duty, carelessly and recklessly ran the engine at such a rapid rate of speed

that it was impossible for petitioner to alight in safety, and before he realized that the engine would not be slowed up or stopped, and before he could change his position, he was struck by the switch frame. By another amendment, he alleged: Defendant was negligent in having and maintaining a switch too near the main-line track of its road, at the point where said switch was located. By reason of the fact that it was too near the track, the switch struck petitioner, and knocked him off the step of the engine, thereby causing his injuries. The switch should have been at least five feet from the track, but in fact it was only about three feet. Petitioner had not had time or opportunity given him at the time of the accident to take notice of the fact, of the negligent construction and location of the switch, and had a right to believe, and every reason to believe, and did believe, that the engineer would slow up or stop before reaching the switch, in order to give petitioner an opportunity to alight in safety. It was the engineer's duty to do so, but he did not, but ran his engine by the switch recklessly and carelessly, at a high rate of speed, in consequence of which, and on account of the negligent location of the switch, petitioner was knocked off by the frame, and injured. To the allowing of this last amendment, the defendant objected, upon the ground that it would set up a new cause of action. The objection was overruled, and to this ruling defendant excepted. All the material allegations in the petition as to the cause of the injury and the negligence of defendant or its agents were denied by the pleas of defendant. The pleas further set up that petitioner was well acquainted with the switch, its position and construction, and could, by the exercise of proper care and diligence, have avoided the accident.

There was a verdict for plaintiff for \$2,500, and, defendant's motion for a new trial being overruled, it excepted. The motion was upon the general grounds that the verdict was contrary to law and evidence. Further, because the court erred in failing to state to the jury that defendant denied the allegations of plaintiff's petition, and did not state to the jury the issues made by the pleadings and the evidence, and did not charge the jury the defendant's side of the case. Further, because the court erred in charging: "On the other hand, if you find that the company was negligent, either in the engineer running at too high a rate of speed, under all the circumstances, approaching the switch, or you believe that the company was negligent in having this switch in too close proximity to the track, and that by reason of that negligence the plaintiff was injured, then the plaintiff would be entitled to recover, unless the jury find that this was due to some fault on his part,"—the error being that said charge required the jury, in case it found the defendant guilty of negligence in reference to the speed of the engine or the proximity of the switch stand to the track, to find for the

plaintiff, unless the negligence alleged in reference to these two matters was due to some fault on plaintiff's part. Error in charging: "There is one other matter that you are to consider: If you should find from the evidence that the company was negligent, and while that negligence was existing, and while it was in operation, that he himself knew of it, or saw it, or could have avoided the consequences of it by exercising ordinary care on his own part, and if he failed to do it, then he cannot recover. For instance, if you should believe that it was a negligent act of the company to have the switch stand so close to the track, and if you should believe he knew of its being so close, and that it might injure him if he should stand on the step, if you believe, in the exercise of ordinary care, he could have seen it, and he could have foreseen this accident, and could have avoided the consequences of it, and if he failed to do so, under those circumstances he would not be entitled to recover,"—the errors being (a) that said charge required the jury to find that Hays had actual knowledge at the time of the accident of the alleged negligent proximity of the switch stand to the track, before they could find him negligent in reference thereto, and did not permit them to find him negligent in reference thereto if, by the exercise of ordinary care, he could have known of its proximity, thus requiring actual knowledge on the part of the plaintiff before he could be charged with negligence; (b) that it required the jury to find that Hays, at the time of the accident, could have seen the switch stand, and could have foreseen this accident, and could have avoided the consequences of it, before they could find the company not liable. Error in charging: "If you should believe that he was injured by one of those risks that are naturally incident to his employment, then he could not recover; but he does not undertake on his part the risk that he may be injured by the negligence of his fellow-servants, or negligence of the company, and, if he is injured by their negligence, that is not one of the risks that he assumes,—that he is held under the law to assume. Again, in that same line, I was requested to charge you: An employer has a right, if he sees fit, to adopt a mode of doing business that might be more hazardous than some other mode; yet, if the employees know it, and continue in the employment, they are held to assume it, because they could quit, and they are not obliged to go on; and if this switch stand was hazardous, more hazardous in being closer to the track than it would be if further off, and he knew of it, he would be held to assume the risk of it. On the other hand, to come back, if the jury believe that without any fault on his part, in the prosecution of his duty as an employé, he was injured by the fault of the company, if the jury believe the engineer was negligent in the way he approached the place, or believe that the switch was too close, and in the exercise of his (the plaintiff's) duty,

and without fault on his part, he was knocked off that engine, hurled to the ground, and his arm run over and mashed off, he would be entitled to recover,"—the errors being: (a) The statement, without qualification, that employes do not assume the risk of the employer's negligence, whereas the law is that if the company is negligent, and the employes know it, or in the exercise of ordinary care should know it, they are held to assume it as a risk attendant on the employment. (b) In charging that Hays must have known of the alleged negligence in reference to the location of the switch stand before he could be held to assume the risk; whereas, if, in the exercise of ordinary care, he should have known of it, he will be held to have assumed the risk, the request to charge (oral) having been to that effect, and not as charged. (c) In adding the clause beginning, "On the other hand," etc., said clause negating the preceding portion of the charge quoted, and tending to confuse the jury. Error in charging as follows, as set out in the preceding ground: "On the other hand, to come back, if the jury believe that without any fault on his part, in the prosecution of his duty as an employe, he was injured by the fault of the company, if the jury believe the engineer was negligent in the way he approached that place, or believe that the switch stand was too close, and in the exercise of his (the plaintiff's) duty, and without any fault on his part, he was knocked off of the engine, hurled to the ground, and his arm run over and mashed off, he would be entitled to recover,"—the errors being: (a) That said charge negated the preceding charge. (b) It required the jury to find that Hays was in fault before they could find defendant not liable. (c) It required the jury to find that Hays was hurt "without any fault" on his part before they could find the defendant not liable, and eliminates the separate defense of Hays' assumption of risk without regard to his care in taking the risk. Error in submitting to the jury the question of negligence in reference to the situation of the switch stand, the undisputed evidence showing that the plaintiff knew, or in the exercise of ordinary care should have known, the position, character, and construction of the switch stand.

Denmark & Adams, for plaintiff in error.  
Barrow & Osborne, for defendant in error.

PER OURIAM. Judgment affirmed.

(99 Ga. 290)

#### COOLEY v. TYBEE BEACH CO.

(Supreme Court of Georgia. Aug. 3, 1896.)

#### DEFAULT JUDGMENT—SETTING ASIDE—ACTION FOR DAMAGES—EVIDENCE.

1. Until the final adjournment of the term at which a judgment by default has been entered, the court has such control thereof that it may, for any legal and satisfactory reason, set the same aside. It follows that, even in a court where a final judgment may be rendered at the

first term, the judge may, in his discretion, and upon a proper showing at such term, set aside either a judgment by default, or a final judgment entered thereon.

2. A final judgment in an action for unliquidated damages cannot, in any case, be lawfully entered without the introduction of evidence showing the amount of damages to which the plaintiff is entitled.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Thomas Cooley against the Tybee Beach Company. Judgment by default. From an order opening the default, plaintiff brings error. Affirmed.

The following is the official report:

In 1895, under the pleading act of 1893, Cooley sued the Tybee Beach Company, in an action returnable to the November term, 1895, of the city court of Savannah, to recover damages resulting from its failure and refusal to comply with its certain bonds for title to real estate. Defendant was duly served, and required to appear at the next term of the city court, to be held on November 4, 1895. On that day, the first day of the November term, the entire docket of cases pending in said court was called, in accordance with the rule of practice therein; and, defendant failing to appear personally or by counsel, the case was marked in default, and a judgment by default was duly entered by the court in favor of plaintiff. On November 23, 1895, defendant moved to open the default. This motion was sustained, the judge below ordering that the default judgment be opened and set aside upon payment by defendant of all costs to date, and plea to be filed at once. To this judgment plaintiff excepted. It appears that the rules of the city court bearing upon the question are as follows: Rule adopted July 6, 1894: "The call of cases required by the third section of the act of December 15th, 1893, shall take place on the second Monday in each term; provided, that in any case in which the defendant make no appearance, either in person or by attorney, and the plaintiff shall be entitled to take judgment under the law irrespective of said act, then he may take such judgment on any previous day of said term." Rule adopted November 5, 1894: "The entire docket of cases pending in this court will be called on the first day of each term, for the purpose of ascertaining what cases are in default by failure of the defendant to appear, personally or by counsel, taking judgment in or otherwise disposing of the same; of continuing cases where both parties consent; of dismissing cases in which there is no controversy as to the propriety of the dismissal, and of otherwise disposing of cases in which there shall be no controversy as to the propriety of such disposition. This rule shall not abrogate or interfere with the existing rule of this court providing for the call of the appearance docket as provided in the act of December 15, 1893." The motion to open the judgment by default was upon the following grounds: (1) That the copy writ in the case was served upon J. C. Rowland, the vice

president, who retained the same for a few days; and then handed it to the president, D. G. Purse. Said Purse has been actively engaged over two months past in public duties of the most exacting character, in looking after the interest of the city of Savannah at the Atlanta Exposition, having thrown upon him the entire responsibility of the exhibits made at the exposition, and this has required all of his time. The writ which he received became misplaced among the papers in his office, and during the interim between the reception of it by him, and up to within a few days past, when he arrived in Savannah from Atlanta again, he has been almost continuously in the city of Atlanta, attending to the interest of the city of Savannah at said exposition. For these reasons the company was not represented in court on the opening day when the judgment was taken, although it had a meritorious defense, as hereinafter set out. (2) The judgment should be opened because defendant is not indebted to Cooley, and it files along with this motion its plea to the merits, which it asks the court to consider in connection herewith. Movant admits that it gave bonds for title, copies of which are substantially set forth in plaintiff's petition, to lots 47 and 48 in ward 1; on Tilton avenue, Tybee Island, and that plaintiff has paid up the full amounts required by said bonds as the purchase money of said lots. Movant denies that it has not complied with its said bonds, and states that it has always been ready and willing to make Cooley good and sufficient warranty titles in fee simple to the real estate described in said bonds. It desired to amend the plat of its land on Tilton avenue by increasing lots 47 and 48 about 57 feet deeper each, and by putting a street 60 feet wide in front and rear, whereas the lots delineated on the plat from which Cooley bought said lots had a 60-foot street in front, and a 20-foot lane in the rear; and to that end it caused its secretary and treasurer to tender duly-executed deeds to Cooley for lots 47 and 48, but embracing this larger area, but which Cooley declined. Defendant has always been ready to make him deeds to his lots as originally laid out, and is ready and willing to do it now, and has never refused to convey to him as above. This motion was supported by the affidavit of Purse, and there is also in the record the affidavit of the secretary and treasurer of defendant as to the tender of the deed as set forth in the motion, and Cooley's refusal to receive them. He further made affidavit that the board of directors of defendant have never refused to deliver the lots purchased by Cooley, but, on the contrary, have been ready and willing to deliver them, and only asked him, for convenience, to take the deeds for the lots as amended, being better and larger; but they are ready, and have been ready, to turn over to him the identical lots that he insisted upon. An exhibit to this affidavit was a letter from Cooley to defendant, dated May 18, 1893, requesting defendant to execute a deed to him for lots 47 and 48 as per the bonds for titles, and requesting, if it could

not deed the identical lots purchased, that it refund the purchase money, with interest.

O'Connor & O'Byrne, for plaintiff in error.  
Garrard, Meldrim & Newman, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 291)

**SAVANNAH SAV. BANK v. LOGAN.**

(Supreme Court of Georgia. Aug. 3, 1896.)

USURY—WHAT CONSTITUTES—DURESS.

1. Where a debt, including both principal and interest, and due by installments, if paid according to the terms of the contract is free from usury, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the installments matured, although, as a result, the creditor would receive, in the aggregate, a sum amounting to more than the principal and the maximum legal rate of interest.

2. That a creditor holding such a debt, which was secured by a mortgage, threatened foreclosure if the installments past due were not paid, and at the same time refused to cancel the mortgage unless the entire debt, including installments not due, was paid, did not amount to duress, nor render involuntary a payment by the debtor of the whole debt, even though such payment was made for the purpose of having the mortgage canceled; nor, under such circumstances, was the debtor entitled to a rebate of interest on the unmatured installments.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Annie M. Logan against the Savannah Savings Bank. Judgment for plaintiff. Defendant brings error. Reversed.

The following is the official report:

Annie M. Logan sued the Savannah Savings Bank, alleging: On December 14, 1892, she gave a note for \$1,300 to defendant, and to secure its payment made to defendant a note, and executed to defendant a mortgage on certain described land. Said note represented \$1,050 principal and \$250 interest, for a length of time not stated in the note or mortgage. The mortgage provided that payments on the note should be made in equal monthly installments of \$30 until it was paid. Petitioner was unable to pay the installments regularly or promptly, but did pay defendant, from time to time, amounts aggregating \$345. Defendant demanded the amount claimed by it as due and unpaid on October 11, 1894, to wit, \$975.77. To save her property from being sold under foreclosure of the mortgage, and at a loss, and to save costs, she was obliged to mortgage the property to get the money to pay the demand. On October 11, 1894, she paid defendant, under protest, said sum of \$975.77, because it refused to cancel the mortgage and note until said amount was paid, and it was necessary that the mortgage should be canceled to enable her to execute another mortgage on the property as above stated. On said date she owed the bank only \$832.40, as will appear by reference to a bill of particulars attached.

The difference between this sum and the \$975.77 is usurious, being for interest charged at a higher rate than 8 per cent. per annum, and she was legally and wrongfully compelled to pay said usurious interest to the bank, to her damage \$143.37. The suit was brought January 4, 1896. The note was for \$1,300, payable in monthly installments of \$30 upon the 15th day of each month, until the whole was paid. By its answer the bank admitted that the note was represented by \$1,050 as principal and \$250 of interest, but alleged that the loan of \$1,050 was made to plaintiff for the term of three years, seven and one-third months, and that she was charged interest on said sum at the rate of 6 $\frac{1}{2}$  per cent., which amount of interest is represented by said sum of \$250; that the principal and interest were consolidated, and divided into monthly installments of \$30, the loan being so arranged by the request of plaintiff, to meet her convenience in repaying same, and she was fully informed of and understood the conditions of the same at the time of making the loan and executing the note and mortgage; that defendant has the power to make such loans under the seventh paragraph of its charter granted to it (Act December 16, 1890); that it was not true that plaintiff was compelled to pay it the sum of \$143.37 as usury, and that it charged her any usurious rates; and that the true indebtedness of plaintiff to it was the sum of \$975.77, as set forth in bill of particulars attached. It did refuse to cancel its mortgage until its entire debt was paid, but it is not true that the \$975.77 was paid under protest, the payment being voluntarily made by plaintiff. There was a verdict for plaintiff for \$143.37, and, defendant's motion for a new trial being overruled, it excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in charging the jury that in this particular contract there is no provision that on failure to pay any one installment the whole amount becomes then immediately due and payable, and instructing the jury on that branch of this case, as far as those installments were concerned, that the company had no right to force Annie M. Logan, against her will, to pay the full amount of the principal and interest; the said charge being unauthorized by the evidence, and being otherwise illegal. As to this ground, the judge states that it was not contended in this ground that he had expressed any opinion therein as to what had or had not been proved by the evidence. Error in charging: "If it was not voluntarily entered into; if the jury should find that the plaintiff entered into it because she was forced, because she believed that the defendant could foreclose and turn her out of possession; that she raised money by other mortgage, and it was necessary, before she raised that money, that the mortgage paid by it be cleared off; that she was doing it to es-

cape foreclosure,—if the jury believe that she paid under protest, then I charge you that that would not be such accord and satisfaction as would be a defense for this company." The said charge being unauthorized by the evidence, and being otherwise illegal. Error in charging: "If the jury find that any interest in excess of eight per cent. was charged, all of that excess the bank would have to refund in this suit, the plaintiff being entitled to recover it back in this suit, provided she did not voluntarily enter into the agreement or settlement in accord and satisfaction in which this very question of usury was discussed." The said charge being unauthorized by the evidence, and being otherwise illegal.

A. L. Alexander and Denmark, Adams & Freeman, for plaintiff in error. Wm. P. Hardee and Edward S. Elliott, for defendant in error.

PER CURIAM. Judgment reversed.

(90 Ga. 297)

#### LOCKE et al. v. WILLINGHAM.

(Supreme Court of Georgia. Aug. 10, 1896.)

##### APPEAL—REVIEW—NEW TRIAL.

No error of law was committed on the trial of this case, and, the verdict being supported by the evidence, this court will not control the discretion of the trial judge in refusing a new trial. (Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by W. J. Willingham, Jr., against R. D. Locke and others. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

On February 12, 1896, Willingham sued Locke and Hendricks upon six promissory notes dated April 17, 1893, and due in the months from July to December, 1894, each being for \$19.50. Defendants pleaded that on April 17, 1893, Locke, acting for both defendants, attended a public sale of lots of land belonging to plaintiff, with the purpose of bidding for and buying some of the property; that the advertisements of the sale stated that it would be a bona fide auction sale to the highest bidder, and that there would be absolutely no by-bidding allowed; that, in the belief that the sale was being conducted as advertised, Locke, in good faith, bid for and bought lots 4, 5, 6, 7, and 25, for various sums, aggregating \$780; that among the several persons bidding on said lots was Roy Sims, who bid against Locke for them, causing him to bid more for them than he would otherwise have bid, and more than they were worth; that lots 16 and 89 were knocked off to Sims, as the highest bidder, for \$150 each, but he never paid for them, and no effort was made to force him to consummate the sale, but said lots were subsequently sold to other parties for less money; that Sims was not a bona fide bidder, but was acting at the instance of plaintiff, for the purpose of causing bona fide bidders to bid more for the

property than they would otherwise have bid, but defendants did not know this, and only discovered the same after plaintiff's petition was filed; and that his action in having a puffer at the sale was a fraud upon defendants, rendering void the sale, and the notes founded thereon. Further, that Sims was acting for plaintiff's benefit, which fact was concealed from defendants and others who were present for the purpose of bidding and buying at the sale; that, if Sims had bought in the property aforesaid, plaintiff would not have held him responsible for his bid; and that \$780 was \$430 in excess of the real value of the lots bought by defendants. They offer to reconvey the title thereto, upon receipt of the payments they have made, and the notes still held by plaintiff.

The verdict was in favor of the plaintiff, and defendants' motion for a new trial was overruled. The motion contains the following, in addition to the general grounds: The court erred in charging the jury: "It is not a question as to what Mr. Sims may have thought or understood. You are to determine what was actually the fact. You will take into consideration all the evidence as to what passed between Mr. Willingham and Mr. Sims, what they said to each other, and the purpose of their conversation; and if Mr. Sims was incorrectly impressed, if he thought never so truly that he was employed and procured by Mr. Willingham to go there and be a puffer, if in point of fact Willingham never had intended to procure him to so act, and was perfectly ignorant of Sims having such impression, and did not intend to have any puffers, and did not, in point of fact, have any, the fact that Mr. Sims went there and bid under the impression that he was to be relieved would not vitiate the sale." Error in charging: "The mere fact that all who bid at the public sale were not forced to comply with their bids does not vitiate the sale. The seller of any property may, of his own volition, release any purchaser from complying with his bid, for any reason that is satisfactory to the seller, and that would not release or relieve other bids at the same sale at all. Testimony of that nature and kind in this case is allowed to go to you simply to throw light on the general case, so you may better determine the motives of these parties, and determine thereby what was the real engagement between them, if they had any engagement. After a sale is completed, —after the contract is made,—the parties themselves to the contract may rescind at any time, and it is nobody's business but their own; and hence the charge that any seller may relieve bona fide bidders of their agreement to take the property, if they see fit so to do, after the transaction is over." Error in refusing to charge: "If the jury believes from the evidence that Mr. Sims bid on this property with the understanding or belief that he would not be held responsible for his bids in case they should be the highest bids on

any lots, and that Mr. Willingham received the benefit of such bids, said Sims would be a by-bidder, under the law, whether Willingham knew of such by-bidding and understanding or not." Error in overruling an objection to the question asked plaintiff, whether the lots sold to defendants were sold for more than they were worth, the ground of the objection being that the witness had no right to give an opinion, and in receiving the answer, over objection that it was irrelevant: "No, sir; they sold for less than what they were selling beyond there half a mile." Error in refusing to allow Locke to answer the question, propounded on redirect examination, "Did Captain Sims bid generally on all of the lots?" the court ruling, "The question is objectionable on the ground that it has already been gone over." Error in asking counsel, at the end of the charge, and in the hearing of the jury, whether or not the notes sued on stipulated for attorney's fees, without explaining to the jury, or in their hearing, the reason for asking such question. The court charged: "But if before the bid is made the seller agrees with the bidder that the bidder shall make bids so as to create the impression that he wants the property, but that he shall not be held to any of his bids, but be relieved of all liability to the seller, that would be by-bidding, which would vitiate the sale. The sole question for you to determine, under the light of what I have tried to make clear to you as the law of the case, is whether or not the plaintiff and Mr. Sims agreed together that Mr. Sims should be a puffer or by-bidder at that sale, and that Mr. Sims did make fictitious bids by which he was not bound, which engagement was not known to the other bidders, and thereby fictitious bids were made by the consent and procurement of the seller. If any such thing as that transpired at the sale, then the sale is void, and may be rescinded at the option of the defendants in this case. If there was no such bidding as that, the contract is binding, and they cannot rescind it." It is alleged that the court erred in failing to go further, in the light of the evidence adduced by plaintiff intended to show that the lots did not sell for more than half their real value, and charge substantially that, the question being one exclusively of fraud in the sale, it was not necessary for the defendant to show that he paid more for the property than its real value, or that the by-bidding, if any, caused such fictitious value, but that the mere proof, if there was such proof, that there was a by-bidder present and bidding at the sale at the instance or procurement of the seller, either by express or implied agreement, would be sufficient to vitiate the sale; and in failing in any other part of the charge to instruct the jury to this effect. The court charged: "You consider what was said, and the circumstances under which it was said, between the parties. Acquiescence or silence, under all the circumstances, must be taken into considera-

tion by the jury, and they are to determine whether the circumstances are such as to make acquiescence assent to any proposition. You see whether any assent to any proposition on the part of Sims was so made by Mr. Willingham, and whether thereby they entered into an agreement. You will be careful, in considering any admission by way of silence or acquiescence, or assent arising from silence, to scan the evidence closely, to see what the parties understood and intended under the circumstances, so you will be careful not to impute to one a motive or purpose which he did not entertain. On the other hand, you will be likewise careful to impute to all parties in the controversy or contract, or to the transaction, a genuine motive, the true purport of which their conduct and words indicate." The assignment of error here goes to the last two sentences of the charge quoted, it being insisted that the same tended strongly against defendants' position that the plaintiff, if he did not enter into an express contract of by-bidding, was bound by his assent thereto, and bore a very strong intimation of an opinion entertained by his honor that there was no intentional assent on the part of the plaintiff which would bind him, which intimation may have and probably did influence the jury in making up their minds as to whether or not there was sufficient evidence to show such assent on the part of the plaintiff as might bind him for acts done in pursuance thereof.

Anderson & Jones, for plaintiffs in error.  
A. W. Lane, for defendant in error.

PER CURIAM. Judgment affirmed.

(39 Ga. 285)

### HOWARD v. HOWARD.

(Supreme Court of Georgia. Aug. 10, 1896.)

ACTION ON NOTE—INSTRUCTIONS—ARGUMENT OF COUNSEL.

The exceptions to the charge of the court, in view of the issues involved and the evidence submitted, are not well founded; and while this court does not entirely approve the argument of counsel, as it appears in the record, as being strictly justified by the evidence, the refusal of the court to grant a mistrial because of the misconduct of counsel did not constitute such an error as would require the control of his discretion in the refusal of a new trial, especially where, as in the present case, the overwhelming preponderance of the testimony is in favor of and sustains the finding of the jury.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Sallie Howard against H. L. Howard. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Miss Sallie Howard brought suit against H. L. Howard, her brother, upon a promissory note dated February 18, 1892, for \$500.65 principal, "with interest from —, at the rate of — per cent. per annum, with all ex-

penses of collection included, ten per cent. attorney's fees on principal and interest." The defendant pleaded as follows: In consideration of services to be rendered by him to plaintiff in looking after the money for which the note was given, and of the fact that he gave his own personal note for money which he was using for her benefit, he was to pay her no interest; and it was on that account that the provision in the note as to interest was left blank, it being the intention of the parties that no interest was to be charged. It was further agreed that he was to pay her said money when she needed it; and she has never called upon him for the payment thereof. It is not true that the note was ever presented to him for payment, nor that payment was demanded or refused; nor is it true that there is now due on the note the principal and interest as alleged. Since the death of their father, in 1891, defendant has looked after the affairs and business of plaintiff, and she and her mother have been under his personal care and protection. Prior to the giving of the note, defendant had been investing and looking after the collection of plaintiff's money several years. He had already loaned said money to one Newman; and in order that plaintiff might be perfectly secure from loss, and that the risk of loss might fall on defendant, instead of plaintiff, he executed to her his own note for the amount of the loan. He only collected back the money after considerable delay, and with a great deal of trouble, and in small amounts from time to time, extending over a long period; and plaintiff agreed, in consideration of the fact that he assumed all the trouble and risk of collecting the debt, that he was to pay no interest on the note, and was not to be called upon to pay the principal until she needed it, and notified him of the fact. She has never so notified or called upon him. Further, plaintiff is not entitled to recover the amount sued for, because she was and is indebted to him in certain sums, shown by bill of particulars attached, with interest thereon, for medical services rendered by him to her, as well as for board he furnished her, which sums he pleads as a set-off.

The jury found for the plaintiff the full principal of the note, together with interest and 10 per cent. attorney's fees. Defendant's motion for a new trial was overruled, and he excepted. The motion alleges that the verdict is contrary to law and evidence, and that the court erred in charging the jury: "If you believe that the plaintiff went to the house of H. L. Howard by reason of a contract he entered into with her mother, whereby he undertook to board her and her mother for this year for a valuable consideration, that he was to take the place for so much, and that their board was a part of the rent compensation for the place, and she went there under that sort of an arrangement, and stayed there under that sort of an arrange-

ment, and after she had left there for a visit, or any other purpose, that contract was changed, and she never went back there any more, then he would not be entitled to charge her any board. If the new contract was silent on the question of whether she was to pay anything for the time already spent with him, the presumption would be that, in making the new contract, he was fully compensated for the time already boarded. If, on the contrary, there was no such agreement as that, if she went to his house without any information on his part, and under circumstances showing he was to entertain her as a guest simply, and he did entertain her as a guest simply, he could not afterwards charge her board without her consent. But if she went there to board, and he understood she was there for that purpose, an implied obligation thereby arose on her part to pay for the board what it was reasonably worth. And, in making the new contract, her liability was retained. But I hardly think it worth while to charge you any further on that subject. The evidence is for your consideration. If this new contract was made, and nothing said about board, the presumption is that he was satisfied with the new contract. If the new contract was entered into before she left there, and she continued to stay there after the new contract was entered into, she would be liable for that time." The errors assigned upon this charge are that no presumption arose that, in making the new contract, defendant was fully compensated for the time already boarded, if the new contract was silent on the question of whether plaintiff was to pay anything for the time already spent with him; that the uncompleted sentence of the charge quoted was an intimation of the opinion on the part of the court as to the evidence; that the making of the new contract for rent embracing board raised the presumption that plaintiff was to pay for the board what it was reasonably worth, which board was to be paid for outside of the amount paid by defendant for rent; and that this applied to board already due, as well as to become due in the future. The court charged that, if the jury found the full sum of principal and interest due plaintiff, she would be entitled to recover also 10 per cent. attorney's fees. Defendant contends that no attorney's fees could be recovered, the contract sued on having been made after the act of 1891, providing that all obligations to pay attorney's fees in addition to the interest specified therein are void and of no effect.

Claud Estes, Esq., counsel for plaintiff, in closing argument for plaintiff to the jury on the trial of said case, and before the closing argument for defendant (defendant having the conclusion), in a long, impassionate strain of oratory, used language substantially as follows, namely: That this lordly doctor (referring to defendant) had driven his old mother out of her house; that he had

driven her, an outcast, from that roof under which she bore her children; that it was a distressing sight to see an old, aged mother driven out from under her roof, which her old husband had left her as a shelter and protection to her old age, by her own boy, her strong-handed son, that she had nursed as an infant; that he (defendant) had taken the old homestead away from her, and run the old rat out of the barn, and she's got nothing else to do but go off and die somewhere; that he was trying to take the bread out of his sister's mouth, and rob her; that he seeks to rob his sister of her patrimony; that the brother, that plaintiff loves as only a sister can love a brother, was robbing her of the money which that old father had worked for and given her; that defendant had taken from her the last cent she had; that she did not have money enough to buy a pair of shoes; that he compromises with his conscience, and files a defense that will stare him in the face as long as this courthouse stands; that he (defendant) was trying to take the bread from his sister, and rob her; that he (counsel) ought to abuse Dr. Howard (this defendant), but would not do it; that the jury have all got hearts and feelings, and he (counsel) knew what the verdict would be; that he (counsel) wanted to see a jury one time who would find against plaintiff for every dollar she's got in the world; that the defendant had got the old homestead, which belongs to that old mother, and had driven her and her daughter out from their home; and that that poor old woman was an outcast from her own roof, and left without a shelter over her head; and that there is nothing for her to do but go off and die,—together with other such language in the same general strain, extending throughout the length of said argument, from the beginning to the end thereof. Immediately after the close of said argument by plaintiff's counsel, defendant, by his attorney, requested that the court permit the jury to retire for a moment, in order that defendant might make a motion in said case, which perhaps was not proper for the jury to hear. The court thereupon having permitted the jury to retire into another room, defendant requested and moved the court that said case be withdrawn from the jury, and a mistrial declared in said case, upon the ground that the said remarks of counsel were improper, and had a prejudicial effect against defendant, and disqualified the jury from dispassionately and calmly and without prejudice passing upon said case. Defendant, in said motion, contended, that the jury were by said motion wrought up to such a pitch of fervor and excitement and passion against the defendant as to deprive defendant of his right to a fair and impartial trial. Defendant, in said motion, contended that said language of counsel was improper, and in particular that portion of said argument referring to defendant's driving his

aged mother, an outcast, from her roof, and as to his mother being driven out by him from the roof which her old husband had left her, and as to her being left an outcast in the world, without a shelter over her head, and with nothing to do but go off and die, and as to defendant taking the bread out of plaintiff's mouth, and taking from her her last dollar, and not leaving her money enough even to buy a pair of shoes, and other such similar language, which was absolutely not based upon any evidence or any deduction to be drawn from the evidence, but was brought in gratuitously, and without excuse or justification, to inflame the minds of the jury against defendant. The court overruled said motion, and refused to withdraw the case from the jury, or to declare a mistrial therein, and required said case to proceed to a conclusion and verdict before said jury. Error is assigned upon the refusal of the court to withdraw the case from the jury, and declare a mistrial, and upon the failure of the court to rebuke or stop counsel from the use of such language, or instruct the jury to disregard it.

In overruling the motion for a new trial, the judge says: "This court is of opinion that the charge to the jury touching the plaintiff's liability to the defendant for board, and to which exception is taken, was rather too favorable to defendant than otherwise. The record shows that there was no material conflict in the evidence on this point, and, under that evidence, there was certainly no contract, expressed or implied, on the part of the plaintiff, to pay any board for the time spent with defendant. She was at his house by virtue of a contract between him and his mother, of which contract plaintiff was a beneficiary, but to which she was not a party. The defendant admitted his liability on the note declared upon, and assumed the burden of establishing his counterclaim; and the right to open and conclude the argument to the jury was invoked by and granted to his attorneys. During the entire speech of Mr. Estes for the plaintiff, defendant's attorneys sat in silence, and uttered not a word of objection, and raised no question as to the propriety of said argument until it had been entirely concluded, when the jury was sent out, and the motion was made as stated. It did not occur to the court to interrupt and rebuke Mr. Estes: (1) Because the argument, in the main and as a whole, did not impress the court as being improper and unduly prejudicial to defendant's rights; (2) because the court was not paying that strict attention to the argument to the jury which is accorded to arguments addressed to the court, presuming that counsel for defendant, who was following the argument, would call to the attention of the court any transgression of strict propriety on the part of opposing

counsel, unless he should see proper to reserve the privilege, as advocates sometimes do, of criticising and replying to such arguments as seem unfair, in his concluding argument to the jury. The language of Mr. Estes which is excepted to, though rather extravagant, seems to the court authorized by the evidence; certainly is that wherein he criticises the conduct and attitude of defendant towards the plaintiff. Whether the conflict between the testimony of defendant and of his mother and other evidence in the case authorizes all counsel said or not, the court was not at any time requested to rebuke counsel, and warn the jury against being unduly influenced by his remarks. But, conceding the argument to have been improper, the evidence demanded the verdict for the plaintiff, and such verdict ought to have been rendered though her counsel had not uttered a word by way of argument to the jury. It is doubtful if defendant's testimony in his own behalf, if uncontradicted, would authorize a finding in his favor. Certainly, such a verdict ought not to be set aside because of the argument of counsel. The verdict for the plaintiff declares the truth in the case, is just, was demanded by the evidence, and ought to stand."

Steed & Wimberly, for plaintiff in error.  
Estes & Jones, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 300)

# PETTEY v. DUNLAP HARDWARE CO.

(Supreme Court of Georgia. Aug. 10, 1896.)

## INJUNCTION—GARNISHMENT—REMEDY AT LAW.

1. Money deposited in a bank to the credit of "P., agent," could be reached by a garnishment served upon the bank at the instance of a creditor of P.; and if the bank knew the creditor's contention was that this money in fact belonged to P. individually, and not to another for whom he claimed to act as agent in making the deposit, it could not, except at its peril, pay over the money to the alleged principal; and, this being so, there was no occasion in such case for the creditor to obtain an injunction to prevent the bank from so doing, although the debtor was insolvent.

2. It appearing at the hearing of an application for such an injunction that the bank had answered, denying indebtedness, and that its answer had been traversed, the injunction should have been denied, the plaintiff's remedy at law under the garnishment proceeding being ample and complete.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by the Dunlap Hardware Company against W. B. Pettey. From the judgment, defendant brings error. Reversed.

Estes & Jones, for plaintiff in error. Dashner, Park & Gerdine, for defendant in error.

PER CURIAM. Judgment reversed.

(99 Ga. 301)

**WILLIAMS et al. v. CHEATHAM.**

(Supreme Court of Georgia. Aug. 10, 1896.)

**RES JUDICATA.**

It appearing from the allegations of the plaintiff's petition as amended that the various matters of which she therein complains against the defendant had been adjudicated against her by a consent judgment rendered in "an equity proceeding" to which both of them were parties, and the declaration not making it, for any reason therein alleged, apparent that this judgment was void, and neither it nor any of the pleadings upon which it was founded being set forth, and all the presumptions of law being in favor of its validity, the petition set forth no cause of action, and the court erred in overruling the demurrer to the same.

(Syllabus by the Court.)

Error from superior court, Madison county; Seaborn Reese, Judge.

Action by Elizabeth Cheatham against B. B. Williams and others. From a judgment overruling a demurrer to the complaint, defendants bring error. Reversed.

W. M. Howard and John J. Strickland, for plaintiffs in error. H. H. Carlton, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 303)

**GEORGIA R. R. LESSEES v. JONES.**

(Supreme Court of Georgia. Aug. 13, 1896.)

**STOCK KILLED ON TRACK—EVIDENCE.**

The evidence in this case shows conclusively that the defendants exercised all the care and diligence required of them by law to prevent the killing of the plaintiff's animal, and the verdict finding them liable was therefore contrary to law, and ought to have been set aside.

(Syllabus by the Court.)

Error from superior court, Warren county; Seaborn Reese, Judge.

Action by M. M. Jones against the lessees of the Georgia Railroad. Judgment for plaintiff. Defendants bring error. Reversed.

Jos. B. & Bryan Cumming and M. P. Reese, for plaintiff in error. Jas. Whitehead, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 310)

**HALL v. WORLEY.**

(Supreme Court of Georgia. Aug. 13, 1896.)

**DIRECTING VERDICT—CONFLICTING EVIDENCE.**

The action being against the administrator of a married woman, upon a promissory note signed by herself and her husband, the defense to which was that she signed as surety only, and the evidence being conflicting as to whether, in executing the note, she contracted as a surety, or as a principal, in her own name and right, it was error to direct a verdict for the defendant.

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

Action by James N. Hall against Joseph N.

Worley, administrator of Mrs. E. C. Hanes. Judgment for defendant. Plaintiff brings error. Reversed.

The following is the official report.

J. N. Hall sued the administrator of Mrs. E. C. Hanes, deceased, upon a promissory note for \$1,210, "for purchase money of land," dated February 9, 1889, due December 25, 1889, and signed by E. C. Hanes and C. C. Hanes. Defendant pleaded that Mrs. E. C. Hanes signed the note as security for C. C. Hanes, who was her husband, and that the consideration of the note was money borrowed by C. C. Hanes, and there was no consideration moving or justifying the signature of E. C. Hanes thereto, save the suretyship for her husband. At the trial, after an introduction of the note, C. C. Hanes testified for the defendant that he borrowed the money for which the note sued on was given, and his wife signed it as security, and at his request; that he once went to plaintiff to borrow this money, and he refused to let witness have it, and he had Seymour to go and see plaintiff, who afterwards let him have it. Seymour testified that he went to see plaintiff, and told him if he would let C. C. Hanes have the money his wife would secure him by deed to her land. In rebuttal plaintiff testified: "I never did let C. C. Hanes have any money. He came to me to get money, and I refused to let him have it. I never had any dealings with C. C. Hanes at all. I didn't let him have any of the money for which the note sued on was given. He had nothing to do with it, except to sign with his wife as her security. He owned some of the land deeded to me to secure this note. I loaned the money to buy part of this land with. My money bought it. I did not let C. C. Hanes have any money. The land my money paid for in part never was in the estate of Mrs. Hanes. I have a deed to the land my money went into, to secure the payment of this note." The court ruled out the testimony of plaintiff, and directed a verdict for the defendant. Plaintiff assigned these rulings as error.

G. A. Worley, for plaintiff in error. Jos. N. Worley, in pro. per.

**PER CURIAM.** Judgment reversed.

(99 Ga. 319)

**DODD et al. v. MAYFIELD.**

(Supreme Court of Georgia. Aug. 13, 1896.)

**RES JUDICATA.**

Where, in a given transaction, several promissory notes resting upon the same consideration are executed, and pass by negotiation into the hands of different third persons, though in a suit instituted by a holder of one of these notes the maker defends by filing a plea of failure of consideration, and his plea is found against him, he is not thereafter estopped by the judgment rendered in that case from filing a like defense to a similar action brought by a holder of another of such promissory notes. Estoppels by judgment, like estoppels in pais, must be mutual.

(Syllabus by the Court.)

Error from superior court, Milton county; George F. Gober, Judge.

Action by E. Mayfield against E. S. Dodd and others. Verdict for plaintiff. Defendants bring error. Reversed.

The following is the official report:

Mayfield, as bearer, sued E. S. Dodd, J. D. Neese, and T. J. Bettis on a promissory note for \$100, dated March 24, 1894, and due November 1, 1894, payable to J. M. Dodd or bearer, and signed by defendants. Defendants pleaded not indebted, and that the note was given for a certain jack, which was worthless, and hence the consideration of the note had failed. There was a verdict for plaintiff on conflicting evidence. Defendants moved for a new trial, and, the motion being overruled, they excepted. The motion was upon the ground, among others, that the court erred in charging the jury: "If the jury should believe from the evidence that another note was given as a part of the consideration of the purchase of the jack, along with the note sued on, and that the first note had been sued on, and a plea filed thereto on the ground of failure of consideration, and that this plea had been found against this defendant in a case where such plea was tried, and the facts were such as to allow the trial of such plea on its merits, then the matters set up in such plea, and determined against the defendant, would be res adjudicata, and they could not be set up against him in this case." It was insisted by the plaintiff that on the trial of the former case the defendants insisted on the plea of failure of consideration, for the reason that the payee had an interest in the note, and that the bearer held it as collateral, and had only a part interest therein.

Jas. A. Dodgen and J. P. Brooke, for plaintiffs in error. T. L. Lewis and B. F. Simpson, for defendant in error.

PER OURIAM. Judgment reversed.

(99 Ga. 314)

MARTIN et al. v. McCONNELL et al. (two cases).

(Supreme Court of Georgia. Aug. 18, 1896.)

STIPULATION TO DISMISS—ENFORCEMENT.

Where an agreement for the dismissal of a pending action rests upon the condition that the defendants will execute a mortgage to secure a balance due upon the debt sued for, after payment of a sum certain in pursuance of such agreement, if the defendants offer to comply, by the due execution of the mortgage, the plaintiffs cannot defeat the right of the defendants to a dismissal of the action by a refusal to accept the mortgage. The court erred in charging to the contrary.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action by J. C. McConnell & Co. against E. & B. C. Martin. Judgment for plaintiffs. Defendants bring error. Reversed.

The following is the official report:

McConnell & Co. sued E. & B. C. Martin upon a promissory note for \$73.38. Defendants pleaded that since the suit was brought they had made a contract with plaintiffs by which the note sued on was fully paid off. Upon trial in the superior court the jury found for the plaintiffs the amount sued for. The testimony for defendants was as follows: About the 1st of March, 1895, after the suit on this note and several others of plaintiffs against defendants had been commenced, defendants proposed to plaintiffs to make to them a payment on the debt they owed plaintiffs, which consisted of the note sued on and several others, and give a mortgage on real estate to secure the same, provided plaintiffs would withdraw the suits and pay the costs, and wait with them until fall. Plaintiffs agreed to the proposition. In accordance with the contract, defendants paid \$17, in a bale of cotton, and they had deposited a note with plaintiffs as collateral, made by P. J. Shore; and, after plaintiffs sued, defendants had told Shore not to pay the note until they and plaintiffs had a settlement. After the contract by plaintiffs to extend time until fall, defendants ordered Shore to pay over to plaintiffs the amount due on the note. After defendants made the payment of \$17, and the Shore note of \$103, plaintiffs said one of them would meet defendants at Clarkesville, and they would draw the mortgage. Defendants did meet J. C. McConnell, one of plaintiffs, at Clarkesville, as agreed, but he then refused to carry out the contract because one of the firm objected to the arrangement. So the mortgage was never executed, but defendants had been ready, and were now ready, to execute the same as agreed, and otherwise fully carry out the contract. If the contract was to be disregarded, they desired the \$17 credited on this note and three other small notes divided equally between each note. J. C. McConnell testified that defendants made the payment of \$17, and nothing was said as to where it was to be placed. He had not placed it on any of the notes defendants owed him, but he did not care where it was placed. He was willing to have it placed on this note and three other small notes. He did agree with defendants that if they would pay him the \$17, and secure the balance with a mortgage that Mr. Bowden would say was good, he would extend the time till fall on all defendants owed them, but defendants had never made the mortgage. He did not agree to pay the costs in the cases in the justice's court, and did not say anything about the Shore note to defendants the day they came to see him; but when Shore got ready to pay his note he accepted it, and gave defendants credit on the \$300 note, for which it was placed in his hands as collateral security. Defendants except to the following instructions in the charge of the court: "If the defendants had placed a note on another party, with plaintiffs as collateral, to secure a certain note for \$300 made by defendants, payable to plaintiffs, and plaintiffs still

held the note as collateral at the date on which this contract to extend time is claimed to have been made, and the collateral note was paid to plaintiffs by the party who owed it, I charge you that that was no consideration for the promise to extend time to defendants on this note; and I charge you that plaintiffs would have had the right to credit the amount of the proceeds of the collateral note on the \$300 note for which it was given or turned over to plaintiffs by the defendants to secure. If you should believe there was a contract between plaintiffs and defendants to extend time to defendants, by defendants making or executing a mortgage or deed to plaintiffs to secure the indebtedness of defendants to plaintiffs, and the mortgage or deed has never been executed in accordance with the contract, the contract would not be binding on plaintiffs, notwithstanding defendants may have made some small payments on debts due to plaintiffs."

Geo. P. Erwin, and J. C. Edwards, for plaintiffs in error. Jones & Bowden, for defendants in error.

**PER CURIAM.** Judgment in both cases reversed.

(99 Ga. 317)

**NORRELL v. MORRISON.**

**LEMLEY v. SAME.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**APPEAL FROM JUSTICE—FILING.**

1. Where a case is tried in a justice's court, and the losing party desires to appeal, he must enter the appeal within four days from the rendition of the judgment complained of; and where it does not appear, either from an entry of filing, or from extrinsic evidence, that an appeal was actually filed with the magistrate rendering the judgment within the time above stated, the same should, on motion, be dismissed.

2. This case differs from that of *Harvey v. Allen*, 19 S. E. 246, 94 Ga. 455. There it affirmatively appeared that an appeal from a decision of the court of ordinary actually arrived at the ordinary's post office in due time, and under the peculiar facts of that case this was treated as a filing with the ordinary himself.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; J. J. Kimsey, Judge.

Actions by J. Norrell and E. Lemley against D. M. Morrison in a justice court. Judgment for plaintiffs, and defendant appeals. From an order refusing to dismiss the appeal, plaintiffs bring error. Reversed.

W. S. Huff and W. A. Charters, for plaintiffs in error. R. H. Baker, for defendant in error.

**PER CURIAM.** Judgment in each case reversed.

(99 Ga. 336)

**SCOTT v. WHEELER.**

(Supreme Court of Georgia. Aug. 24, 1896.)

**TRIAL—ARGUMENTS OF COUNSEL—REVIEW OF EVIDENCE.**

1. Where an administratrix had advertised land for sale as the property of her intestate, to

which a claim was filed, and after a trial of the claim case had been begun she filed an equitable petition for the purpose of more distinctly asserting the title of her intestate, which was met by an answer from the opposite side, the effect of all of which was to leave in controversy only a single material issue, as to which the administratrix carried the burden of proof, there was no error in allowing her counsel to open and conclude the argument.

2. The evidence warranted the verdict, and none of the numerous grounds of the motion for a new trial, so far as approved by the judge, disclose the commission of any error which would warrant this court in overruling a judgment refusing to set the verdict aside.

(Syllabus by the Court.)

Error from superior court, Cherokee county; George F. Gober, Judge.

Sarah L. Wheeler, administratrix, obtained an order for a sale of land. A. K. Scott filed a claim thereto. Judgment for the administratrix, and claimant brings error. Affirmed.

P. P. Dupree, J. P. Brooke, and Clay & Blair, for plaintiff in error. W. A. Teasley and Brown & Hutcherson, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 322)

**MIZE v. BREWER.**

(Supreme Court of Georgia. Aug. 24, 1896.)

**APPEAL IN FORMA PAUPERIS—AFFIDAVIT—AMENDMENT.**

An affidavit to appeal in forma pauperis from a judgment rendered by a county court, upon which affidavit was an entry of filing, duly signed by the county judge, and which was in all respects complete, except that it lacked the signature of the county judge to the jurat, was amendable by supplying the deficiency; and it was therefore error not to allow the appellant to show by that judge that the failure to sign was a clerical omission, and also error to refuse to allow him to sign the jurat instantan.

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

Action by S. S. Brewer against George B. Mize. From the judgment, defendant brings error. Reversed.

The following is the official report:

The case of *Brewer v. Mize*, pending in the superior court on appeal from the county court of Elbert county, being called for trial, counsel for plaintiff moved to dismiss the appeal on the ground that the affidavit in forma pauperis had no jurat to it; the affidavit being in all other respects of proper form, and being dated August 15, 1894. On the back of the affidavit was written: "Filed this August 15, 1894. P. P. Proffitt, Judge C. C." The only objection offered to the affidavit was that it lacked the signature of the judge of the county court to the jurat. In answer to this objection, defendant moved the court to allow him to show by the judge of the county court, who was then present in court, that it was a clerical omission of his that his signature did not appear on the jurat, and moved further to have the judge of the county court supply the deficiency instantan. This

the court refused to allow, and dismissed the appeal, to which ruling appellant excepted.

L. O. Van Duzer, for plaintiff in error. J. P. Shannon, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 326)

**CRAIG v. KIKER.**

(Supreme Court of Georgia. Aug. 24, 1896.)

**FRAUDULENT CONVEYANCES—INSTRUCTIONS.**

There being nothing in the evidence to warrant the judge in giving in charge to the jury paragraph 1 of section 1962 of the Code, it was error to do so; and as the evidence in support of the verdict was not strong, and there was much evidence to the contrary, this error is cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

Action by E. J. Kiker against P. M. Craig. Judgment for plaintiff. Defendant brings error. Reversed.

W. H. Dabney, for plaintiff in error. E. J. Kiker, R. J. & J. McCamy, and F. A. Cantrell, for defendant in error.

**PER CURIAM.** Judgment reversed.

(99 Ga. 327)

**ESLINGER v. WESTERN & A. R. CO.**

(Supreme Court of Georgia. Aug. 24, 1896.)

**DEATH OF EMPLOYEE—NEGLIGENCE OF MASTER—EVIDENCE.**

The plaintiff's evidence made no stronger case at the last trial than at the trial under review when the case was before this court at the March term, 1895. 22 S. E. 580, 95 Ga. 734. It was then held that she was not entitled to a recovery, and consequently there was no error at the next hearing in granting a nonsuit. The amendment to the declaration alleging an additional ground of negligence against the defendant was not sufficiently supported by evidence to authorize a recovery on that ground.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Lillie A. Eslinger against the Western & Atlantic Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

The following is the official report:

Mrs. Eslinger sued the railroad company for damages because of the killing of her husband. Her declaration alleged in brief: On June 4, 1892, and for some time previous, her husband was employed by defendant as car coupler in its yard in Atlanta. On June 4, 1892, without negligence on his part, but because of the gross carelessness of defendant, he was killed while in the discharge of his duty as coupler in said yard. He worked at night, and had been so employed since his connection with defendant. On said date he came on duty as usual, and proceeded to per-

form the duties assigned to him. At a point about 25 yards north of defendant's depot is a side track upon which cars are placed at a transfer shed. This track runs north and south, passes by the depot, and connects with a series of tracks south of the depot. Some few feet south of said transfer shed, the space between the rails of this side-track had been floored with heavy oak planks, fastened so as to leave no space between the planks, except near the rails, on the inside of the rails, for the flange of the car wheels to run in, but entirely too wide for this purpose. Ordinary care required defendant to see that this flooring was properly done. A few feet south of the point where her husband was killed, these planks had been sawed off square at the ends. Some of them were longer than others. From the top of the planks where they had been sawed off, to the ties upon which the planks were fastened, left a fall or step-off of three or four inches. Some time during the day of said June 4th, cars had been left upon this track; and the south end of the car furthest south was stopped a few inches south of and beyond the point where the planks were sawed off, so that the ends of these planks extended up a short distance under this car. About 8 or 9 o'clock on the night of June 4, 1892, the duties of her husband called him to couple this car to others attached to the switch engine. As the last-named cars came back he went in to make the coupling, which he succeeded in doing. The momentum with which the cars came back against the stationary car forced it beyond the point where the ends of the planks were, while he was between the cars. The step-off at the end of the planks caused him to lose his footing and fall, and before he could extricate himself the cars passed over him, killing him. He went in to make the coupling from the west side of the cars. The brake beam upon the moving car, which was next to and approaching the stationary car, and to which he was to couple, had a bolt sticking out through the beam, the point of which extended through and beyond the beam three or four inches, in the direction where he had to stand to make the coupling. This bolt was exposed, and had no tap on it; and, from the position in which his body was found, this bolt, or the space between the planks and the rail, above described, must have caught and held his feet and legs, as his head was in the direction of the engine, and in the opposite direction from that in which the engine and cars were moving. Having and leaving said space between the rails and planks, it was gross carelessness to have said bolt in the place it was, exposed and sticking out as it was, without a tap on it. It was gross carelessness on the part of defendant to leave the ends of the planks sawed off, and in the condition in which they were. Ordinary prudence required that the ends of the planks should have been sloped or beveled, or that dirt be packed at the ends and sloped,

thus furnishing him a reasonably safe place in which to perform the duties assigned him, as in law it was bound to do. The brake beam was too low. If it had been of the proper and usual height, after he was caught and caused to fall it would have passed over him, but it was so low as to catch and strip his clothing up and over his head. Because he worked at night, he had no knowledge of the condition of the planks, brake beam, and bolt, and thus, when killed, was in the strict line of his duty, and without fault or negligence. By amendment it is alleged that the reason why the brake beam was too low was that a nut on top of a rod which ran through the brake beam to hold it up was loose, and had, by moving down on the bolt, caused the beam to come down too low, and that the usual, proper, and ordinary height of a brake beam is eight inches above the rail, while the brake beam on the car that passed over Eslinger was but four inches above the rail. A former trial of the case resulted in a verdict for the plaintiff, and a judgment refusing to set aside the same was reversed by this court. 95 Ga. 734, 22 S. E. 580. The amendment just referred to was made at the last trial, and upon the introduction of the evidence for the plaintiff a nonsuit was granted, to which ruling she excepted.

The evidence shows the following: Eslinger was killed about 7 o'clock at night, in June, 1892. His cheek was crushed in. He was found lying with his cheek next to the rail, and his feet were lying north, somewhat diagonally along the track, or across the track. No part of the machinery of the car was resting on his body. His face was lying close enough to the rail for the flange of the wheel to have made the wound on his face. The track between the rails where his body was lying was a smooth place floored in with planks. Witness Torrence testified that, to the best of his recollection, all of the body was resting on the planks. Some of the planks are longer than others. The body was lying on the planks between the rails. Torrence would guess that 6 or 8 or 10 inches of Eslinger's legs were extending over the ends of the planks. Thinks there was about 4 or 5 feet of the planks extending under the stationary car before it was moved. Did not measure. After the cars were hit they moved  $4\frac{1}{2}$  or 5 feet, and when they stopped they were right about the end of the planks. Torrence thinks the car was right about even with the end of the planks, or maybe a few inches north of them. The planks are about 2 inches thick. Interrogatories of Torrence were taken about two or three months after the accident. His mind was then much fresher about the accident than it is now. He then swore that the stationary car which Eslinger went in to couple was standing about  $2\frac{1}{2}$  or 3 feet over the floor,—that is, the end of the floor extended under the car about  $2\frac{1}{2}$  or 3 feet,—and that the other stationary car was not over any of the floor at all. In

answer to the question whether that testimony is the truth, he says that the end of the box car next to the engine was not over the floor. "Q. The one north of the planks? A. They was when they hit." The stationary car that Eslinger went in to couple was standing about  $2\frac{1}{2}$  or 3 feet over the planks. The first person to get to him after he was killed was Say. When Torrence saw him, the distance of his head from the end of the floor was about 3 feet. His head was south, and his feet were north. The cars moved about 4 or 5 feet after they came together. In going this distance they would have to pass over the end of the plank floor. Torrence was about a car length and a half from Eslinger when he went in to couple the cars, which were from 30 to 34 feet in length. The first thing that attracted the attention of Torrence was the lamp falling out that hit the ground, and the next thing was Eslinger hallooing, "Oh, Lordy!" Just as the cars came together the lamp fell out. He hallooed pretty close after. Torrence cannot give any idea as to how many seconds after the cars came together before Eslinger hallooed. Does not know how long it was between the time the lamp fell out and the time he hallooed. Swore in the interrogatories that "time elapsing being about four or five seconds when he was killed from the time he went between the cars." Never timed it, and did not know for certain whether there were four or five seconds. The cars were moving back very slowly to the stationary car, and he went in to make the coupling, and just as the cars came together his lamp fell out and he hallooed; and Torrence gave the engineer a distress or immediate stop signal, and he stopped. Torrence ran by the engine and told the engineer that Eslinger was killed, and ran around the engine and told those in the office, and came right back. From the time he went between the cars to the time he was killed was very short. What Torrence said in his interrogatories must have been as nearly right as he could have gotten it. If he went in about two or three feet from the end of the planks, he went on a perfectly smooth and level place. Torrence does not know what was there to make him fall. If the stationary car was up over the end of the planks, and he had to step off the planks, it would be some rougher than on the planks. They are about two inches thick. The lamp falling out and the hallooing were not exactly at the same time. The latter was "right on top" of the former. The cars were barely moving at the time of the coupling. Torrence examined the machinery of the cars after the accident two or three hours. The brake beam was in good order. He saw nothing wrong about it. It was about eight inches from the floor. The plank was beveled off close to the rail, leaving a space for the wheels to run in, which space was too wide to catch a foot. The place is now just as it was at the time of the accident. There

was a rod that projected from the center of the brake beam, and right under the draw-head. That could not have caught Eslinger, unless he had got right between the draw-heads, which would have been a dangerous position if the cars came together. He could not have been caught by the bolt in the center of the brake beam, if he was in a standing position between the cars. He would have had to be in a reclining position, leaning pretty far back, for the bolt to have caught him. To have made the coupling properly, he would not have had to be closer than 18 or 20 inches to the rod or bolt in the brake beam. In going in to make the coupling, the coupler follows the moving car after the cars hit. There is no absolute necessity to go between the rails to make the coupling. He can stand on the outside and enter the link and pin, and that is all to be done. The car was moving very slowly. It stopped within four or five feet after the coupling was made. It was made successfully. Torrence does not know whether it was made before the lamp fell out or not. The lamp fell out about the time the car was hit. Guesses Eslinger made the coupling before he hallooed. He made it about the time he hallooed. The place for the flange of the wheels to run in the floor was wider than was necessary. Torrence put his foot down in that place four or five different times. There was nothing where Eslinger went in to make the coupling to cause him to fall. It is a smooth, safe place. He had been coupling cars over this place two months, at different times, along that track and over that place. This was one of the most-used tracks in the yard. Torrence has never known an accident to occur at that place before or since this one. The condition of the place has remained unchanged. Eslinger's work was done at night. There was nothing to prevent the superintendent and yard master from seeing the place.

From the testimony of Addington, it appears that he was about 100 yards away at the time of the homicide, and went immediately to the place. He, with several others, looked at the brake beam of the car under which Eslinger was killed. The beam was hanging very low,—witness thinks not over four inches from the plank. He turned a tap on the bolt that holds the brake beam. Had no trouble to move the bolt. If it had been tightened up, he could not have moved it, and it would have raised the brake beam two inches higher. The usual and ordinary height of a brake beam is eight inches. Witness had never seen one that low before. It would pitch a man forward if he was in there and his foot caught on the planks. In stepping partly on the planks and partly off them, the low brake beam would catch a person on the leg. Witness has been caught that way. He assisted in taking Eslinger from under the car. His head looked as if the flange of a wheel had run over it. Did not notice any

bruises on any other part of his person. His vest was pulled up over his head. Did not notice where the brake beam, or any part of it, caught his clothing. There was no blood on the ground and rail where he was lying. The brake beam was four inches from the rail, and four from the ground, which would make it eight inches from the ground, but for the planks, which were up within an inch or a half inch from level with the top of the rail. These are estimates. Witness did not measure. The planks were two or three inches thick. The step-off from their ends would not exceed three inches. Witness does not know that, for the brake beam to strike Eslinger, he must have been leaning toward it, and not in a standing attitude. The brake beam is under the body of the car, and under the bumper. It is about three feet from the brake beam to where the link is, when you go to make coupling. For a man to put a link in a bumper, he would be three feet from the brake beam, but his feet would not be that far. He could get his foot caught by walking along when the cars come together. He has got to keep them out of the way of the brake beam, or it will catch him every time. If he keeps his foot up level with his body, then the brake beam will not catch him. "Q. Only way for the brake beam to catch him is for his foot to get back under the bumper? A. Unless it would be in a case of this kind."

John Byrd, as an expert, testified, among other things, that it is from four to six or eight inches from the bottom of the brake beam to the ground. He thinks a brake beam four inches high would be more likely to catch a brakeman than one eight inches high. Four inches is not enough space in there to let his foot out in case it should get hung, while one eight inches high has enough room to get his foot out and get out of the way, if one with beam four inches high would hang him and drag him under the car. That has been his experience. If a coupler went in to couple a car standing stationary, with the planks extending two or three feet under the end of it, and the place is smooth, witness does not know what would cause him to fall.

The engineer of the train which did the killing testified: "I do not think it was over a minute after the accident before I reached the place. Eslinger's head was turned toward the engine when I got to him. His head was about two or three feet from the end of the planks. From the point where he went in to make the coupling to where his body was found, he would have had to pass over the end of the planks in some way. I do not know how he got over the end of the planks. He could have been dragged over this step-off. I think the planks are two and a half inches thick, and it is down grade there, and cinders and sand and dirt have washed in there until it is nearly level. It could not have been more than an inch step-

off. It was a public crossing, and had been so planked two or three months. It is now in about the same condition as it was on the night of the accident. The step-off is just as it was when the crossing was completed. I think Eslinger had been coupling for two or three months. We coupled over this track every night. There is no chance for him to get his foot caught in the place where the flange of the wheel runs. It is too wide. The planks are beveled off for the flange to run in. I made a careful examination of the brake beam that night, to see if I could find anything wrong with it. I found nothing wrong. I looked to see if I could see any signs of where his foot had been caught, but found nothing. I never measured it, but suppose the brake beam was about seven or eight inches high. I never saw anything wrong with any part of it. Beam was in good condition, and seemed to be hung right. I saw no nuts or bolts projecting from it. The brake rod goes through the beam, right under the drawhead. To have been caught by the bolt on the brake beam, he would have to be right square under the bumper. I do not think the nut was off. I could find no place where he could have been caught. The bolt that comes through the brake shoe does not affect the height of the beam. The only way to change the height of the beam is to take it down, and change the length of the hanger rods. The bolts on the end of the beam have nothing to do with the height of the beam. They are put there to hold the brake shoes on. I looked to see what could have caused the accident, and could not find a thing. I saw no evidence of his having been dragged over the planks. When this coupling was made, I was coming back very slowly, barely moving. Had my hand on air-brake throttle, and, when Torrence signaled me down, I stopped at once. I think the train moved about five feet after he gave me the signal. I was looking right at him when he gave it. He cut me down as soon as I felt the jar of the cars coming together. I cannot understand how Eslinger's head came to be turned towards the engine." The witness last referred to further testified that Eslinger had told him he had a weak ankle, and that on two occasions his ankle had given way under him as he attempted to step on the footboard of the engine witness was driving, and came near being injured. Witness advised him to quit the job he held and get another, and he said he thought he would. There was testimony by plaintiff, and two other witnesses who had long known Eslinger, that they never saw or heard of any weakness in this respect; that they were frequently with him, and he was rather an active man, etc.

Maddox & Starr, for plaintiff in error. R. J. & J. McCamy and Payne & Tye, for defendant in error.

**PER CURIAM.** Judgment affirmed.

**ATKINSON, J. (dissenting).** There was evidence to require the submission of the issues of fact in the case to a jury.

(119 N. C. 39)

**WARREN v. SHORT.**

(Supreme Court of North Carolina. Oct. 13, 1896.)

**CONVEYANCE OF STANDING TIMBER — CONSTRUCTION.**

A conveyance of all the timber which measures 12 or more inches in diameter at the stump, growing on a certain tract, all of it to be cut and removed within 10 years, includes only the timber of that dimension when the conveyance was executed.

Appeal from superior court, Beaufort county; Timberlake, Judge.

Controversy between Deborah V. Warren and Bettie Lee Short, submitted without action, under Code, § 567 et seq. Defendant, Short, devisee and executrix of E. M. Short deceased, claimed that the conveyance by plaintiff, Warren, to deceased, of all the timber which measured 12 or more inches in diameter at the stump, growing on a certain tract, all of it to be cut and removed within 10 years, conveyed all the timber which should attain that dimension within the 10 years. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Rodman, for appellant. Ohas. F. Warren, for appellee.

**AVERY, J.** A conveyance of land, at common law, was deemed, unless a contrary intent was expressed in the deed, to relate to the date of its execution, and hence, in construing the statute of wills (which contained the words "having an estate of inheritance"), the courts decided that, devices being a species of conveyance, only land to which the deviser had title at the date of the execution of the instrument, not land acquired between that time and his death, passed by a general disposition of all of his land. 2 Bl. Comm. p. 378. A person may convey the whole mineral interest, or only a particular mineral, or the whole of the timber, or only certain trees, designated by dimensions or species, or by both, and in either case such trees pass as fulfill the description at the time of executing the conveyance. The modification of the common-law principle, in so far as it relates to devices, in no way affects its application to deeds of conveyance. Upon this principle, as well as upon the reason of the thing, it was held in *Whitted v. Smith*, 2 Jones (N. C.) 36, that an exception in a deed of "all the pine timber that will square one foot" embraced only such timber as had attained the size specified at the time. An exception in a deed of a part of the thing granted must be described with the same certainty as the subject-matter of the conveyance, and hence the rules for ascertaining what is excepted must be the same as those for determining what passes by the deed. The conveyance contained no language which evinced a purpose to take the instrument out of the

general rule. One may convey something that has no potential existence, subject to such restrictions as are imposed by public policy, provided, always, he expresses with sufficient clearness his intent to do so. *Williams v. Chapman*, 118 N. C. 943, 24 S. E. 810; *Brown v. Dail*, 117 N. C. 41, 23 S. E. 45; *Loffin v. Hines*, 107 N. C. 361, 12 S. E. 197. The deed might have been so drawn as to pass all trees that would attain the size mentioned within a reasonable, though not for an indefinite, period; but the terms of the deed cover none that did not fill the description at its date, and no others passed. *Robinson v. Gee*, 4 Ired. 186. For the reasons given, the judgment of the court below is affirmed.

(119 N. C. 12)

GWINN et al. v. PARKER et al.

(Supreme Court of North Carolina. Oct. 13, 1896.)

JUDGMENT—VACATION—TIME FOR FILING PLEADINGS—DISCRETION OF COURT.

1. A court has power to vacate or modify its judgments and orders during the term in which they are made.

2. The discretion given to the court by Code, § 274, to extend the time for filing pleadings, is not subject to review.

Appeal from superior court, Gates county; Robinson, Judge.

Action by Amos Gwinn and others against L. S. Parker and another. From an order setting aside a judgment previously rendered for plaintiffs, and extending defendants' time for answering, plaintiffs appeal. Affirmed.

E. F. Aydlett, for appellants. R. O. Burton, for appellees.

**FAIRCLOTH, C. J.** The plaintiffs, having previously filed a complaint, on Thursday, spring term, 1896, obtained judgment for want of an answer. On the next day the judge, on defendants' affidavit and application, set aside the judgment, and allowed defendants 30 days to answer. Plaintiffs appealed. It has been the settled rule for some time that any order or decree made was, during the term, in fieri, and that the court, during the term, could vacate or modify the same. The court has the discretion, also,—not reviewable,—to extend the time for filing pleadings. Code, § 274; *Gilchrist v. Kitchen*, 86 N. C. 20; *Brown v. Hale*, 93 N. C. 188. No error.

(119 N. C. 232)

CHADBOURN v. JOHNSTON et al.

(Supreme Court of North Carolina. Oct. 13, 1896.)

MORTGAGE—FORECLOSURE—DEFECT OF PARTIES—UNAUTHORIZED APPEARANCE—EFFECT ON JUDGMENT.

1. A widow, and also the devisees, of a deceased mortgagor, or those claiming under them, are necessary parties to an action to foreclose the mortgage.

2. Where not only the return of a summons shows proper service on defendants, but an ap-

pearance is entered for them by solvent attorneys, a judgment or order of court will not be set aside on a showing that such service was not made nor the appearance authorized.

Appeal from superior court, Pender county; Graham, Judge.

Action by W. H. Chadbourn against E. M. Johnston and others. Appeal by plaintiff from an order setting aside a judgment and sale and confirmation thereunder. Reversed.

W. R. Allen, for appellant. J. L. Stewart, for appellees.

**FURCHES, J.** This is a motion to set aside a judgment of foreclosure, sale and confirmation thereunder, and from the facts found by the court it appears that on the 6th of December, 1886, John Watkins and his wife, Rebecca A. Watkins, executed a mortgage on the land mentioned in the complaint to the defendant E. M. Johnston, to secure a debt due by note of \$3,704, payable 12 months from date; that on the 26th of December, 1886, said Johnston assigned said note to the plaintiff, Chadbourn; that after the execution of this note and mortgage, and before the commencement of this action, the said John Watkins died, leaving a last will and testament, in which he devised this land to his wife for life, and the remainder in fee to the defendant E. M. Johnston, and that since the death of said Watkins the defendant E. M. Johnston has sold and conveyed his estate in said land to W. J. Johnston; that this action was brought against E. M. Johnston, W. J. Johnston, and R. A. Watkins, the widow and devisee for life of the said John; that the summons was served on the defendant E. M. Johnston, but there was no service on the other two defendants; that at the return of the summons the defendant E. M. Johnston employed John D. Kerr, Marsden Bellamy, and Herbert McClammy, practicing attorneys at that court, who entered a general appearance for the defendants, believing they were employed by all, and filed an answer for the defendant E. M. Johnston, and obtained leave to file for the others, but no other answer was filed. And at March term, 1894, a judgment was entered against E. M. Johnston, who was one of the executors of the mortgagor, John Watkins, for the amount of the debt secured by the mortgage, a commissioner appointed, and a sale of the land ordered. This sale was made and reported to the court by the commissioner, and confirmed, and judgment of foreclosure entered; and this is the judgment and proceedings thereon that are asked to be set aside under this motion.

The wife of a mortgagor who joins with her husband in making a mortgage is a necessary party in an action to foreclose. *Nimrock v. Scanlin*, 87 N. C. 119. And, if the wife is a necessary party, it would seem that the widow who joined in making the mortgage with her husband would be. The heirs at law of the mortgagor are necessary par-

ties in an action to foreclose. *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159. And it would seem that, if heirs are necessary parties, a devisee and those claiming under him would be. We are therefore of the opinion that Rebecca A. Watkins, both as widow and as devisee, was a necessary party, and that W. J. Johnston, assignee of E. M. Johnston, was a proper, if not a necessary, party. But it seems that they were both legal parties to this action. They were made defendants in the summons issued in the case, which was returned executed, though in truth and in fact it was not executed on Rebecca A. Watkins and W. J. Johnston. This *prima facie* gave the court jurisdiction, and authorized it to proceed to judgment. But this presumption might be rebutted by showing that in fact it had not been served; and, if nothing more had occurred, upon the court's finding this fact it would have been the duty of the court to set aside the judgment. But the matter did not end here. Three practicing attorneys make a general appearance for the defendants, which put the defendants Rebecca and W. J. Johnston in court, and one of these attorneys (Marsden Bellamy) is found to be "amply solvent." And it has been held by this court that where this is the case the court will not set aside a judgment otherwise regular. *University v. Lassiter*, 83 N. C. 42. For this reason the court erred in setting aside the judgment of sale and the order confirming the same and foreclosing the mortgage. Error.

(119 N. C. 46)

#### MEEKINS v. WALKER.

(Supreme Court of North Carolina. Oct. 13, 1896.)

#### AGRICULTURAL LIEN — AGREEMENT — PAROL EVIDENCE.

1. Under Code, § 1799, declaring that a person making an advance in money or supplies to one engaged in, or about to engage in, the cultivation of the soil, shall be entitled to a lien on the crops made during the year on the land in the cultivation of which the advances have been expended, in preference to other liens, provided an agreement in writing to that effect be entered into before any such allowance is made, in which shall be specified the amount to be advanced, it is not necessary that the agreement state that the advance was not made before the agreement was made, but, it being stated that a note has been given for supplies "to make a crop," it may be shown by parol that the supplies were furnished after the agreement.

2. An instrument, though in form a chattel mortgage with power of sale, will be held an agreement for agricultural lien, where it embodies the requisites prescribed by Code, § 1799, and the intent to create the lien is clear.

Appeal from superior court, Tyrrell county; Robinson, Judge.

Action by J. O. Meekins, Sr., against A. G. Walker. Judgment for defendant, and plaintiff appeals. Reversed.

Pruden, Vann & Pruden and W. J. Griffin, for appellant. Blount & Fleming, for appellee.

MONTGOMERY, J. On the 10th of March, 1894, David Alexander executed a paper writing to the plaintiff, who had it registered 10 days afterwards, in the following words and figures: "I, David Alexander, of the county of Tyrrell, am indebted to J. C. Meekins, Sr., of said county, in the sum of \$250, for which he holds my note, to be due on the 1st of December, 1894 (said note having been given for money and fertilizers to enable said Alexander to cultivate a crop this year—1894—on the lands on which he lives, in Tyrrell county), and to secure the payment of the same I do hereby convey to said Meekins these articles of personal property, to wit: All the crop of cotton or corn that I may cultivate or cause to be cultivated this year—1894—on the lands in which I live, in said county, Scuppernon township, which land is known as the 'Ed. Davenport land,' commonly known as the 'Woodlawn Farm,' and adjoining the lands of Alfred Alexander, Andrew Bateman, and others, about 100 acres of said crop; all of which crops are not otherwise incumbered. But on this special trust: That if I fail to pay said debt and interest on or before the first day of December, 1894, then he may sell said property for cash, first advertising the same for twenty days at the courthouse and two other public places in said county, naming the time and place of sale, and applying the proceeds of such sale to the discharge of said debt and interest on the same; and, should there be a surplus of such sales in his hands after paying said debt, he shall apply the same to the credit of a note he holds against me, which note was made to A. G. Walker, and by him assigned to said Meekins. Given under my hand and seal, this 10th day of March, 1894. David Alexander. [Seal.]" Three months after the execution of that instrument, Alexander executed to the defendant an agricultural lien upon the same crops conveyed in the paper writing executed by Alexander to the plaintiff. The defendant took into his possession and converted a part of the crop, and this action was brought by the plaintiff to recover the value of the same, the plaintiff alleging that he is entitled to it under his lien. The recovery is resisted by the defendant on the ground that his (defendant's) lien is the superior one. The question, then, is, can the instrument under which the plaintiff claims be upheld as an agricultural lien under section 1799 of the Code? If it can be, then the plaintiff ought to recover; if not, he cannot. It is contended by the defendant that the form of the instrument is that of a chattel mortgage with a power of sale, and that, therefore, no statutory agricultural lien arises, or was intended by the parties thereto. Such, indeed, is the form of the paper writing, but words are used therein which show a purpose to give effect to the statute, to wit, "said

note having been given for money and fertilizers to enable said Alexander to cultivate a crop this year—1894—on the lands on which he lives, in Tyrrell county." And this court has said in *Townsend v. McKinnon*, 98 N. C. 106, 8 S. E. 837, that: "No particular form of agreement is prescribed whereby the lien is created. When, therefore, it embodies the requisites prescribed, and the intent of the parties to create the lien contemplated by the statute is clear, whatever the form, the lien at once arises. In such cases, the agreement, though it have the form of a chattel mortgage, must be so treated as to effectuate the intent of the parties, and, in connection with and under the statute, the latter becomes a part of it, directs the intent, and gives character to the lien." The requisites prescribed to create the lien are: (1) That the advances must be in money or supplies; (2) to the person engaged or about to engage in the cultivation of the soil; (3) after the agreement is made; (4) to be expended in the cultivation of the crop made during that year; (5) and the lien must be on the crop of that year. *Clark v. Farrar*, 74 N. C. 690. In addition, the amount to be advanced is to be set out in the agreement, which was done in this case. The instrument itself shows on its face that the requisites have been complied with, except that it is not stated therein that the supplies were furnished after the agreement was made. The plaintiff offered to show this by witnesses, but the court refused the testimony, and the plaintiff excepted. The exception is sustained. The statute does not require that the agreement should state that the supplies were furnished after the agreement had been made. And it is competent to show that fact by proof dehors. *Reese v. Cole*, 83 N. C. 90. The instrument recites that the note was given for supplies "to make a crop," without stating whether they had already been furnished or were to be thereafter furnished (and from the date the latter is probable), and hence the evidence to show the furnishing after the lien was executed would not contradict the written instrument. New trial.

(119 N. C. 56)

**CRABTREE et al. v. SCHEELKY et al.**  
(Supreme Court of North Carolina. Oct. 13, 1896.)

**APPEAL—PRACTION—CONSENT ORDERS.**

1. A finding of fact that property was sold at an execution sale for a fair price cannot be reviewed on appeal.

2. A consent order that an application to confirm a sale may be made and heard before either the resident judge or the judge riding the district, at any time or place, either within or without the district, is valid, and an order of confirmation made in accordance therewith is hence legal.

Appeal from superior court, Craven county; Bryan, Judge.

Action by J. H. Crabtree and others against O. J. Scheelky and others. Defendants ap-

peal from an order confirming a sale. Affirmed.

W. D. McIver, for appellants. M. D. W. Stevenson and Clark & Gulon, for appellees.

**CLARK, J.** The finding of fact that the land at the sale under judicial decree brought a full and fair price is not reviewable on appeal. *Trull v. Rice*, 92 N. C. 572; *Clark's Code* (2d Ed.) pp. 567, 568; *Supp. Clark's Code*, p. 86.

The consent order that judgment of confirmation might be entered up in vacation, and outside the county, was valid. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118; *Bank v. Gilmer*, 118 N. C. 668, 24 S. E. 423. The further agreement that motion for such judgment might be made either before the judge riding the district, or the resident judge thereof, upon 10 days' notice of the time, place, and judge, was likewise valid. The resident judge had general jurisdiction, and his exercising it in this case was not a defect of jurisdiction, which cannot be conferred by consent, but an objection to the venue, which is waived unless objected to. The parties, having consented to the resident judge hearing the motion, cannot be heard to except. The act of 1883, c. 33 (now Code, § 337), expressly provides that such consent orders may be made as to injunctions (*Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519); but we take it that consent orders, waiving objections to the venue, when a court has general jurisdiction of the subject-matter, are valid, independent of that statute, and applicable in all cases. Practically, this must often be a convenience to suitors and counsel, and, as such course can only be taken by consent, we cannot see that any hardship therefrom is likely to arise. No error.

(119 N. C. 59)

**GOLDBERG et al. v. COHEN et al.**  
(Supreme Court of North Carolina. Oct. 13, 1896.)

**FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—INSTRUCTIONS.**

An instruction that the purchase of a stock of goods at an assignee's sale by a brother of the assignor, and the placing them in the hands of another brother, who was insolvent, were badges of fraud, was not erroneous, where the evidence showed a number of previous transactions between the assignor and his relatives of a suspicious character.

Appeal from superior court, Craven county; Graham, Judge.

Action by M. Goldberg & Son and others against Solomon Cohen and others to set aside a general assignment as in fraud of creditors. Judgment for plaintiffs, and defendants appeal. Affirmed.

O. R. Thomas, for plaintiffs. Clark & Gulon and W. D. McIver, for defendants.

**EVERY, J.** The assignment of error upon which counsel for defendants relied on the argument was especially the last, in the order

in which they appear in the statement of the case on appeal. If the court had charged the jury that the purchase of the remnant of the stock of goods at public auction, and through an agent of one Lee Cohen, of New York, a brother of the assignor, and the placing of another brother, W. H. Cohen, in charge of the goods purchased, considered apart from all other portions of the testimony, constituted a badge of fraud, such instruction would have been clearly erroneous. *Banking Co. v. Whitaker*, 110 N. C. 345, 14 S. E. 920. But circumstances which of themselves are not sufficient to arouse just suspicion of fraud very frequently, when considered, as it is proper to do, in their relation to other portions of the evidence, are calculated to challenge close scrutiny into the good faith of a party to an alleged fraudulent transaction. Thus, the sale of goods by an assignor for the benefit of creditors to an insolvent clerk, or to a brother, who pays no money, but gives his note, though it does not raise a presumption of fraud, and may be consistent with honesty of purpose, without further explanation, is nevertheless calculated to excite suspicion, and is therefore deemed a badge of fraud. *Beasley v. Bray*, 98 N. C. 266, 3 S. E. 497. The sale by the assignor, Solomon Cohen, who was then insolvent, during the year preceding the assignment, to his mother, a married woman, who was then incapable of binding herself by contract, and to his insolvent brother, W. H. Cohen, of large quantities of the goods on a credit, and the removal of large quantities of goods to a room just across the street before assignment, together with the bringing of the same back to the store after Lee Cohen had placed W. H. Cohen in charge, and in packages still unbroken, were all circumstances pregnant with suspicion, and, if believed by the jury, invited scrutiny. The evidence of the near relationship of Lee Cohen to the assignor and to W. H. Cohen and the mother, considered in connection with his intrusting the goods to another near relative of the assignor, who, after being already under suspicion for transactions prior to the assignment, subsequently covinously brought back goods which had been fraudulently concealed, and made them a part of the common stock claimed under the purchase for his brother Lee, was properly called to the attention of the jury as a badge of fraud, in the sense that, in the light of the surrounding circumstances, it gave stronger color to the suspicion that overhung the conduct of the assignor and his near relations both before and after the assignment. True, the purchase by the absent brother, after the assignment was a fact accomplished, was of itself no evidence of fraud; but his intrusting the management of the goods to a brother whose previous conduct had been suspicious, and whose subsequent management of the stock was covinous, tended to show that the concealed goods were brought into the store after, but in pursuance of, a conspiracy to cheat, entered into before the assignment.

It is not just to the trial judge to detach a part of a sentence, or an entire sentence, in that portion of the charge enumerating the facts relied on to show the fraud, and insist that the judge meant, or the jury understood, that every single fact mentioned of itself constituted a badge of fraud. If a transaction is secret, and exclusively between near relations, the law, under a familiar rule of evidence, where the circumstances are known only to those parties present, imposes upon an insolvent member of the family, disposing of his property under such circumstances, the burden of rebutting the presumption of bad faith. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470. In *Bank v. Bridgers*, 114 N. C. 353, 19 S. E. 667, the court said, "The existence of near relationship between the parties to a suspicious transaction often constitutes additional evidence of fraud for the jury," but is not prima facie evidence of fraud. *Bank v. Gilmer*, 116 N. C. 703, 22 S. E. 2. While Lee Cohen was not a party to the assignment, nor present when it was executed, yet his purchase of the residue of the stock, and turning it over to an insolvent brother, whose conduct was so suspicious before and after the execution of the deed, together with his near relationship to all of the other parties, tended to show his entrance after the assignment into a conspiracy to defraud creditors, formed by other members of the family, including the assignor, in contemplation of making a fraudulent disposition of the property.

While counsel did not abandon, he did not insist upon, the other assignments of error. They have been carefully considered, however, and are all without merit. As they would have been disposed of by a per curiam, but for the exception already passed upon, it is not necessary to discuss them in detail. In defendants' appeal the judgment is affirmed.

(119 N. C. 34)

#### HARRIS v. MURPHY et al.

(Supreme Court of North Carolina. Oct. 12, 1896.)

#### EVIDENCE—MODIFICATION OF CONTRACT BY PAROL—INSTRUCTIONS.

1. The rule that parol evidence cannot be received to contradict or vary a written agreement does not exclude parol evidence of a modification of such a contract after its execution.

2. An instruction is not erroneous because it tells the jury that, if they believe a certain witness, and that the facts are as testified by him, they shall find for plaintiff, but that, if they do not believe such witness, and believe the facts are as testified by other witnesses, they shall find for defendant.

Appeal from superior court, Beaufort county; Boykin, Judge.

Action by R. W. Harris against Murphy, Jenkins & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. F. Warren, for appellants. W. B. Rodman and J. H. Small, for appellees.

MONTGOMERY, J. This action was commenced in the court of a justice of the peace to recover of the defendants an amount alleged to be due to the plaintiff for work and labor performed for the defendants in raising a sunken flat or barge filled with coal, and for other services rendered in connection therewith. The first cause of action sets out an express contract, the second declares as for a quantum meruit. The defendants deny the right of the plaintiff to recover, on the ground that the contract was in writing, and entire, and that the plaintiff has not performed his part of the same. The contract is in the following words and figures: "Washington, N. C., September 7, 1891. Received of E. V. Murphy fifteen dollars in part payment for raising barge of coal, and taking up coal from bottom of river at S. R. Fowle & Son's wharf, and preparing the two barges for towing to Tarboro, and going and looking after them from Washington to Tarboro. The full amount being \$55 for the entire contract. R. W. Harris." During the trial the plaintiff offered evidence tending to show that the contract had been modified after its execution to the extent of relieving the plaintiff of every obligation thereunder except that of raising the barge, and that for any services the plaintiff should render after the barge was raised the defendants were to pay him two dollars per day. The defendants excepted to the introduction of this evidence on the grounds: First, that there was an express contract in writing, and entire, between the parties, and that the plaintiff could not recover for his services as on a quantum meruit, nor for part performance; and, further, that parol evidence could not be allowed to contradict, alter, or modify the written contract. The exception cannot be sustained. In *Meekins v. Newberry*, 101 N. C. 17, 7 S. E. 655, 656, it is said: "It is a settled rule of the law that, when the parties to a contract reduce the same to writing, in the absence of fraud or material mistake, properly alleged, parol evidence cannot be received to contradict, add to, modify, or explain it." And this rule was recognized before, and has been affirmed in numerous cases since, that decision. But in all those cases the offer was to change or to modify or to alter the written contract by evidence in parol of declarations and understandings made either contemporaneous with or prior to the execution of the written contract. The rule, however, does not apply in cases like the one before the court, where the modification is alleged to have been made subsequent to the execution of the writing. *Browne*, Par. Ev. 99; *Greenl. Ev.* 303; *Swain v. Seamens*, 9 Wall. 271; *Emerson v. Slater*, 22 How. 41. In the last-cited case the court cite the case of *Goss v. Nugent*, 5 Barn. & Adol. 65, and quote from it the rule as laid down by Lord Denman: "After the agreement has been reduced into writing, it is competent to the parties, in cases falling within the general rules of the common law, at any time before the breach of it by a new contract, not in writing, either altogether

to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from or vary or qualify the terms of it, and thus to make a new contract." One of the witnesses—Walter Spencer—testified that after the contract in writing was entered into while the work was going on at the wharf, Murphy (a deceased partner of the defendants) agreed that Harris should only raise the barge, and that he should be released from the balance of the contract, and that all the services that the plaintiff might render after the flat was raised should be considered extra, and that the plaintiff should receive therefor two dollars per day. Several other witnesses testified concerning that conversation between the plaintiff and Murphy, and these witnesses said that the only modification of the contract was that the plaintiff was not required to get up from the bottom of the river the coal which had slipped off the barge when it sunk. The testimony was irreconcilably contradictory. His honor instructed the jury: "Now, if the jury should believe that the witness Walter Spencer told the truth, and that the contract was so modified, that they should find that the defendants are indebted to the plaintiff in the sum of forty dollars, that being the balance of the contract price; and also for any extra services after the flat was raised at the rate of two dollars per day. The plaintiff claims that he was engaged five days in transferring the coal from the flat to the wharf, at two dollars per day; and that he was engaged five days in watching the flat, at two dollars per day. But, on the other hand, if the jury should believe that the witness Walter Spencer did not tell the truth, and should believe, as testified by the other witnesses, that the only modification of the contract was the plaintiff was not required to get up the coal from the bottom of the river, then, it being admitted that the other provisions of the contract on the part of the plaintiff, viz. the preparation of the barges for towing, and going with them and looking after them from Washington to Tarboro, had not been performed by the plaintiff, the contract being entire and indivisible, the plaintiff would not be entitled to recover." The defendants excepted to the charge. The exception cannot be sustained. There are numerous decisions in our reports to the effect that the court cannot single out a witness or witnesses where the testimony is conflicting, and charge the jury, if such witnesses have told the truth, or if they believe those witnesses, to let their verdict be so and so. *State v. Rogers*, 93 N. C. 523; *Anderson v. Steamboat Co.*, 64 N. C. 403; *Welsfield v. McLean*, 96 N. C. 253, 2 S. E. 56; *Jackson v. Commissioners*, 76 N. C. 282. If the instruction complained of seems to be obnoxious to the prohibition contained in the above-named cases, it is only seemingly so, and not really so. In the case before the court the witness Spencer was not singled out, in the offensive sense of those words. The attention of the jury was sharply drawn to the

contradiction between the testimony of that witness and that of the other witnesses, and the jury were instructed, in substance, to weigh the testimony of them all. They were told that, if they believed this witness Spencer had told the truth, and that the contract was modified as he had testified, then to find for the plaintiff; and in the same breath they were told: "But, on the other hand, if the jury should believe that the witness Spencer did not tell the truth, and should believe, as testified by the other witnesses, that the only modification of the contract was the plaintiff was not required to get up the coal from the bottom of the river, then, \* \* \* the contract being entire and indivisible, the plaintiff would not be entitled to recover." The credibility and the character of the witness Spencer were no more on trial before the jury than were the credibility and character of the other witnesses. It was impossible for the jury to have been misled by this charge so as to have believed that it was his honor's opinion that more weight was to be given to Spencer's testimony than to that of the other witnesses whose testimony was in conflict with his.

The other exceptions are not sustained, and, as they are connected with and are dependent upon those already discussed, it is needless to go into them. Affirmed.

(119 N. C. 43)

**KEATON v. JONES et al.**

(Supreme Court of North Carolina. Oct. 13, 1896.)

**RECEIPT—PAROL EVIDENCE.**

A memorandum reciting that "this is to show that J. and K. have this day settled all accounts standing between them to date, and all square except the balance of \$302.54 as dealing with and through S.," is subject to be explained by parol evidence as to the matters considered in the settlement.

Appeal from superior court, Perquimans county; Robinson, Judge.

Action by Joseph D. Keaton against G. B. Jones and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

E. F. Aydlott, for appellants. W. M. Bond and R. C. Strong, for appellee.

**FAIRCLOTH, C. J.** The contract alleged in the first article of the complaint and admitted by the answer was "that on or about the — day of February, 1893, defendants agreed and contracted with plaintiff to buy from him, at five dollars and fifty cents per thousand, all the logs which he would cut and put in tugboat water in Perquimans river during the year 1893; that plaintiff was to inform defendants when the logs were put in water according to agreement, and defendants were at once to send rafting gear, measure said logs, receive them, and pay plaintiff for them." Several rafts were received and paid for. One raft or lot was put

in the water according to contract, but, for want of rafting gear, was lost. On January 20, 1894, defendants wrote to plaintiff "to come to Elizabeth City to settle for last raft received by defendants from him." The parties met accordingly at Elizabeth City, and the following writing, marked "A," was signed by each party: "This is to show that Jones & Co. and J. D. Keaton have this day settled all accounts standing between them to date, and all square except the balance of \$302.54 as dealing with and through Speight & Son, for which amount we hold both responsible. Speight & Son and J. D. Keaton." The evidence of both parties shows that the "lost" logs were not considered nor paid for in said settlement, and for their value this action is brought. His honor told the jury that, if the parties had a settlement of all their matters, the plaintiff could not recover; also that, if the sunken logs were not taken into consideration, then "plaintiff could go behind the receipt," and recover whatever amount they found to be the value by the contract price of the lost logs. Defendants excepted and appealed.

The defendants insist that the writing marked "A" is conclusive, and that parol evidence cannot be heard in support of plaintiff's claim, unless fraud or mistake be alleged and proved. This is a misconception. When the writing is the contract as well as a receipt, then it is conclusive, except for fraud or mistake shown; but when the writing is only an acknowledgment of payment or delivery it is only prima facie conclusive, and the fact recited may be contradicted by oral testimony. This rule is laid down in 1 Greenl. Ev. § 305. The same was held by this court in *Reid v. Reid*, 2 Dev. 247, and several subsequent cases, notably that of *Harper v. Dail*, 92 N. C. 394. The writing marked "A," and relied on by defendants, does not profess on its face to be a contract, nor does it recite the material parts of the contract, made about a year before, as it is admitted in the pleadings. It is only evidence of a settlement had, and was subject to be explained by parol proof. The charge of the court was agreeable to the uniform decisions in this state, and the judgment is affirmed.

(119 N. C. 39)

**TAYLOR v. RUSSELL et al.**

(Supreme Court of North Carolina. Oct. 13, 1896.)

**STATUTE OF FRAUDS—WHO MAY PLEAD—PARTNERSHIP—INJUNCTION AND RECEIVER.**

1. A person who, by a parol contract, is to receive a conveyance from another, cannot plead the invalidity of the contract under the statute of frauds, when the other offers to perform.

2. Where a partner, who remains in possession of the partnership property after dissolution, is insolvent, and is about to sell the property, the granting of an injunction to prevent such sale, and the appointment of a receiver pending an accounting between the partners, is proper.

Appeal from superior court, Beaufort county; Boykin, Judge.

Action by W. H. Taylor against H. A. Russell and Thomas Lee. Defendants appeal from an order granting an injunction and appointing a receiver. Affirmed.

W. B. Rodman, for appellants. J. H. Small and B. B. Nicholson, for appellee.

FURCHES, J. This action is before us by appeal of the defendants from an order of the court below granting an injunction and appointing a receiver. And as the appeal is from an interlocutory order based upon affidavits, it becomes our duty to consider only such matters as will enable us to determine whether the order appealed from should be continued till the final hearing, and to leave as many of the disputed and litigated questions undisposed of as we can until the final hearing. It appears from the affidavits of both parties that there was a partnership entered into to do a milling and lumber business, though there is some dispute as to the terms of this partnership, and we do not undertake to settle this disagreement; that under this agreement the plaintiff and defendant commenced and carried on the milling and lumber business for some time, both parties alleging that they put money and labor into the concern. After operating this business for some time, a disagreement took place between them, and work was suspended, and the defendant alleges that the partnership was dissolved, and plaintiff does not deny this allegation. A part of the agreement was that plaintiff should convey to the defendant an undivided half interest in the mill and land upon which it was located. The plaintiff alleges, subject to two mortgages then existing upon said property,—one to the Bank of Washington, and another to Thomas Lee for \$3,500; and the defendant admits that he was to take his moiety subject to the Lee mortgage, but denies that the other mortgage was named, and further alleges that he had no knowledge of the bank mortgage. It is also alleged and admitted that the defendant has taken possession of what money there was on hand belonging to the concern, and that he has taken possession of the logs and lumber on hand; also the books and accounts. And it is alleged, and not denied, that the defendant is insolvent. This, ordinarily, would seem to entitle the plaintiff to an account, to an injunction against the defendant's selling the property, and to a receiver. But the defendant sets up two reasons why he says the plaintiff is not entitled to this order: First, that a part of the contract was that the plaintiff was to convey to him one-half of the mill, etc., which is real estate; that the plaintiff has refused to do this; and that it is a contract within the statute of frauds, not being in writing, and the defendant pleads this statute; while the plaintiff denies that he ever refused to convey this property to the defendant, and

alleges that he is now ready and willing, and always has been, to convey to the defendant upon his complying with his part of the contract. So we see that this is one of the matters of dispute between the parties that we cannot decide. But it is a question of fact necessary to be considered by us in passing upon the question of injunction. If the plaintiff is prepared and willing to make defendant a deed according to the contract, as he alleges he is, the defendant cannot prevent it by pleading the statute of frauds. He is at the wrong end of the contract to do this. *Green v. Railroad Co.*, 77 N. C. 96, and a dozen other cases cited by Womack under this case. If the plaintiff is ready and willing to convey, as he alleges he is, equity will consider what should be done as done, and the defendant, in equity, a joint owner of this property. But the defendant says further that since the dissolution of the partnership he has bought the Thomas Lee mortgage, and has paid, or has obligated himself to pay, \$2,250 for it, and it is under this mortgage that he has advertised the property, and is proposing to sell, and should not be interfered with by injunction. While, on the other hand, the plaintiff replies that there are at least two reasons why he should be enjoined, viz. that it was an incumbrance upon the partnership of which the defendant is a member; that the basic principle of partnership is good faith; that each partner is an agent, and even a trustee, of the partnership (*Beach, Mod. Eq. Jur.* §§ 538, 882); and, as this purchase was a transaction in which the partnership was interested, that the partnership is entitled to share in the benefits of this purchase. These are interesting questions, or will become so if, upon the trial, the plaintiff is able and willing to make good his allegation to convey. So, taking into consideration the allegations of the plaintiff, the admissions of the defendant, and his alleged insolvency, which is not denied, we are of the opinion that it is a clear case for an account for a receiver and for an injunction. *Phillips v. Trezevant*, 67 N. C. 370. There is no error, and the judgment below is affirmed.

(119 N. C. 26)

COWAN et al. v. PHILLIPS et al.  
(Supreme Court of North Carolina. Oct. 13, 1896.)

FRAUDULENT CONVEYANCES—EVIDENCE TO REBUT PRESUMPTION OF FRAUD—WHEN CONVEYANCE OPERATES AS ASSIGNMENT.

1. A chattel mortgage given by a husband and wife on a stock of goods to secure a prior indebtedness of the husband for the purchase of a half interest in the stock, the wife being owner of the other half, which contained a provision that the husband should conduct the business as agent for the mortgagee, retaining a certain sum per week for expenses, and not being required to pay over any money to the mortgagee until the maturity of the debt, while not fraudulent on its face, as a matter of law, is presumptively so; and the presumption cannot be rebutted by the testimony of the parties simply that it was made in good faith, and not to defraud creditors.

2. Where a debtor executed a chattel mort-

gage to secure an antecedent debt, but at the time owned other property nearly or quite equal in value to that mortgaged, though he was insolvent, such mortgage did not operate as a general assignment, and was not rendered void by the fact that the mortgagor did not file a schedule of his assets, as required by Laws 1893, c. 453.

Appeal from superior court, Beaufort county; Graham, Judge.

Action by Andrew Cowan and others against George A. Phillips and another. Judgment for defendants, and plaintiffs appeal. Reversed.

W. B. Rodman, for appellants. Chas. F. Warren, for appellees.

**FURCHES, J.** This is an action brought by plaintiffs, who are creditors of the defendant T. E. Warren, against said Warren and George A. Phillips, mortgagee, to set aside the mortgage upon the ground of fraud. The defendant Phillips and M. A. Warren, wife of T. E. Warren, were partners in the harness business from 1890 to the 14th of January, 1893, when the defendant Phillips sold his interest in the business to the defendant T. E. Warren at the price of \$1,250, when the defendant T. E. Warren executed six notes, as the consideration of the purchase,—five for \$200 each, and one for \$250,—payable to the defendant Phillips, one of said notes falling due on the 14th day of January of each succeeding year, making the last, which was for \$250, fall due on the 14th January, 1899. On the 21st of November, 1894, the defendant T. E. Warren executed a mortgage to the defendant Phillips on the stock of goods in his harness business, to secure the payment of the six notes mentioned above. Among the conditions contained in this mortgage were these: That said Warren was to pay said notes as they became due, and in default of said payments the mortgagee, Phillips, was authorized to foreclose. Another condition was that the defendant Warren was to remain in possession of the goods so mortgaged until these notes were paid; was to carry on the business, to buy and sell for cash only; and was to receive from the business, for his services, and to cover running expenses, such as rents, taxes, etc., \$25 per week. The plaintiffs then produced evidence showing that defendant Warren was the owner of a house and lot in the town of Washington, which was under mortgage, which had since been foreclosed by sale, and only brought the amount of the mortgage debt; that he claimed to own another small tract of land, worth some \$400 or \$500, and that he owned between \$400 and \$500 worth of personal property, not included in the mortgage; that the defendant Warren was then being pressed with debts, and there were \$900 or more in judgments against him, besides that of plaintiffs, which was \$869.35, making about \$1,800 in judgments against him, upon some of which judgments executions had been issued, and returned nulla bona. In fact, he was badly insolvent. None of these facts were denied or controverted by

defendants, and the only evidence defendants offered in rebuttal or explanation was the testimony of both the defendants that the debts secured were bona fide debts, and that the mortgage was made in good faith to secure these notes, and not with intent to hinder, delay, or defraud creditors. This evidence was objected to by plaintiffs, but admitted by the court, and plaintiffs excepted.

The court was asked to hold and to charge that the mortgage, upon its face, was fraudulent and void. The court declined to give this instruction, and we find no error in this ruling. And, while we hold that it was not fraudulent upon its face, it is certainly on the verge of being so, as said by Bynum, J., in the case of *Cheatham v. Hawkins*, 76 N. C. 335. Where a mortgage is fraudulent upon its face it is then called a fraud in law, and cannot be rebutted by evidence. But where it does not disclose such a fraud upon its face as to call upon the court to declare it fraudulent and void, but has such earmarks and badges of fraud as to create a presumption of fraud, this presumption may be rebutted, but the burden is on the defendant. There is sufficient appearing upon the face of this mortgage to create the presumption, and if it had contained upon its face what appears in evidence, and uncontradicted,—that Warren at the time was badly insolvent, and that while he had worked for the defendant Phillips and M. A. Warren, while they were partners, at \$50 per month, by this mortgage his wages had been increased nearly 100 per cent.—it would have become the duty of the court to declare it fraudulent and void, as a matter of law. *Cheatham v. Hawkins*, supra. And this presumption is not allowed to be rebutted by the testimony of the defendants that it was made in good faith to secure the six notes, and not to defraud creditors. *Booth v. Carstarphen*, 107 N. C. 402, 12 S. E. 375, and cases cited. Indeed, this case is so nearly the same as *Cheatham v. Hawkins*, reported in 76 N. C. 335, and again in 80 N. C. 161, that we are not able to distinguish the principle involved in the one from the other. Therefore, while his honor was correct in refusing to hold that the mortgage was fraudulent and void from what appeared upon its face, as a matter of law, he should have instructed the jury, after the evidence was in, that, if they believed the evidence, the mortgage was fraudulent as to the plaintiffs, and that they should so find.

There was another question discussed, which it hardly seems necessary for us to pass upon, in view of what we have already decided, and we would not, but for the fact that it would come up again if the case should be tried again. The plaintiffs contended that this mortgage fell within the provisions of the act of 1893, and was void for the reason that the mortgagor filed no schedule, as he was required to do; and *Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2, and *Id.*, 117 N. C. 416, 23 S. E. 333, were cited to sustain this contention.

But this case is distinguishable from *Bank v. Gilmer*, and, in our opinion, does not fall within the provisions of the act of 1893. There is error, and there must be a new trial as to the issue of fraud, and the new trial will be confined to this issue, or issues involving this question, as the appeal seems not to have involved the other questions decided. Error and new trial.

(119 N. C. 73)

**HAHN v. MOSELY.**

(Supreme Court of North Carolina. Oct. 13, 1896.)

**JUDGMENTS—LIEN OF—SUFFICIENCY OF INDEXING—ADMINISTRATOR.**

1. Code, § 433, requiring the indexing and cross indexing of judgments, is for the purpose of facilitating the search for judgment liens or incumbrances, and the index must be made with reference to each judgment debtor, whose name must be specified; but it is not necessary that a judgment be indexed as to more than one plaintiff, though recoveries may have been adjudged in favor of different parties in the same judgment.

2. On a recovery by the holder of a judgment lien of the proceeds of land sold by the administrator of the judgment debtor, the administrator is not entitled to be allowed from the proceeds the amount of taxes and insurance voluntarily paid by him on the property, though he is entitled to commissions on the amount paid over.

Appeal from superior court, Craven county; Graham, Judge.

Action by Joseph L. Hahn against Robert G. Mosely, administrator of the estate of Isaac Forbes, deceased, to enforce certain judgments against the decedent against the proceeds of land sold by defendant as administrator, on which it was claimed that such judgments were liens. The judgment creditors represented by plaintiff were co-defendants with decedent in the action in which the judgments were rendered, and such judgments were rendered on cross complaints. The index of the judgment showed a judgment in favor of the plaintiff in the action only. Judgment for plaintiff, and defendant appeals. Modified.

M. D. W. Stevenson, for appellant. Clark & Gulon, for appellee.

CLARK, J. The object of the statute (Code, § 433) requiring an index and cross index of judgments is stated in *Dewey v. Sugg*, 109 N. C. 328, 334, 13 S. E. 923, 924, to be that: "The inquirer is not required to look through the whole docket to learn if there be a judgment against a particular person. \* \* \* When there are several judgment debtors in a docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any one of the others." The docketing creates a lien, and the index and cross index are provided to facilitate the search for such incumbrances, and hence the name of each defendant must be indexed. *Redmond v. Staton*, 116 N. C. 140, 21 S. E.

186. But, as to the plaintiffs, it is sufficient that one name appear, since that indicates the case in which the incumbrance accrued by judgment against the specified defendant; and by turning to the judgment recorded, or the judgment roll, in such case, the full nature and extent of the judgment will appear. It could serve no purpose to index the names of additional plaintiffs in the same judgment, when there is more than one. In the present instance the index and cross index showed that a judgment had been docketed in favor of *Simmons & Manly* against *Forbes* and the other defendants named. Had the defendant in this action turned to that judgment as recorded, he would have found its scope and purport, and amounts recovered therein, and to whom payable. He is fixed with notice of all that an examination of such judgment itself would have disclosed. Though recoveries were adjudged against divers parties, and for different amounts, they were all embraced in the same judgment, and by virtue of such judgment alone were liens on the property of the defendants therein named. The administrator is not entitled to be reimbursed the taxes and insurance, for these were volunteer payments on his part, but the decree should be reformed below to allow him commissions on so much of the proceeds of the sales of realty as is necessary to be paid on the plaintiff's judgment. Modified and affirmed.

(119 N. C. 80)

**SCHEELKY v. KOCH.**

(Supreme Court of North Carolina. Oct. 13, 1896.)

**LANDLORD AND TENANT—LEASE—DAMAGES FOR BREACH.**

Where leased premises are vacated by the tenant before the expiration of his term, the fact that they are re-leased by the landlord will not relieve the tenant from liability for the damages sustained by the breach of the contract, unless it is shown that the landlord assented to the surrender.

Appeal from superior court, Craven county; Graham, Judge.

Action commenced before a justice of the peace by C. J. Scheelky against W. F. Koch. Judgment in the superior court for plaintiff, and defendant appeals. Affirmed.

The judgment of the court, which by agreement contains the facts found, is as follows: "This cause coming on to be heard before Graham, J., and it having been agreed by the parties that the judge might find both the law and the facts, his honor found the following facts: That the defendant leased from the plaintiff a certain lot of land in the city of Newbern for the term of one year from the 1st day of February, 1894, with the privilege of one year more, at the monthly rate of ten dollars; that on the 28th day of February, 1895, the defendant vacated the said premises, and paid the rent therefor up to March 1, 1895; that on

the — day of March, 1895, the plaintiff took possession of the premises, and rented the same to one J. B. Watson, and continued in the possession thereof up to the commencement of this action; that the plaintiff received as rent for the said premises for the year ending February 1, 1896, from the various parties to whom they had been rented, the sum of \$76. Upon the foregoing findings of facts, it is found as a conclusion of law that the plaintiff is entitled to recover in this action \$44.93, with interest from the 1st day of March, 1896. It is thereupon ordered and adjudged that the plaintiff recover of the defendant and his surety, D. F. Jarris, on his appeal bond, said sum, and the costs of this action, to be taxed by the clerk."

M. D. W. Stevenson and Clark & Guion, for appellant.

FAIRCLOTH, C. J. "If the lease had been surrendered with the understanding that it should be canceled," the plaintiff could not recover. *Everett v. Williamson*, 107 N. C. 213, 214, 12 S. E. 189. The case stated fails to show any such understanding or consent on the part of the plaintiff. Affirmed.

(119 N. C. 68)

GOLDBERG et al. v. COHEN et al.  
(Supreme Court of North Carolina. Oct. 13, 1896.)

CREDITORS' BILL—SETTING ASIDE FRAUDULENT ASSIGNMENT—PARTIES—DISTRIBUTION OF FUND.

In a suit begun in December, 1894, by creditors, to set aside a deed of assignment as fraudulent, P., a preferred creditor in said deed, was made a defendant in 1895. Meanwhile P. had instituted an independent action to set aside the same deed as fraudulent, and at February term, 1896, filed his answer in the other suit, disclaiming any purpose to claim under the deed, and announcing his concurrence in the complaint, except in so far as it assailed the bona fides of his debt. Other persons had been allowed by the court to come in as plaintiffs, and the same privilege was, on motion, extended to P. on the filing of his answer, and thereafter he actively participated in the trial, at which the original plaintiffs withdrew their allegations that P.'s claim was fraudulent, and the only issue submitted was as to the fraudulent character of the deed. *Held*, that P. was entitled to be treated as a party plaintiff, and prorate with the other plaintiffs upon the setting aside of the deed. *Hancock v. Wooten*, 12 S. E. 199, 107 N. C. 9, distinguished.

Appeal from superior court, Craven county; Graham, Judge.

Action in the nature of a general creditors' bill, by M. Goldberg & Sons and others, against Solomon Cohen and others. Jacob Pizer, originally a defendant, was subsequently allowed to come in as plaintiff; and, from so much of the judgment in favor of plaintiffs as allowed said Pizer to share equally with the original plaintiffs, the latter appeal. Affirmed.

C. R. Thomas, for appellants. Clark & Guion and W. D. McIver, for appellees.

EVERY, J. This is the appeal of the other plaintiffs from so much of the judgment as allows Jacob Pizer to share equally with the creditors who instituted the suit. Jacob Pizer was preferred as a creditor of the second class in the deed of assignment which the suit was brought to set aside as fraudulent. The summons was issued by the other plaintiffs on December 29, 1894, and the complaint was filed on the same day; Jacob Pizer being named in both as a party defendant. Alias and pluries summons and publication were resorted to before Jacob Pizer was brought into court, at the fall term, 1895, when further time was allowed him to answer. Pizer had meantime instituted a second action, on August 1, 1895, to set aside the same assignment as fraudulent, though he was preferred therein, in the second class. At February term, 1896, Pizer filed his answer, in which he set forth that he was debarred from joining in the suit in December, 1894, because the other plaintiffs, in their complaint, charged that his claim was fraudulent. He disclaimed any purpose to claim under the deed, and announced his concurrence in the complaint except in so far as it assailed the bona fides of his debt. Meantime, accepting the invitation of the original plaintiffs, Emigh & Lobdel, Hartman & Richards, Wallace, Elliott & Co., William Everett House, and others were allowed to come in at February term, 1895, and make themselves parties. Of the number then allowed to make themselves parties plaintiff, judgment of nonsuit was entered against Mark H. Cohen at the spring term, 1895, for failure to contribute to the expenses of the action. But, on the coming in of Pizer's answer, he not only disclaimed any purpose to uphold the deed, but concurred in the charge that it was fraudulent, and asked to be made a party plaintiff; and the court, on motion, ordered that he be allowed to come in as a plaintiff, after which order he, personally and through his counsel, actively participated in the conduct of the suit up to the rendition of the verdict on the issue as to the fraudulent character of the deed. Upon the trial the other plaintiffs withdrew all allegations in the original complaint that Pizer's claim was fraudulent, for the reason that he had withdrawn all objections to their claims, and only the issue mentioned was finally submitted because of that understanding. The relation sustained by Pizer to the original plaintiffs, therefore, was very widely different from that occupied by Wooten, in *Hancock v. Wooten*, 107 N. C. 9, 12 S. E. 199, which the plaintiffs seem to rely on in support of their contention.

1. Pizer was allowed, on motion, to which there appears to have been no objection, to become a plaintiff instead of a defendant. The original plaintiffs entered no exception, as they might have then done, and, in the exercise of due diligence, ought to have done, but, on the contrary, availed themselves of the assistance rendered by him, and treated him in all respects as they did Emigh & Lob-

del and other parties who accepted their invitation and joined in the prosecution of the action, on motion and order at February term, 1895, and went so far as to withdraw their attack on his claim, for the purpose of securing his co-operation on the trial of the issue of fraud. It is manifestly too late now to object to Pizer's sharing the fruits of the recovery, which he has the same right to claim as those plaintiffs who began to contribute under an order of the court in February, 1895, and continued to be parties till after the hearing. Having treated the suit as a general creditors' bill, by recognition of the others who asked to come in, it is too late now for the original plaintiffs and those who joined them by leave of court up to the February term, 1895, to set up claim to the whole fund acquired by the assistance of another party, whose help they seemed so anxious to have that they admitted, what they had previously questioned, the bona fides of his claim. Whatever may be the last moment at which a creditor can be admitted as a party plaintiff as a rule, in view of all of the circumstances the plaintiff appellants cannot, in the face of the invitation and orders mentioned, avail themselves of the exception against a co-plaintiff because he has been permitted to change from an adversary to an assisting party. Pizer, in every aspect of the question, came in without objection, and in apt time. *Dobson v. Simonton*, 93 N. C. 270.

2. The principle laid down in *Hancock v. Wooten*, supra, was that the creditors who attacked a deed of assignment, and succeeded in having it set aside for fraud, are entitled to share pro rata in the recovery, and are entitled to the preference over other creditors who either fail to become parties at all, or, as parties defendant, unite with the assignor in defense of the fraudulent assignment. 107 N. C., at page 19, 12 S. E. 200. The court said: "He [Wooten] has never abandoned his adverse position, and is even now insisting upon a new trial upon the issue involving the validity of the trust." Upon the issue of fraud, Pizer was actively assisting the affirmative, while Wooten fought against the finding that the deed was fraudulent even upon the hearing in this court. Without entering further into the discussion of the doctrine laid down in *Hancock's Case*, supra, it is sufficient to say that Pizer must be treated just as if his name had appeared as a plaintiff instead of as a defendant in the original summons, issued December 29, 1894. The judgment is affirmed.

(119 N. C. 13)

#### COOK v. GUIRKIN et al.

(Supreme Court of North Carolina. Oct. 13, 1896.)

#### PLEADINGS—BURDEN OF PROOF—ADMISSIONS.

1. The burden is on one who sets up facts peculiarly within his own knowledge, or who has the custody of documents on which he relies to

establish a certain averment, to prove such facts or averment, if material to his cause.

2. When defendant admits the truth of any of the facts which constitute plaintiff's cause of action, or entitle him to recover, such admissions, so far as they extend, have the same force and effect as a finding of the jury.

3. In an action to cancel a note which plaintiff alleged had been paid in full by the sale of securities deposited with defendants, leaving a residue which plaintiff sought to recover in a second cause of action, defendants admitted the receipt of the securities, but averred that the proceeds of the sale were, with plaintiff's consent, applied to the payment of the debts due them from plaintiff. Held, that the burden was on defendants to show that they had a legal right to apply the fund in liquidation of other indebtedness in preference to the note.

4. In such case a motion by plaintiff for judgment on the admissions of the pleadings before impaneling a jury, or his refusal to offer proof in support of his second cause of action after the jury is impaneled, does not affect plaintiff's right to judgment on the first cause of action, though it waives his claim for relief on the second.

Appeal from superior court, Pasquotank county; Timberlake, Judge.

Action by F. M. Cook, administrator, against Guirkin and others to cancel a note, to restrain a sale under the trust deed securing the same, and for other relief. From a judgment for defendants, plaintiff appeals. Reversed.

E. F. Aydlett and B. B. Winborne, for appellant.

AVERY, J. The plaintiff alleged that the defendant trustee holds his note for the sum of \$464.60, due August, 1886, and secured by a deed of trust conveying a certain lot, and that on May 19, 1894, the other defendants caused the defendant trustee to advertise the same for sale. The plaintiff further alleged that the note had been paid and discharged in full by the sale of bonds and coupons deposited with the defendants, from which the defendants realized \$1,500. The plaintiff demanded judgment that the note be canceled, and for the residue of the \$1,500, and asked and obtained an injunction till the hearing. The defendants admit that they received securities worth more than \$1,500 from the plaintiff, but aver that the proceeds of the sale of the bonds received were by plaintiff's consent applied to the payment of other debts due them from the plaintiff, after a settlement, and before the note and mortgage which gave rise to this controversy were executed. Upon the trial the plaintiff rested his case before the jury upon the admissions in the answer, and insisted that the laboring oar was with the defendants to show the lawful application of the fund which they admitted was received, otherwise the court should adjudge the application of it to the payment of the note secured by the mortgage.

Had the plaintiff simply set up, as a ground for the interference of the court of equity, that the debt secured by the mortgage had been paid, and had that allegation been met with a general denial, the burden would

manifestly have rested on the plaintiff to prove the payment; but when the defendants admitted the receipt of \$1,500 from the plaintiff, and sought to avoid its application as a payment on the note by a general averment that it was lawfully applied to the payment of other claims held by them against the plaintiff, the question arose whether the burden was not shifted to the defendants. Was it not incumbent on them to show that a fund admitted to have been received was not properly applicable to the discharge of a debt acknowledged to have been then due, but that it was used in liquidation of other indebtedness, to which they might lawfully apply it in preference to the note?

The general rule is that the laboring oar remains with the plaintiff to establish every affirmative proposition that it is essential to prove in order to entitle him to the judgment demanded. But when the defendant admits the truth of any or all of the facts which constitute his cause of action, or entitle him to recover, such admissions, as far as they extend, have the same force and effect as a finding of the jury. *Helms v. Green*, 105 N. C. 262, 11 S. E. 470; *Bonham v. Craig*, 80 N. C. 224. If the defendant admits all the material allegations, and seeks to avoid the apparent liability growing out of such admissions by setting up new matter in avoidance, he must prove the facts necessary to establish his defense, and thereby overcome the plaintiff's apparent right to recover. It is true in this case that the plaintiff first admitted a debt, and set up payment; but when the defendants admitted a sufficient set-off, and sought to avoid its application in discharge of the debt by averring the legal right to apply it in some other way, it became incumbent on them to show what they averred, or submit to the judgment for a perpetual injunction. It seems to be the well-settled rule that where the answer admits material allegations of the complaint, but accompanies the concession with a statement of affirmative matter in explanation by way of defense, "the plaintiff may avail himself of the admissions without the qualification." *Pom. Rem. & Rem. Rights*, § 578; *Dickson v. Cole*, 34 Wis. 626; *Farrell v. Hennesy*, 21 Wis. 632. The material facts, in the application of the rule, are such as are issuable or essential to the proof of the cause of action. *Pom. Rem. & Rem. Rights*, § 617. "Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is reached [says 2 Whart. Ev. § 354], then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof." This rule was laid down as applicable to the common-law system of pleading, where the contest was ultimately narrowed down to a single issue. But under the Code system the ultimate issuable fact upon which the controversy in our case hinges is whether the defendants held other claims, to

which they had the right to apply the fund which they admit passed into their hands. This they have asserted, and have the means of proving if it be true. One of the tests often resorted to in order to determine upon whom the burden rests to produce particular evidence is that it is always incumbent upon a party who sets up in his pleadings facts which are within his own peculiar knowledge, or who has the custody of the documents upon which he relies to establish a certain averment, to prove such facts or averments where it is material to his cause to do so. *State v. Morrison*, 3 Dev. 299; *State v. Emery*, 98 N. C. 668, 3 S. E. 336; *Helms v. Green*, 105 N. C. 263, 11 S. E. 470; *Bank v. Bridgers*, 114 N. C. 883, 19 S. E. 666; 1 *Rice*, Civ. Ev. § 77; *State v. Mitchell*, 102 N. C. 372, 9 S. E. 702; *Rice*, Cr. Ev. § 260. In no court can the burden of proving a negative be imposed on a plaintiff where the facts are within the peculiar knowledge of the defendant, and this principle may also be invoked in support of the proposition that it was incumbent on the defendant to show the truth of averments that from the face of the pleadings seemed to involve the production of papers in possession of defendants. *Id.* § 262.

It may be contended for the defendants that the plaintiff, for a second cause of action, claimed that a balance of "five hundred dollars, or some other large sum," was due him from the defendants, and that it thereupon became incumbent on him to offer testimony to show the sum that he was entitled to recover. But if, on the other hand, the pleadings established the right of the plaintiff upon his first cause of action to demand judgment that the mortgage debt was paid, and for the cancellation of the note, or for a perpetual injunction, the failure to offer additional evidence would not work a forfeiture of his right to the judgment which he was entitled to demand without impaneling a jury. The motion for such a judgment before impaneling a jury, or the refusal to offer proof in support of his second cause of action after they were impaneled, must be held a waiver of the claim for relief growing out of the second cause of action; but neither would work a forfeiture or be deemed an abandonment of the right to a judgment on admissions in pleadings which constituted a sufficient basis for a decree for any relief whatever. The burden rests upon the plaintiff to prove a *prima facie* case, and he may safely rest when he has offered testimony tending to show his right to the relief demanded upon any one of several causes of action declared upon,—a *fortiori* when, upon the face of the pleadings, admissions appear which entitle him to relief without offering any additional testimony. 1 *Rice*, Civ. Ev. p. 136, § 89b. The plaintiff was entitled to win upon the test question, who had the right to judgment without offering testimony, other than that already before the court? The assertion of the right to judgment upon one

cause without attempting to establish the facts upon which other causes of action depend is a waiver of the demand for judgment upon them, but in no way precludes a party from the benefit of admissions in pleadings which are tantamount to a verdict that will support a judgment. For the reasons given there was error, and the plaintiff is entitled to a new trial.

(113 N. C. 688)

HUGHES v. WELLINGTON & P. R. CO.  
(Supreme Court of North Carolina. Oct. 13, 1896.)

**RAILROAD COMPANIES—RIGHT OF WAY—CONTRACT—CONSTRUCTION.**

The owners of certain land executed to defendant's assignor a contract which recited that in consideration of \$150 cash "for 50 acres, more or less," such owners "hereby grant, bargain, sell, and convey with general warranty, unto" said company "and its assigns, all (to 12 inches across the stump) the timber on the tract of land" described: that such owners granted to said company, its successors, etc., "a right of way through and across the said tract . . . and any other lands owned" by them, for the purpose of cutting and removing the timber cut from said land by said company, "or for the purpose of cutting or removing timber from any other tract" purchased or controlled by such company, and the right to erect all tracks, etc., necessary for such purposes; and that such owners granted unto said company, "and any persons or body corporate, its lawful successors or assigns, the right of way through said tract of land, and all lands owned by" them, "for a permanent railway, to be owned and operated by any persons or body corporate to whom said" company "shall assign the right hereby specifically granted." Just preceding the first granting clause were the words, "It is a part of this contract that the right of way through the open land is excepted." Held, that such contract granted to such company and its successors or assigns a right of way for a permanent railway through all the land of such owners.

Appeal from superior court, Bertie county; Boykin, Judge.

Petition by O. P. Hughes for the appointment of persons to assess the compensation due him for land taken by the Wellington & Powellville Railroad Company. From a judgment in favor of the company, petitioner appeals. Affirmed.

The statement of the case on appeal, as agreed to by the parties, is as follows:

"The petition of O. P. Hughes respectfully shows unto the superior court of Bertie county: (1) That he (O. P. Hughes) is the owner in fee simple and in possession of the tract of land in Bertie county, N. C., upon which he now lives, adjoining the lands of Freeman Perry, H. Bass and wife, Ben. Perry, Ehl Daniel, and others, and containing about 80 acres, more or less. (2) That the Wellington and Powellville Railroad Company is a corporation, duly formed under the laws of North Carolina, having been organized under letters of incorporation from the secretary of state of North Carolina about September 1, 1890, and is now actively at work in Bertie county, N. C. (3)

That, prior to the filing of this petition, the said railroad company entered upon said land without license from petitioner, and has constructed, and is now constructing, over and upon the open land of said farm, both a switch and its main line of its railroad, thereby damaging said land, taking up and using a portion thereof, digging ditches thereon, raising mounds, ponding water, and rendering travel from one part of said land to the other difficult, and greatly impairing the value of said land for agricultural purposes. (4) That your petitioner is the only person interested in said land, and his post-office address is Colerain, N. C. (5) That, before filing this petition, your petitioner undertook to adjust with Jas. A. Fickett, an officer of said company, to wit, its superintendent, the amount of compensation to be paid to him for the taking of said land, and the damages incident thereto, but was unable to agree upon the amount. (6) That the width of land for which defendant is liable to this petitioner is not less than eighty feet, nor more than one hundred feet, and that petitioner's compensation is worth at least one hundred and fifty dollars, which he demands. Wherefore your petitioner asks (1) that this court will appoint three disinterested persons, freeholders, residents of Bertie county, and competent men, who shall assess the compensation due plaintiff under the law; (2) that this court will name the time and place of the first meeting of said commissioners.

"Francis D. Winston,

"Attorney for Petitioner."

"The defendant, answering the petition in this cause, says: (1) That section 1 is admitted; (2) that section 2 is admitted; (3) that section 4 is admitted; (4) that section 5 is admitted; (5) that section 6 is untrue; (6) that section 3 is untrue. Further answering section 3, defendant says: That by deed duly executed in December, 1890, and duly recorded in Bertie county, in Book 68, page 597, which defendants ask may be taken and considered as part of its answer, the plaintiff and his wife conveyed to Nansemond Timber Company, of North Carolina, and to its successors and assigns, all the timber upon said lands in complaint described, and a right of way across the said lands for the purpose of removing the timber cut from said land, or any other land owned or controlled by said timber company; also, a right of way through said lands for a permanent railroad, to be owned and occupied by said timber company, or any other person or body corporate to whom the said company shall assign said right granted to it. (7) That said Nansemond Timber Company, of North Carolina, conveyed all the rights and interest acquired by it under the deed aforesaid to the Browning Manufacturing Company, by whose license and authority the defendant entered upon the lands described in the complaint, and the said Browning Manu-

facturing Company has, by deed, conveyed all of its said interest and right in the said lands, and to the right of way aforesaid, to the defendant. Wherefore defendant demands judgment, that it go without day, and that plaintiff take nothing by this action.

"Pruden, Vann, and Martin,

"Attorneys for Defendants."

"This agreement, made this 10th day of —, in the year 1890, between C. P. Hughes and —, his wife, of the county of Bertie, state of North Carolina, of the first part, and the Nansemond Timber Company, of North Carolina, of the second or other part, witnesseth: That in consideration of the sum of one hundred and sixty dollars, agreed to be paid by the party of the second part unto the parties of the first part, viz. for fifty acres, more or less, to be hereinafter laid off and designated out of the tract hereinafter described by said party of the second part, which purchase money or consideration is to be paid as follows, viz.: One hundred and sixty dollars prior to the execution of this deed, the receipt of which is hereby acknowledged. It is a part of this contract that the right of way through the open land is accepted. The said parties of the first part do hereby grant, bargain, sell, and convey, with general warranty, unto the said party of the second part and its assigns, all (to 12 inches across the stump) the timber on the tract of land lying in Bertie county, North Carolina, bounded and described as follows, viz.: By the lands of Freeman Perry, A. Bass, T. D. Holly, and others. The said parties of the first part hereby grant unto said party of the second part, its successors or assigns, agents and servants, a right of way through and across the said tract of land above described, and any other lands owned by said parties of the first part, for the purpose of cutting and removing the timber cut from said land by said party of the second part or its agents, or for the purpose of cutting or removing timber from any other tract of land purchased or controlled by said the party of the second part. And said parties of the first part also grant to said party of the second part the right to erect all tracks, machinery, buildings, improvements, and fixtures to be used for the objects and purposes set out in the clause next hereinbefore, and also to remove the same at the pleasure of said party of the second part. And the said parties of the first part hereby grant unto said party of the second part, and any persons or body corporate, its lawful successors or assigns, the right of way through said tract of land, and all lands owned by said parties of the first part, for a permanent railway, to be owned and operated by any persons or body corporate to whom said party of the second part shall assign the right hereby specially granted. And said parties of the first part hereby covenant with said party of the second part and its assigns to pay all levies, taxes, as-

sessments, and dues upon the land and timber herein described, during the continuance of this contract; and said parties of the first part hereby grant, accord, and assure unto said party of the second part and its assigns the full term of ten years within which to cut and remove the timber hereby conveyed.

"Witness the following signatures and seals:

his  
"C. P. Hughes. X [Seal]  
mark

her  
"Sallie C. Hughes. — [Seal]"  
mark

"This cause coming now to be heard by the court, both parties being before the court, and it being agreed by the parties that the plaintiff's right to the judgment prayed depends upon the construction of the deed set out in the pleadings, from C. P. Hughes and wife to the Nansemond Timber Company, and the court being of opinion that the said deed conveyed to the said company and its successors and assigns the right of way claimed and used by the defendant, of which plaintiff complains, on motion of defendant's counsel it is adjudged by the court that the plaintiff take nothing by his action, and that defendant go without [day], and recover of plaintiff the cost of this action, to be taxed by the case.

E. T. Boykin, Judge."

"In this cause it is agreed that the petition filed by C. P. Hughes, the answer filed by the Wellington and Powellsville Railroad Company, a certified copy of the deed from C. P. Hughes and wife to the Nansemond Timber Company, as the same is of record in Book 68, page 597, of Bertie county register of deed's office, and the judgment of Boykin, judge, at this term of the court, shall constitute the statement of the case on appeal for the supreme court."

F. D. Winston, for appellant. Battle & Mordecai, for appellee.

FAIRCLOTH, C. J. The only question presented is a construction of the written agreement of the parties. On inspection, we are of opinion that the parties had two objects in view: (1) To sell and buy the timber on the woodland, with the privilege of removing the same within 10 years, with the right of way, and the right to erect tracks, machinery, buildings, improvements, and fixtures for that purpose, and to remove the same at the pleasure of the defendant, the right of way not to go through the plaintiff's open land; (2) to grant to the second party and its successors or assigns the right of way for a "permanent railway" through all the lands of the plaintiff. We think the exception is limited to the first branch of the contract, to wit, the timber lands. If we have failed to find the true intent of the parties, it is owing to the inartificial structure and language of the agreement. Affirmed.

(119 N. C. 779)

## STATE v. WOOLARD.

(Supreme Court of North Carolina. Oct. 13, 1896.)

## CRIMINAL LAW—INSTRUCTIONS—STATUTES—REFRAL—AMENDMENT.

1. In a criminal case, in which defendant testifies in his own behalf, the court may charge that, if the jury believe defendant's testimony, they may find him guilty, where such charge is justified by the evidence.

2. Laws 1893, c. 83, entitled "An act to amend chapter 504, Laws 1889," which placed the jurisdiction of the offense of abandonment in a justice of the peace, repealed such act, and restored to the superior court the jurisdiction of such offense, though the body of the act only amended "chapter 504."

3. Laws 1889, c. 504, placed the jurisdiction of the offense of abandonment in a justice of the peace. Laws 1893, c. 83, purporting to restore to the superior court the jurisdiction in such cases, is entitled "An act to amend chapter 504, Laws 1889," but the body of the act only amends "chapter 504." Laws 1893, c. 481, provides that the act of the same session "to amend chapter 504, Laws 1889," should be amended by inserting the words "Laws 1889" in the body of the act after the words "chapter 504." *Held*, that the latter act amends chapter 83, though chapter 481, in referring to chapter 83, mentioned it as "ratified Feb. 14, 1893," when in fact it was ratified February 11, 1893.

Appeal from superior court, Beaufort county; Graham, Judge.

John W. Woolard was convicted of abandonment, and appeals. Affirmed.

W. B. Rodman, for appellant. B. B. Nicholson, Atty. Gen., and Chas. F. Warren, for the State.

CLARK, J. The charge to the jury that, if they believed the defendant's testimony, to find him guilty, was fully justified by the evidence, and it was competent for the judge, in such case, to so instruct the jury. *State v. Riley*, 113 N. C. 648, 18 S. E. 168. The chief reliance of the appellant, however, is that the act of 1889 (chapter 504), which placed the jurisdiction of the offense of abandonment in a justice of the peace, is not repealed by chapter 83, Laws 1893, because the body of the latter act only amends "chapter 504," omitting the words, "Laws of 1889"; but in the title of said chapter 83, Laws 1893, it is described as "An act to amend chapter 504, Laws 1889." This makes the meaning and purport of said chapter 83 of Laws 1893 entirely clear. It is true that at common law the title of an act was little considered. The reason of this was, because in England the title was no part of an act, but was prefixed by the clerk of that house in which the bill originated. The titles were styled "Rubrics," because written in red ink. Indeed, prior to the eleventh year of Henry VII. (1495), titles were very rarely prefixed at all. But now the title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law; and, if it passes into law, the title thereof is consequently a legislative declaration of the tenor and object of the act. Indeed, so far is this true, and so important has the title

become, that in many state constitutions there are now provisions to guard against the title of bills being misleading. "Ratione cessante, cessat et lex." Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered. *Sedg. St. Law*, 50; *Potter, Dwar.* 101-105; *Cooley, Const. Law* (6th Ed.) 160; *Suth. St. Const.* § 210; *End. Interp. St.* § 58; *Wilson v. Spaulding*, 19 Fed. 304. If there was nothing more before us than chapter 83, Laws 1893, still it would be clear, taking into consideration the title in connection with the body of the act, that the chapter 504 amended was chapter 504, Laws 1889, and therefore that jurisdiction of the offense of abandonment was restored to the superior court as it stood under Code, § 970. Had there been the least doubt on this point, however, it was removed by the supplementary act at the same session (chapter 481, Laws 1893), which expresses in the body of it that the prior act of the same session "to amend chapter 504, Laws 1889," should be amended by inserting the words "Laws 1889" in the body of the act after the words "chapter 504." It is true, the said chapter 481, in referring to chapter 83 (as it was afterwards numbered), mentions it as "ratified 14 Feb., 1893," when in fact it was ratified February 11, 1893. We do not know whether the discrepancy between February 11th and February 14th was a clerical error in copying, or a typographical error in printing, or an inadvertence in drawing the supplementary act or bill; but sufficient appears to make it clear beyond cavil what prior act is referred to. The court will not "distinguish and divide a hair betwixt south and southwest side." A stronger case than ours in favor of following the clear legislative intent is *Wilson v. Spaulding*, *supra*. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197, relied on by appellant, in no wise conflicts with what is above stated, since that case merely holds that the heading of a section prepared by the compilers of the Code will not "affect the construction of the language of the section, when its meaning is perfectly obvious." No error.

(119 N. C. 20)

## NICHOLSON v. COMMISSIONERS OF DARE COUNTY.

(Supreme Court of North Carolina. Oct. 13, 1896.)

## CLAIMS DUE DECEDENT'S ESTATE—SUIT BY LEGATEE—PRESUMPTIONS.

In a suit by a legatee to recover a claim due his testator's estate, there is no presumption two years after testator's death that the legatee was appointed administrator, or that an administrator had been appointed, and the claim assigned to the legatee as part of his legacy.

Petition to rehear. Dismissed.

FURCHES, J. This case was here at the last term of the court on the appeal of the defendant, and was decided, and reported in 118 N. C. 80, 24 S. E. 728, and is now before the court upon a petition to rehear.

The first ground of error set forth in the petition is that this court reversed the court below for the reason that the "will of C. W. Nicholson was not made a part of the record, and that it was not shown to the court that there was a personal representative of said C. W. Nicholson." This assignment of error is not true in fact, as will plainly appear upon reading the case as reported *supra*. It is true that in the argument of the case it is stated that the will of C. W. Nicholson is not made a part of the record, and that it does not appear to the court whether there was an executor or not. But neither of these was the point decided by the court, but they were only facts stated leading to the question decided.

The plaintiff, in her complaint, claimed that she was the assignee of \$712.74 in a judgment which Currituck county had recovered and held against Dare county. This was denied by the defendant, and made the issue to be tried, and is the only issue decided by this court at the last term. The plaintiff, by her complaint, made the proceedings, the reports, and judgments in the case of Currituck County vs. Dare Co. a part of her complaint; and on the trial the plaintiff offered and read this record in evidence, which was the only evidence offered in the case, except the will of C. W. Nicholson. So, if there is any evidence to sustain plaintiff's allegation that plaintiff is the assignee of \$712.74 in the judgment of Currituck against Dare, it is in this record introduced by plaintiff. Upon examination of this record, we find it stated that "on March 2, 1882, the commissioners of Currituck county assigned, of this judgment against the defendants, the following amounts to the persons named below"; and among the names below is that of C. W. Nicholson, and opposite his name is set \$712.47. We find the name of C. W. Nicholson as many as seven times mentioned in this record, and the name of Lovey Nicholson is not to be found in it. There is this entry: "(8) To paid Mrs. Nicholson, \$276.50." But this was no part of the judgment of Currituck against Dare, even if the "Mrs. Nicholson" mentioned is Mrs. Lovey Nicholson, the plaintiff in this case; and there is nothing, unless it be this entry, to show that she is. Upon this evidence, on the trial below, the defendant asked the court to charge the jury "that there is no evidence of an assignment of any judgment, or the interest of any judgment, to plaintiff by Currituck county." This prayer was refused by the court, and we said there was error in this refusal; and, after another argument and a full consideration of the whole case, we are of the same opinion now that we were then.

In the argument, the counsel for plaintiff seemed to lay great stress upon the fact that it appeared from the record that C. W. Nicholson died in June, 1880, and this assignment was not made until May, 1882. But we are unable to see the force of this argument; for,

if it should be held (and we do not so hold, as that question is not before us) that it is void as to C. W. Nicholson, it could not follow that this made it a good assignment to some one else, to whom it was not assigned.

It was suggested on the argument at this term that the plaintiff could probably sustain her action under the doctrine of presumption; that the clerk of Currituck had qualified, or appointed and qualified the plaintiff or some one else than the personal representative of C. W. Nicholson; and that, as more than two years had elapsed since the death of C. W. Nicholson, the plaintiff or whoever qualified as the personal representative had paid the debts and settled the estate, and assigned this claim to plaintiff, as a part of her legacy under the will. But this cannot be so, as there is nothing for the presumption to rest upon. There is no law requiring a clerk to appoint an administrator or to qualify an executor, unless he is applied to and asked to make such appointment. Generally, presumptions arise from admitted or established facts, and is a very useful principle of legal jurisprudence. But it cannot be presumed that a party is the owner of property without some admitted or established fact to start with. Where an indebtedness exists by a promissory note or other negotiable paper capable of manual delivery, and the plaintiff is in possession of the note or other paper, the law, in the absence of other evidence, presumes the holder to be the owner. But here is the fact that the plaintiff is in possession of the note, which creates or raises the presumption. But, if the plaintiff had no possession of the note, there would be no presumption. So, if one is in actual possession of an office, the fact that he is in, exercising the duties of the office, raises the presumption that he is rightfully in. So, it is that, where an officer of court does a thing in the line of official duty, the law presumes it is rightfully done, until the contrary appears. But it cannot be presumed that a court has tried a case or made an appointment, although it had the right to do so, if applied to; and, if he does this, it must be made to appear upon proof of the fact. So, there can be no presumption that the clerk had appointed and qualified a personal representative of C. W. Nicholson; and, as there is no evidence or presumption that any one has ever been appointed, there can be no presumption that they acted properly or improperly. Besides, this suggestion is not only without foundation to rest upon, but it is in direct conflict with the allegation of plaintiff's complaint, which alleges that she is the assignee of the county of Currituck; and it was argued before us by plaintiff's counsel that C. W. Nicholson never had any interest in this judgment, upon which this action was brought. The petition must be dismissed, and the case goes back for a new trial, when the plaintiff will take such course as she may be advised by counsel. Petition dismissed.

(119 N. C. 96)

**MAY et ux. v. STIMSON LUMBER CO.**  
(Supreme Court of North Carolina. Oct. 20, 1896.)

**JUDGMENT—ERRONEOUS AND IRREGULAR JUDGMENTS DISTINGUISHED—PROCEEDING TO REVIEW.**

A judgment in an action in which the defendant has appeared and answered, rendered on a trial in which the court erroneously submitted but one issue to the jury, though others were presented by the pleadings, is erroneous, but not irregular; and the remedy is by appeal, and not by motion at a subsequent term to set aside the judgment.

Appeal from superior court, Pitt county; Graham, Judge.

Action by Alfred May and wife against the Stimson Lumber Company. Appeal by plaintiffs from an order setting aside a judgment in their favor, rendered at a former term. Reversed.

Swift Galloway and J. B. Batchelor, for appellants. Blount & Fleming, for appellee.

**FAIRCLOTH, C. J.** Judgment was rendered in this action at January term, 1896, by Boykin, J., and no appeal was taken. On September 10, 1896, the judgment was set aside by Graham, J., on affidavit of the defendant, alleging that it was erroneous, in that only one issue was submitted to the jury, although three issues were raised by the pleadings. The defendant having appeared by attorney and filed an answer to the complaint, he was then in court, although no summons had been served, and there was no irregularity in the course of the court in that respect. The complaint now made is that the court erred in submitting only one issue to the jury. If that is true, as alleged by defendant, it was error in law, and the judgment rendered was an erroneous one, and the defendant's remedy was by appeal, and not by motion at a subsequent term to have the judgment set aside. That would be his remedy if the judgment was irregular only, in proper cases. The distinction has been frequently stated by this court, to wit, an irregular judgment is one contrary to the course and practice of the court, as judgments without service of process. An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law; as where it is for one party when it ought to be for the other, or for too much or too little. *Wolfe v. Davis*, 74 N. C. 597. The remedy in the latter event is by appeal; in the former, by motion at apt time. Issues arise out of the pleadings, and must be submitted to the jury. If the court shall be of opinion that one or more issues are enough to reach the merits of the case, without depriving the parties of an opportunity to have their rights heard by court and jury, then no more issues need be submitted; and, if in that opinion the court is mistaken, the parties have no remedy except to appeal. *Simmons v. Dowd*, 77 N. C. 155. We then have a case in which

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there was no irregularity; and, if there was no error, the defendant has no case for relief; and, if there was error, he has lost his remedy by failing to appeal. He cannot appeal from one superior court judge to another. Error.

(119 N. C. 99)

**STATE ex rel. RICKS et al. v. STANCILL et al.**

(Supreme Court of North Carolina. Oct. 20, 1896.)

**FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCE—BURDEN OF PROOF.**

Where voluntary conveyances are attacked for fraud by plaintiffs, who are admitted to have been creditors of the grantor when such conveyances were made, the burden rests upon the grantees to prove that the grantor retained property sufficient and available to pay his existing debts.

Appeal from superior court, Pitt county; Boykin, Judge.

Action on relation of J. A. Ricks and W. B. Ricks, executors of G. E. Taft, deceased, and R. E. Mayo, against R. W. Stancill, administrator of T. J. Stancill, deceased, and others. The complaint alleged that T. J. Stancill was administrator of the estate of Wiley Stancill, and that G. E. Taft and R. E. Mayo were sureties on his bond; that a judgment was obtained against the principal and sureties on said bond, which was paid by the sureties; that, prior to the recovery of said judgment, T. J. Stancill, for the purpose of defrauding his creditors, executed voluntary conveyances of his land to certain of the defendants, who were his children; that, after the payment of the judgment by the sureties, T. J. Stancill executed to them a mortgage to secure its repayment on the land previously conveyed to defendants, and on certain personal property which has since become destroyed, or has passed out of existence. Plaintiffs prayed judgment setting aside the voluntary conveyances, and declaring their claim a lien on the lands, and that they be subrogated to the rights of the plaintiffs in the judgment which they had paid. From a judgment for plaintiffs, defendants appeal. Affirmed.

James E. Moore, for appellants. Blount & Fleming, for appellees.

**MONTGOMERY, J.** The defendants tendered five issues, all of which the court refused to submit, and the defendants excepted. Those issues were as follows: "(1) Was there an assignment of the judgment mentioned in the pleading to the use of the plaintiffs? (2) At the time of bringing the suit, was the deed of T. A. Stancill to his children made without retaining sufficient property to pay his then existing creditors, without consideration, and with intent to hinder, delay, and defraud the plaintiffs? (3) What was the value of the personal property of T. J. Stancill? (4) Was the property conveyed

in the mortgage of T. J. Stancill to G. E. Taft and others sufficient to pay plaintiff's debt? (5) Was the property mortgaged by T. J. Stancill to R. E. Mayo and G. E. Taft wasted and lost by the carelessness and negligence of plaintiffs?" The court submitted the following issues: "(1) Were the conveyances made by T. J. Stancill to his children made without any consideration other than that of natural love and affection? Ans. Yes. (2) Did G. A. Stancill, G. E. Taft, and R. E. Mayo agree at the time of the execution of the mortgage to them by T. J. Stancill to accept said mortgage in full satisfaction of all indebtedness of said Stancill to them? Ans. No. (3) Were the conveyances made by T. J. Stancill made with the intent to hinder and defeat his creditors? Ans. Yes. (4) What amount, if any, is due R. E. Mayo on account of money paid on the judgment mentioned in item two of the complaint? Ans. \$224, and 8 per cent. interest from date, May 20, 1889. (5) What amount, if any, is due G. E. Taft on account of money paid on the judgment mentioned in item two of the complaint? Ans. \$224, and 8 per cent. interest from date, May 20, 1889."

There was no need for the first issue tendered by the defendants, for the plaintiffs on the trial had admitted that the judgment had not been assigned to them. The defendants were not entitled to their second issue, for the question was not whether Stancill did or did not do anything at the time of the commencement of this suit, but whether, at the time when he made the voluntary conveyances to his children, he retained a sufficiency of property to pay his then existing creditors, the defendants having agreed on the trial that the first issue submitted by the court should be answered "Yes," and that the deeds were voluntary; and it appears that that part of the defendant's second issue as to whether the deeds were made to hinder, delay, and defeat his creditors was submitted in No. 3 of the issues submitted by the court. The third issue tendered by the defendants was properly rejected, for the reason that the personal property of Stancill, the deceased donor, whatever its value might have been, had been administered in due course of law by his personal representatives. The fourth and fifth of the defendants' issues the court properly refused to submit. It was in evidence that none of the property conveyed by Stancill to plaintiffs ever came into the plaintiffs' possession; but, on the other hand, it appeared that the mortgagee, Stancill, used the whole of it for his own benefit and purposes. Under the issues submitted by the court the defendants had the opportunity to present fully their testimony, and the law arising thereon. *Patton v. Garrett*, 116 N. C. 847, 21 S. E. 679; *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C. 797, 21 S. E. 917. The complaint sets out with sufficient plainness

and conciseness to enable the plaintiffs to maintain their standing in court that they were compelled to pay the amount of a judgment recovered against them as sureties on the administration bond of Stancill, and that in good time they commenced this action with the view of deriving the rights and remedies against their principal and his estate provided under section 2096 of the Code.

The main contention, however, in the case is whether or not Stancill, at the time he made the voluntary conveyances of his land to his children, retained a sufficiency of property to pay his then existing creditors. The plaintiffs introduced no evidence on this point. The defendants' evidence went to show that the property retained after the exemption should be allowed was not sufficient for that purpose. The defendants' counsel asked the court to instruct the jury that there was no evidence that Stancill did not retain sufficient property to pay his debts, and that they should answer the third issue "No." This was refused, and the defendants excepted. There was no error in this refusal. In this connection the court charged the jury that the burden was upon the plaintiffs not only to show that the conveyances were voluntary, and without consideration, but, by the weight of testimony, that Stancill did not retain property sufficient and available to pay his then existing creditors, and that, unless the plaintiffs had proved by a weight of the evidence that Stancill did not retain property sufficient and available for the satisfaction of his then creditors, they would answer the third issue "No." That instruction was erroneous, but, as the jury found for the plaintiffs, no harm has been done. As we have said, the defendants had admitted that the conveyances from Stancill to his children were voluntary, and that he owed the plaintiffs a large sum of money at the time they were executed. Upon these admissions, the deeds having been attacked for fraud by the plaintiffs, the burden was imposed on the defendants to show that the donor retained at the time when the deeds were executed sufficient property, and available to pay his debts. *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702. We have examined the other exceptions, and they are of no force. No error.

(119 N. C. 677)

#### PARKER v. NORFOLK & O. R. CO.

(Supreme Court of North Carolina. Oct. 13, 1896.)

#### STATUTE OF LIMITATIONS—OVERFLOW OF LAND BY CONSTRUCTING DITCHES—MEASURE OF DAMAGES.

1. A railroad company acquired a right of way over plaintiff's farm, and in 1888 constructed its drains, which were proper for the safety of the roadbed; but by such drains surface water from land adjacent to plaintiff's was diverted, and caused to overflow plaintiff's cultivated land. *Held*, that an action for damages caused by such

overflow, brought in October, 1894, was not barred by limitations, as to permanent damages, or the damages accruing within three years prior to issuing the summons, and up to the time of the trial.

2. In an action for permanent damages for overflowing lands, it was error to charge that if defendant had negligently diverted the water, and caused the overflow, plaintiff could recover the difference between the value of the land "before the road was built, and the value after the road was built," though plaintiff alleged that by reason of the unlawful diverting of the water's course his farm, by repeated overflows, had been rendered unfit for agricultural purposes, since the measure of permanent damage was the difference in the value of the land in its condition when the right of action accrued, and what would have been its value had the road been skillfully constructed.

3. Where plaintiff's land was overflowed and damaged by reason of a diversion of surface water from its natural outlet, he was entitled to permanent damages.

Appeal from superior court, Bertie county; Boykin, Judge.

Action by Henry Parker against the Norfolk & Carolina Railroad Company to recover damages to plaintiff's land by overflows of surface water caused by ditches and drains constructed by defendant. From a judgment for plaintiff, defendant appeals. Reversed.

The pleadings are as follows:

Complaint: "Henry Parker, plaintiff, complaining of the defendant, the Norfolk & Carolina Railroad Company, alleges: (1) That the defendant, the Norfolk & Carolina Railroad Company, is a corporation duly organized under the laws of North Carolina, as set out in chapter 3 of the Acts of 1880, and is engaged in operating a railroad, carrying both freight and passengers, between Pinner's Point, in Virginia, and Tarboro, in North Carolina. (2) That the plaintiff, Henry Parker, was before January 1, 1887, and has been since that date, the owner of that certain tract of land in Bertie county, North Carolina, in Roxobel township, called the 'Arthur Harrell Land,' which he bought of Lam Parker and wife, containing 67 acres, and adjoining James Morris' land, the Axum Peele tract, and others. (3) That said Henry Parker for the past six years planted said land in crops of corn, peas, and other products, and endeavored to cultivate crops on said land, until it was rendered unfit for cultivation by the unlawful, negligent, and wrongful act of the defendant. (4) That the defendant, the Norfolk & Carolina Railroad Company, some time about the year 1888, negligently, wrongfully, and unlawfully cut ditches along its right of way on plaintiff's land, for the purpose of draining the water of Long Pond and Flat pocosons, on said land, by means of its side ditches, and also of draining the water which collected in said side ditches. (5) That by reason of the negligent, unlawful, careless, and wrongful cutting of said ditches on said land, it was and is constantly overflowed with great quantities of water, which defendant has diverted from its nat-

ural course, and from the way in which it had been accustomed to flow, and thereby emptied the same upon the farm of plaintiff, above described. (6) That by reason of the negligent, wrongful, and unlawful and careless cutting of said ditches, and the negligent and unlawful diverting of the course of said water, the plaintiff's farm has been constantly and repeatedly overflowed for the past six years, and the crops destroyed, and the land rendered unproductive. (7) That by reason of the negligent, wrongful, unlawful, and careless cutting of said ditches, and the negligent and unlawful directing of the course of said water, the plaintiff's farm, by said repeated overflow, has been rendered sour and sodded, and its fertility destroyed, and rendered unfit for agricultural purposes. (8) That, owing to the acts above alleged, plaintiff has been damaged one thousand dollars. Therefore plaintiff asks judgment—First, for one thousand dollars; second, for all equitable and legal relief; third, for the costs of this action."

Answer: "The defendant, for answer to the plaintiff's complaint, says: (1) That defendant admits sections Nos. 1 and 2 to be true. (2) That the defendant is informed and believes that section 3 of the complaint is not true, and therefore denies the same. (3) That the defendant admits that it cut ditches on its right of way, but alleges that the said ditches were necessary for the proper drainage of its roadbed, and that in cutting the same it exercised a lawful right, in a lawful and proper manner, and denies that they were wrongfully, negligently, or unlawfully cut. (4) That the defendant is informed and believes that section 5 of the complaint is untrue, and alleges that the plaintiff's land described in the complaint has not been overflowed more frequently since than before the construction of its roadbed, and that it has not diverted any water from its natural course, or caused it to flow upon the [land of] plaintiff in greater quantities than it hitherto was wont to do. (5) That the defendant is informed and believes that section 6 of the complaint is not true, and therefore denies the same. (6) That the defendant denies sections 7 and 8 of the complaint to be true. Wherefore the defendant demands judgment that it go, without day, and recover the costs of this action."

Amendment to answer: "By leave of the court the defendant amends the answer by adding thereto the following, to wit: (7) That defendant purchased of plaintiff the right of way over the land on which the ditches and drains complained of were constructed, and that said ditches and drains were necessary for the proper construction of defendant's roadbed, and the same were properly and skillfully constructed; and, if any damage resulted to plaintiff's land in consequence thereof, it was the natural and necessary result of a proper and skillful construction of said roadbed, and plaintiff, in

afterwards cultivating said lowlands, was guilty of contributory negligence. (8) That all of the causes of action set out in plaintiff's complaint accrued, if at all, more than three years before this action was commenced, and are barred by the statute of limitation. Wherefore defendant demands judgment that it go without day, and recover of the plaintiff the costs of this action."

Issues tendered by defendant: "(1) Is the plaintiff's cause of action barred by the statute of limitation? Answer. No. (2) Were the defendant's roadbed and drains mentioned in complaint skillfully constructed, and the drains necessary and proper for the safety of said roadbed? Answer. Yes. (3) Was plaintiff guilty of contributory negligence in planting corn on his low grounds after the construction of said roadbed and drains? Answer. Yes. (4) Has defendant wrongfully caused the overflow of the plaintiff's land? Answer. Yes. (5) What damage is plaintiff entitled to recover, if any? Answer. \$300."

The judgment is as follows: "This cause, coming on to be heard before Boykin, J., and a jury, and, upon the issues submitted, the jury having returned for their verdict as follows: '(4) Has the defendant wrongfully caused the overflow of the plaintiff's land? Answer. Yes. (5) What damage is plaintiff entitled to recover, if any? Answer. \$300,'—and the court having answered the following issues as set out below: '(1) Is the plaintiff's cause of action barred by the statute of limitations? Answer. Yes. (2) Were the defendant's roadbed and drains mentioned in the complaint skillfully constructed, and the drains necessary and proper for the safety of said roadbed? Answer. Yes. (3) Was plaintiff guilty of contributory negligence in planting corn on his lowlands after the construction of said roadbed and drains? Answer. Yes,'—on motion of Francis D. Winston, attorney for Henry Parker, plaintiff, it is ordered, adjudged, and decreed that Henry Parker, plaintiff, recover of the Norfolk & Carolina Railroad, the defendant, the sum of three hundred dollars, and the costs of this action, to be taxed by the clerk of this court. This recovery is for the actual damage to the lands itself."

The case on appeal is as follows: "There was evidence tending to show that the railroad runs east and west through the lands of the plaintiff. The road is north of the farm. Flat pocoson is east of the locus in quo. Long Pond pocoson is west of the locus in quo. Plaintiff's farm is between these two pocosons. The railroad crosses both pocosons, running east and west. Flat pocoson naturally drains south. Its waters would not drain over plaintiff's lands, because there is a ridge between plaintiff's land and Flat pocoson. This ridge prevents the waters of Flat pocoson draining on plaintiff's lands, and its waters would not touch plaintiff's lands but for the railroad ditches. Long Pond pocoson naturally drains south, and its waters would not drain over

plaintiff's lands, because there is a ridge between Long Pond pocoson and plaintiff's land. The ridge prevents the waters of Long Pond pocoson draining on plaintiff's land, and its waters would not touch plaintiff's land but for the railroad ditches. The natural drain of Flat pocoson is into Wartom pocoson, and its waters empty into that pocoson more than a mile below plaintiff's farm, and south of it. The natural drain of the waters of the Long Pond pocoson is into Cashle swamp. By reason of ditches cut along the line of the defendant's roadbed, the waters of Flat pocoson are drained on plaintiff's land from the east by said ditches, and the waters of Long Pond pocoson are drained on his land from the west by said ditches. The plaintiff's lands are drained. Before the cutting of the railroad ditches the land was in a good state of cultivation, yielding eight barrels of corn to the acre, and did not overflow. Since the ditches were cut, and the overflow caused by them, the yield has been some years one barrel to the acre, and some years nothing, the whole crop being destroyed. Formerly only the waters of Wartom pocoson drained over the land, but plaintiff cut a large canal in 1873 that carried off those waters. He never lost as much as a barrel of corn after the canal was cut, until the overflowing complained of. Fifteen acres in cultivation, seven more cleared, which he abandoned after the overflowing commenced. Corn has averaged \$3 per barrel since defendant cut ditches. The land is now slobbered and soured by reason of the overflows. Plaintiff's loss was an average of forty barrels of corn a year. The land was worth \$25 per acre before the overflowing. It is worth nothing now. The defendant cut down two feet ten inches across the ridge between plaintiff and Flat pocoson, and the same depth as to the ridge between the land and Long Pond pocoson. The drainage is done by reason of the draining of water on it that naturally flowed from it. The ditches cut along the roadbed of the defendant are necessary for the safety of the roadbed, and are skillfully cut. The plaintiff's land has suffered each year since 1838, when the road was built. This action was commenced October 19, 1894. The water comes down quickly, and stays long. Sometimes plaintiff cannot get from one part of his farm to the other. The plaintiff, before the cutting of the railroad ditches, deeded to the defendant a right of way across his land. The plaintiff does not own Long pocoson nor Flat Swamp pocoson, and neither touches his land. It is admitted that, before the drain ditches were cut, the plaintiff conveyed to the defendant a right of way across his farm. The defendant, in writing, and in apt time, asked the following special prayers, to wit: '(1) That it being admitted that defendant purchased its right of way from the plaintiff, along which the drains complained of are constructed, if the jury shall find that said drains were necessary for the safe and proper construction of its roadbed, and further that said drains were constructed in a skillful and

proper manner, then any damage resulting from the construction of said drain must be borne by the plaintiff, and consequently he is not entitled to recover any damage therefor.' This instruction was refused, and defendant excepted. '(2) That if the jury believe the testimony of the plaintiff, to the effect that the construction of said roadbed and drains had rendered said land totally unfit for cultivation, then the plaintiff must recover the damage done to said land in one action, which action accrued to plaintiff when the roadbed and drains were first constructed; and, if the jury believe the evidence, it should find that plaintiff's cause of action is barred by the statute of limitation.' This instruction was refused, and defendant excepted. The court instructed the jury that plaintiff could not recover anything for damage to crops, but that plaintiff was entitled to recover the difference between the value of the land before the road was built, and the value after the road was built, provided that the jury should further find that the railroad company wrongfully and negligently, by its side ditches, drained and diverted from their natural courses the waters of Flat pocoson and Long Pond pocoson into Wartom swamp, and by that means overflowed and damaged the locus in quo. To this instruction the defendant excepted. The court instructed the jury that, if they believed the evidence, the plaintiff's cause of action was not barred by the statute of limitation. To this instruction the defendant excepted. The jury rendered a verdict as appears of record. The defendant moved for a venire de novo. Motion overruled, and defendant excepted. Defendant then moved for a judgment upon the verdict. This motion was overruled, and defendant excepted."

John L. Bridgers and Martin & Peebles, for appellant. Francis D. Winston, for appellee.

AVERY, J. There was no error in the ruling of the court that the plaintiff's right of action was not barred by the statute of limitations. The plaintiff had no cause of action if the defendant's ditches and drains were constructed skillfully, and with a due regard for the rights of the owners of adjacent lands. *Adams v. Railroad Co.*, 110 N. C. 325, 14 S. E. 857; *Ridley v. Railroad Co.*, 118 N. C. 998, 24 S. E. 730. It could only acquire the prescriptive right to pond water on the plaintiff's land by subjecting itself to an action for the injury continuously for 20 years. *Emery v. Railroad Co.*, 102 N. C. 282, 9 S. E. 139; *Sherlock v. Railway Co.*, 115 Ind. 22, 17 N. E. 171; 1 Wood, Lim. Act. p. 468, § 182. Until, by acquiescence in such continuous occupation for 20 years, the presumption of a grant arises, an action will always lie for damage. The plaintiff may elect to claim only the damage sustained up to the trial of the action, and, if the defendant fail to ask in his answer for the assessment of prospective as well as present damages, the bar of the statute will not prevent a recovery for that sustained within three

years prior to the issuing of the summons. *Sherrill v. Connor*, 107 N. C. 638, 12 S. E. 588; 1 Wood, Nuls. § 180. If, however, the plaintiff fail to declare for permanent damage, the defendant, at his option, may demand that the assessment shall extend to prospective injury, or, by silence, acquiesce in the finding only of what may have accrued up to the time of trial. *Ridley's Case*, supra. The right of action accrues in such cases when the first injury is sustained (*Ridley's Case*, page 1010, 118 N. C., and page 730, 24 S. E.), and cannot be defeated by pleading the statute, except by showing 20 years' continuous user (*Emery v. Railroad Co.*, supra).

It being manifest that the statute of limitation was in no aspect of the testimony an available defense, the next question that arises is whether the judge erred in his instruction as to the measure of damages. He told the jury, in substance, that if the defendant, in constructing its roadbed, had negligently diverted the waters of Flat pocoson and Long Pond pocoson from their natural outlets, and by that means had caused the overflow complained of, the plaintiff would be entitled, in any aspect of the evidence, to recover the difference between the value of the land "before the road was built, and the value after the road was built." The plaintiff had complained that "by reason of the negligent, wrongful, unlawful, and careless cutting of said ditches, and the negligent and unlawful diverting of the course of said water, the plaintiff's farm, by said repeated overflows, has been rendered sour and slobbered, and its fertility destroyed, and rendered unfit for agricultural purposes." It is a well-settled principle of pleading, under our Code system, that the right to a particular kind of relief depends, not upon the specific demand for it in the prayer, but upon the facts alleged in the complaint or counterclaim, and proved upon the trial. The allegation of facts that entitle a party to affirmative relief, under our liberal system of pleading, is equivalent to a formal demand for such relief, or a general prayer that would have embraced it, under the rules of practice in courts of equity. *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 593; *Harris v. Sneed*, 104 N. C. 369, 10 S. E. 477; *Roberson v. Morgan*, 118 N. C. 994, 24 S. E. 667; *Holden v. Warren*, 118 N. C. 327, 24 S. E. 770. Under the rule laid down in these authorities, it was not error to hold that the allegation that the fertility of plaintiff's land was destroyed, and that it was rendered wholly unfit for agricultural purposes, should be construed as a demand for permanent damages, and constituted notice to the defendant to meet the proof that might be offered to establish the truth of the claim. The defendant had requested the court to instruct the jury that, if the plaintiff had shown that the land was rendered unfit for cultivation, the plaintiff could recover only permanent damage, and that the right of action accrued when the road was first constructed, and was therefore barred.

While the judge correctly held that the assessment should embrace past as well as prospective injury, he was in error when he told the jury that the plaintiff was entitled to recover for all of the diminution in the value of the land caused by the construction of the road, ignoring the fact that compensation had already been made, in the purchase of the right of way, for any damage that would result from draining the roadbed and cutting proper drains, provided ordinary care was exercised in doing the work. *Fleming v. Railroad Co.*, 115 N. C. 676, 20 S. E. 714. The true measure of permanent damage, as held in *Ridley v. Railroad Co.*, 118 N. C., at page 1009, 24 S. E. 735, "was the difference in the value of plaintiff's land in its condition when the right of action accrued and what would have been its value had the road been skillfully constructed." For the misdirection of the jury as to the measure of damages, there must be a new trial.

But we deem it best to pass upon the only remaining assignment of error, since the same question will almost certainly be again raised in the court below. The authority to divert surface water from a drain through which it previously made its way to its natural outlet, with the proviso that it is carried in the side ditches either directly to its natural outlet, or to a natural outlet capable of receiving it, is included in the easement acquired by the unrestricted grant or condemnation of the right of way. *Fleming v. Railroad Co.*, 115 N. C., at pages 693, 698, 20 S. E. 714; *Staton v. Railroad Co.*, 109 N. C. 337, 13 S. E. 933; *Gould, Waters*, § 273. A railroad company enjoys, as to its right of way, the same privilege as any other landowner, and is subject to the same restrictions and qualifications in carrying off or diverting accumulations of surface water. *Jenkins v. Railroad Co.*, 110 N. C. 438, 15 S. E. 193. It follows that there is no merit in the exception to that portion of the charge relating to the diversion of surface water by the negligent and unskillful cutting of side ditches. If the lands of the plaintiff were overflowed and damaged by reason of such diversion of surface water from its natural outlet, without taking it to an adequate outlet, he was entitled to recover permanent damages, under the rule already laid down. New trial.

(119 N. C. 103)

#### LASSITER v. STAINBACK et al.

(Supreme Court of North Carolina. Oct. 20, 1896.)

#### PARTNERSHIP—CREATION OF TRUST—MATTERS NOT PERTAINING TO PARTNERSHIP BUSINESS.

A partner who uses the firm money to pay for improvements on his own land, with his co-partner's knowledge and consent, charging such fund to his individual account on the firm books, becomes the individual debtor of the partnership, not a trustee therefor, and his co-partner cannot follow the fund, and have it declared a lien on the improvements.

Appeal from superior court, Vance county; Boykin, Judge.

Action by James H. Lassiter against W. T. Stainback and another to declare a lien on certain realty. Judgment for defendants, and plaintiff appeals. Affirmed.

T. M. Pittman and T. T. Hicks, for appellant. A. C. Zollicoffer, for appellee.

FUROHES, J. Plaintiff and defendant were partners in a mercantile business. The plaintiff was indebted to the defendant at the time of forming this partnership, \$1,694.43. But defendant said to plaintiff: "I will not put this in the partnership. I want to buy a lot, and build for me a house, out of this money." The plaintiff replied: "That is right. I want to sell you a lot," which he afterwards did, at the price of \$300, and the price was credited to the plaintiff on the \$1,694.43 debt, and plaintiff made him a deed for the lot. That soon thereafter the defendant commenced building on this lot, and to pay for the same out of the partnership assets, and to charge the same to his individual account on the books of the concern. The plaintiff had full knowledge of this, as the books were examined by him daily; and he made no objection to this course of the defendant, until some three years after, when it was found that the partnership and the defendant were both insolvent. He now seeks to follow this fund, used for building the house, and have it declared a lien thereon. The law constitutes each partner an agent and trustee for the partnership as to such matters as pertain to the partnership business. *Taylor v. Russell* (at this term) 25 S. E. 710. But the partnership does not create these relations of agent and trustee between the individual members of the partnership, as to other transactions not connected with the partnership business. Therefore, while the defendant was the agent and trustee of the partnership as to the business of or connected with the partnership, he was not its agent or trustee to buy a lot and build a house on it for himself. So we see that plaintiff cannot follow the fund, and have it declared a lien on the house, because the defendant was a member of the partnership. If he can follow the fund, and have it declared a lien, it is upon the ground that the defendant had used the partnership funds, and that equity will declare a trust from this fact. But where there are no contractual relations between the parties that create a trust, a court of equity will not do so, unless there is fraud or bad faith. 2 Pom. Eq. Jur. § 1044. If I give A. \$1,000 to buy a tract of land for me, and A. buys the land, and pays for it the \$1,000, but takes the deed to himself, he has acted in bad faith, and equity will declare him my trustee, and compel him to convey. If A. take \$1,000 of my money without my knowledge or consent, and buys land with it, and takes the deed to himself, equity will declare him my trustee, and compel him to convey, on account of the

fraud. But if A. says to me, "There is a tract of land to be sold that I want to buy, but I have not the money." I give him the money, and say, "Go and buy it," and he does so, pays the \$1,000 I gave him, and takes the deed to himself,—equity will not declare him my trustee, and compel him to convey, because there has been no fraud or bad faith practiced by A.; and the money I let A. have will be regarded as a loan. And this action, to declare a lien on the house, involves the same principle as that we have been discussing; and plaintiff would ask to have the defendant declared a trustee, and for a conveyance, but for the fact that the lot upon which the house was erected was the defendant's lot, and not involved in this controversy. When the defendant used the money of the partnership in building the house, with the knowledge and consent of the plaintiff, and charged it to his individual account, he then became the individual debtor of the partnership, and the funds used became his individual funds. So, in legal contemplation, the defendant did not build the house out of the partnership assets, but out of his own means. The whole trouble has arisen from the fact that the defendant has become insolvent, and the firm has to lose its debt against him. It is from the result, and not from the cause. It was questioned whether money used in the improvement of real estate belonging to another could be followed, and made a charge on such real estate. It seems to be held in some of the states that it could, but no authority was cited where it has been so held in this state. But we have not considered this question, as the case goes off on other grounds. There is no error, and the judgment is affirmed.

(36 Ga. 771)

## MUTUAL LIFE INS. CO. v. SMITH.

(Supreme Court of Georgia. Aug. 18, 1896.)

## INSURANCE—PREMIUM NOTES—RENEWAL—TENDER OF PAYMENT.

1. Where a promissory note was given for a premium on a policy of life insurance, and the person taking it executed and delivered to the maker a contemporaneous agreement in writing "to renew said note at the request of [the maker], until three annual payments have been made," it was incumbent upon the maker, in order to obtain under this agreement the right to renew the note in question, to tender or pay in cash the next annual premium upon the policy when the same became due, the contract not contemplating that a promissory note would be accepted for such premium.

2. It appearing from the evidence in the present case that the defendant did not tender or make payment, as above indicated, he did not show himself entitled to the privilege of renewing the note sued on; and, this being so, he was liable thereon, and a verdict in his favor was not warranted.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Action by the Mutual Life Insurance Company of New York against James Smith.

Judgment for defendant, and plaintiff brings error. Reversed.

Lewis & Moore and Alex. & Victor Smith, for plaintiff in error. Jas. Whitehead, for defendant in error.

SIMMONS, C. J. On February 18, 1893, Smith gave to Hodgson a promissory note for premiums on life insurance for 15 months, and at the same time took from Hodgson an agreement in writing, as follows:

"Having this day sold Mr. James Smith, of Sparta, Ga., \$5,000 life insurance in the Mutual Life Insurance Company of New York, for which I have this day taken his note for \$347 in payment of the cash premiums payable January 1st, 1894, I hereby agree to renew said note at the request of said Smith until three annual payments have been made, said Smith paying eight per cent. interest on said note after January 1st, 1894. George T. Hodgson.

"An additional charge of \$89, extra premium, is added and included in above-mentioned note, making total \$435, for fifteen months' premiums. George T. Hodgson."

In pursuance of this agreement, a policy of insurance in the Mutual Life Insurance Company of New York was delivered to Smith, and on January 1, 1894, he gave his promissory note for \$435, with interest from date at 8 per cent., in renewal of the above-mentioned note. He failed to pay the second note, and suit thereon was brought against him by the insurance company, the note having been transferred to the company by Hodgson. The defendant pleaded that the note was without consideration, for the reason that Hodgson, as agent of the insurance company, agreed with him at the time of taking the note of which the one sued on was a renewal that he would not have to pay it when due, but it would be renewed for three annual premiums, defendant only paying the interest; that on January 1, 1895, when the note sued on became due, he was ready and willing to pay the interest and renew the note as agreed upon, but the plaintiff and Hodgson, its agent, refused to allow him to renew the note and keep the contract; and that "he is now ready to pay the interest and renew the note, and offers to do so." At the trial the defendant introduced in evidence the writing above set out, as containing the agreement between himself and Hodgson, and testified that as a result of this contract a policy of insurance was issued to him, which he retained throughout the period covered by the premiums for which the note was given. He further testified that the company refused to renew the note and receive interest on it, but that no offer to pay anything to the company was made until the end of January, 1895, after the policy had lapsed; and that he did not tender the cash, the reason he did not do so being that "the company refused to take anything but cash for the subsequent years." Under this state of facts

we think a verdict for the defendant was unwarranted. The contract, as set out in the writing, being that the note was to be renewed at the request of the maker "until three annual payments have been made," it was incumbent upon him, in order to obtain, under this agreement, the right to renew the note in question, to tender or pay in cash the next annual premium upon the policy when the same became due. The contract did not contemplate that a promissory note would be accepted for such premium; and, as the defendant did not tender or make any payment whatever, he did not show himself entitled to the privilege of renewing the note sued on. There being no further defense than that above stated, the verdict ought to have been for the plaintiff. Judgment reversed.

(99 Ga. 336)

LEWIS et al. v. EQUITABLE MORTG. CO.  
(Supreme Court of Georgia. Aug. 24, 1896.)

SECOND VERDICT—GRANT OF NEW TRIAL.

Where a second verdict has been rendered on substantially the same issues of fact in favor of the same party, the rule of discretion applicable to the first grant of a new trial does not apply; and if at the last trial there was nothing objectionable in the rulings of the presiding judge, and the evidence, though conflicting, supported the second verdict, it should not be set aside. *Veal v. Robinson*, 76 Ga. 838. Lumpkin, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

Action by the Equitable Mortgage Company against J. T. Lewis and others. From an order granting a new trial, Lewis and others bring error. Reversed.

The following is the official report:

In November, 1889, Jackson T. Lewis conveyed 990 acres of land in Gordon county to B. W. Cornelson, W. M. Cornelson, and D. P. Cline, the deed reciting a consideration of \$15,000. The grantees in this deed then made written application to the Atlanta Trust & Banking Company to negotiate for them a loan of \$7,500, offering this land as security for the loan. The papers relating to the negotiation were forwarded by said company to the Equitable Mortgage Company, which was engaged in the business of lending money, with recommendation that it make the loan; and it did so, taking notes and a deed from the Cornelsons and Cline to secure their payment. In default of payment, the Equitable Mortgage Company brought suit on the notes in May, 1891. In November thereafter it amended its petition, making Lewis and his wife parties defendant, and praying for equitable relief against them. It was alleged, in brief, that the loan was procured by false representations of the value of the land, and in pursuance of a scheme originated by Lewis to defraud the plaintiff, he having previously applied to the plaintiff for a loan on the land; but, being afraid

the land would not bear the loan he wanted, he resorted to the artifice, in collusion with the other defendants, of selling it to them for the nominal sum of \$15,000, pretending that \$8,000 of that amount had been paid in cash, when in fact no cash had been paid, and only an insignificant piece of land had been conveyed to represent the cash consideration, and the land so conveyed as security not really being worth over \$3,000 or \$4,000, and the borrowers being wholly insolvent and irresponsible; and that Lewis got the money so loaned by plaintiff, and invested it in certain described land in Bartow county, taking a bond for title to his wife. The object of the amendment was to subject this Bartow county land to so much of plaintiff's judgment as would remain unsatisfied after selling the Gordon county land thereunder. Lewis and wife made answers, in which they denied all charges of fraud, etc. There was a trial, resulting in a verdict for the plaintiff. A motion by Lewis and wife for a new trial was overruled, which judgment was reversed. 94 Ga. 574, 21 S. E. 224. After that decision further amendments to the petition were made; and there have been two trials, each resulting in a verdict in favor of Lewis and wife upon the issue made. Both of these verdicts were set aside by the trial judge. His last judgment, granting a new trial, on the grounds that the verdict was contrary to law and evidence, is now excepted to by Lewis and wife.

The material allegations of the amendments last referred to are as follows: Plaintiff was doing business with the Atlanta Trust & Banking Company, a corporation of good standing and responsibility, in which plaintiff had great confidence; and it did not hesitate to take all loans offered by said Atlanta Company, if no defects were apparent on the face of the papers, relying implicitly and absolutely on the recommendation of said company as to the value of the property offered as security in every case. Said company was not the agent of plaintiff to make loans, but was a well-established company, and had a good business reputation; and plaintiff relied on its business methods for the ascertainment of the value of the property on which it made loans through it, both as to the inspection of property and as to other methods and means for the prevention of fraud as to values of securities. One of the methods used by said company, and known to plaintiff, for the prevention of fraud, was to require all persons applying for loans, who had purchased property within a year, to make affidavit as to what had been paid for the property, and how much had been paid in cash, and how much was still due. The object of this was to prevent a pretended sale for a nominal price of a larger amount than the real amount, so as to make a basis of credit; and the company had regular blanks for that purpose. It was deceived by the device resorted to by Lewis,

but for which deception it would not have recommended the loan to plaintiff. It would have been directly contrary to a business rule of theirs to have done so; and they would not have done so if they had not been deceived by Lewis procuring Cornellison to make said affidavit. The fraud was practiced on the Atlanta Company, and by it the recommendation of that company was secured; and by said recommendation, based on the fraudulent representation, the money was secured from plaintiff, which was well acquainted with the business methods of said company, and relied on its recommendation as to values with implicit confidence, and took securities that were recommended by it, without making any investigation of its own as to their value. On the first Tuesday in April, 1895, the property conveyed to plaintiff by the Cornellisons and Cline was sold at sheriff's sale under the execution issued on the judgment rendered against them in plaintiff's favor; and the amount realized by plaintiff from said sale was \$5,905, less cost and expenses of sale, leaving a deficiency of \$5,605 in paying the judgment, for which deficiency judgment is prayed against Lewis.

At the trial, plaintiff introduced the interrogatories of B. W. Cornellison, taken August 11, 1892, as follows: "I am the father of W. M. Cornellison and the father-in-law of Cline. We three bought the 990 acres of land in Gordon county from Lewis in the fall of 1889. The consideration was \$7,518.50. It was all paid to Lewis as follows: \$6,713.50 in a check from a loan from plaintiff, paid by me in person. The other \$800 was paid by Lewis getting the rent of the place for the first year. The only money paid was the \$6,713.50 paid from the loan. I think I got the deed the same day it was paid. The money was got from plaintiff for a loan on the land. Lewis told me at the time he wanted the money to pay for some land he had purchased from Dyer, and he wanted me to borrow the money in my name, then pay it to him, so that he could pay for the Dyer land. Lewis and E. P. Reed both suggested this plan to me, and told me it would pay me to do it. They wanted the money, and persuaded me to get it that way. No other consideration was paid for this land, except as I have already stated. Before we bought this land from Lewis, I did not own any property except the land where I live, which was worth \$150, and some ordinary household goods, a horse, cattle, and personal property, including solvent debts, all of which was worth about \$6,000. W. M. Cornellison and Cline were together worth about \$2,000 before the purchase of the above property. It was nearly all in notes and accounts. Outside of the mortgage or loan on the Lewis place, which I do not consider that I owe, I owe about \$60. W. M. Cornellison, who lives in Whitfield county, and Cline, who lives in Texas, are worth about what they were then. I do not know that they owe anything. Lewis held out no inducements to us to get us to

buy the place, more than he said the rents of it would more than pay me for my trouble. He told me he paid the money he got from the place for the Dyer land. I saw Reed at the time the loan was made, but not before. He did say something to me about borrowing this money on the land, but I do not remember the details of the conversation. He represented Lewis, and was anxious for me to get the money for Lewis. He said it would be a good thing for me. I did sign a paper purporting to be an affidavit attested by E. P. Reed, notary public, in which it was stated that I and W. M. Cornellison and D. P. Cline had paid \$15,000 for said land to Lewis, part of which had already been paid, and the balance was to be paid out of the money borrowed from plaintiff; but I did not swear to it. When they asked me to sign it, I said I would never do it; it was not true. Reed said it was a mere formality, and had to be signed before they could get the money, and I need not swear to it. I did not read it; just thought what Reed said all right. He, in the presence of Lewis, procured me to sign it. Cline and W. M. Cornellison also signed it, but none of us swore to it. I am 55 years old; my son is 32; and Cline is about 38. I had no evil design or wrong intention towards plaintiff or any one else. Lewis is about 35 years old. He talked to me several times before the trade was made. He told me he had worked it up to get the money to pay for the land he had bought. He never could have got as much for the land in any other way. When I bought these lands, I thought they were worth \$10 an acre; but, since I am better acquainted with them, I know they are not worth it. Lewis said, in order to induce me to buy, that I could make a fair profit out of it. I think he misrepresented what the place had paid for rent. I do not think he did beg or persuade or make any improper or unfair or fraudulent promises to induce me to buy the land. I do not know that he did or said anything, in the presence of Reed or any one else, to show that he was so anxious to make a trade with me as to be willing to defraud or wrong plaintiff. Both Lewis and Reed were present when the papers were signed, and at the other time I have testified about. Lewis did not tell me he had worked or was trying to work up a scheme to sell the land. I know nothing about his trying to get a mortgage on it with the design of selling it for more than it was worth."

Plaintiff introduced the affidavit referred to in its amendment and in the testimony of B. W. Cornellison, which was executed by the Cornellisons and Cline, and attested by Reed, stating "that we are the owners of the property upon which we have made application to the Atlanta Trust & Banking Company to negotiate for us a loan of \$7,500"; that they had bought said land from Lewis at private sale, "and paid therefor the sum of \$15,000, \$8,000 in cash, and \$7,000 when this loan is secured"; and that "this affidavit is made for the purpose of inducing

the negotiation of the loan above mentioned, and as an evidence of the value of the property offered as security." Also, the written application for the loan, made at the same time with the affidavit, addressed to the Atlanta Trust & Banking Company, and requesting it to negotiate for the applicants a loan of \$7,500 on the land in question. Among the representations in this application were that the total value of the land was \$22,205; that the applicants owned other land worth \$4,000, and stocks and notes of credit worth \$8,000, and had received \$1,350 as rental for 225 acres of this land for the preceding year; and that they desired to borrow this money for the purpose of paying a balance of \$7,000 due on this land. To this was appended a statement of Reed, as correspondent, certifying that the land so offered as security was given in or assessed for taxation at \$8,500 for the preceding year. Also, the tax returns of Lewis and of B. W. Cornellison for 1889, Lewis giving the aggregate value of his land at \$3,500, and his other property at \$940, and the values given by Cornellison being \$150 and \$215. Also, two abstracts of title to the land in question, both in the handwriting of Reed, and the latter bearing his certificate,—the first dated October, 1889, and showing the title to be in Lewis; and the other dated December 6th, showing the title to be in the Cornellisons and Cline, and the latter being approved by Hall & Hammond, December 10, 1889. Plaintiff also introduced the testimony of its president, in brief as follows: "Plaintiff did an extensive business of lending money in Georgia and elsewhere. Applications for loans were sent to it by the Atlanta Trust & Banking Company; and, if the papers appeared to be all right and regular on their face, such loans as were recommended by that company would be made. The relation between plaintiff and that company was simply a business one. Plaintiff had no interest in the business of the Atlanta Company, and nothing to do with its management. The methods adopted by it with reference to examination of titles and ascertaining values of property were well known to plaintiff. Its officers were reliable men, and for that reason the plaintiff did not undertake to make any examination at all of its own in reference to values of property offered to it by the Atlanta Company. It took the loans offered by said company on the faith it had in said company, and on that alone. It had to rely on the correct business methods and integrity of the company. It could not do business in any other way. The loan in question was treated in all respects as all other loans made by plaintiff in Georgia. It did not have the property examined, and made no effort to find out its value as security for the loan asked by the Atlanta Company for the parties, except to rely on the recommendation of that company. We had no agents in Georgia for the examination of

property, and had none to examine this property. Plaintiff had large and many transactions with the Atlanta Company, both before and after this loan was made. It knew that said company required, among other things, persons who had recently purchased property to make an affidavit as to what they had paid for it, and how paid, etc. This was relied on as furnishing protection against fraud in cases of that kind. I think it was the custom of all prudent persons and companies to require this, for the reason that fraud might be practiced if it was not done; a fictitious price being made to appear as having been paid for the land, thereby misleading the lender. The Atlanta Company was not employed by plaintiff to make this loan for it, or to make any other loans. No consideration was ever paid by plaintiff to said company for making any examination of property, or in connection with the management of the business, in any shape or form. The company was entirely independent of plaintiff, and managed its own affairs. In our dealings it was understood that all loans offered should be so drawn as to bear 6 per cent. on their face, but enough should be added to the face of the note to make it equivalent to an 8 per cent loan. Plaintiff had nothing to do with any commission charges by the Atlanta Company, or any expenses incurred or paid by it, and got nothing except the principal of its money, with a little less than 8 per cent. interest. I did, on December 5, 1892, write to one Lamar, in Atlanta, in reply to a letter from him, that 'all of our loans taken in your state are through the Atlanta Trust & Banking Company, to which we would respectfully refer you.' Plaintiff made no loans in Georgia except such as were deferred by the Atlanta Company." A. Richardson testified: "I was cashier of the Atlanta Company when the loan was negotiated. The application was for \$7,500, and we added seven and a half per cent. to that, and took note for \$8,062.52, so as to make it net eight per cent. to the plaintiff, as the note bore only six per cent. The actual amount of money advanced by it was \$7,500, and it got no part of the same back. The Atlanta Company got the \$562.62 as its charge on this loan, which was its regular charge. Reed was not the agent of the Atlanta Company in this transaction. He received the application, and sent it to me. The company did not pay him anything for his services. That was a matter between him and the borrower exclusively. Before this application was made, Lewis had been negotiating with the company with reference to a loan on this property. He forwarded this first abstract, certified by Reed, for that purpose. His application was withdrawn, and this one made in favor of Cornellison and Cline. The affidavit as to what was paid for the land was essential to obtaining the loan. The object was to get at the market value of the property, and the

price paid by the purchaser was considered one of the best evidences on that subject. Plaintiff and the Atlanta Company had no connection, except that they did a considerable amount of business together. They were entirely separate in every way. Plaintiff did business in New York. The other company was in the loan business in Atlanta, advertising for loans and capital to place on loans. They placed a great many loans with other companies besides the plaintiff, and with individuals. At one time, Fowler, the president of the plaintiff company, was a director of the Atlanta Company. He did not organize it. He severed his connection with it several years ago. He was the only director that ever resided in New York. The Lewis application never reached me. I only drew up papers after loan had been accepted. The Atlanta Company was not the agent of plaintiff. It was the paid agent of the Cornellisons and Cline. It did not negotiate loans for the plaintiff, but simply placed loans with it. Plaintiff did not leave the disposition of its money with us. After it got these papers, it sent the money to us, and we turned it over to Cornellisons and Cline. We forwarded the papers, and received the money as the agent of the borrowers. We did not collect for plaintiff. There was a limited guaranty by the Atlanta Company on loans placed by the plaintiff. Plaintiff did rely on inspection of lands and valuations made by the Atlanta Company. It did not instruct the company to employ inspectors. The company had inspectors employed, not only for loans placed with plaintiff, but for all other companies. The Atlanta Company paid those inspectors. It sent one Fullerton to inspect this loan, and I think it also sent one Mundy to inspect it. Their written reports show what they value the land at. The company placed the loan partly on its reliance on these reports, and upon other things besides. They had the application, Reed's report as to the value of the place, and his affidavit as to tax returns, and this affidavit as to the price paid for the land. They relied upon all these in passing on the loan. All these papers were placed before plaintiff, to enable it to judge for itself whether it would place the loan. While we represented the borrowers in procuring this money for them, we had to put the papers in proper shape before we could get the money. It was the custom to send on the papers and get the money after they reached plaintiff. They always inspected the papers before they sent out the money. They never sent money to us to invest for them. We sometimes sent all the papers with a draft attached which gave them four days to examine them before paying the draft. Plaintiff assured us that they would take the loan relying on the Atlanta Company as to the value of the property, title, etc.; and they advanced the money relying on said company and the papers forwarded

at the time. Reed was not authorized by the Atlanta Company to negotiate loans for it. He simply took applications, and prepared abstracts, and submitted them to the company. Of course, he was relied upon by said company and by the plaintiff to a large extent. Plaintiff turned down a number of loans that we recommended at different times. Their custom was to examine the papers, and, if they accepted the loan, they would send the money, and, if they rejected it, they would return all the papers without the money."

Upon the question of the value of the land at the time the loan was made, and since, many witnesses testified. Those for the plaintiff valued it at from \$4,000 to \$4,500, one or two as high as \$5,000, and one as low as \$2,500 to \$3,000; while the valuations by defendants' witnesses ranged from \$6,000 to \$15,000. Several of these testified that it had depreciated from a third to a half from the time the loan was made to the sale by the sheriff, in April, 1895. About 225 of the 990 acres were cultivated. At the sheriff's sale the land was bid off by one Brown for the plaintiff at \$5,995. He had been sent by Richardson to bid for the property, but he failed to get special instructions. Richardson testified that his general instructions, when he bid in lands for plaintiff, were to bid up somewhere near the amount of the judgment, if necessary to do so. The only bidder against Brown was Lewis, whose highest bid was \$5,975. The sheriff testified that Brown refused to let him sell in parcels, and demanded that he postpone the sale to 2 o'clock, which he did; that not many persons were present; and that Lewis wanted the land sold in parcels, and not in bulk. Defendants introduced the written reports of Fullerton and Mundy as to the value of the land, made to the Atlanta Trust & Banking Company, and referred to in Richardson's testimony. The first, dated October 5, 1889, shows Lewis to have been the applicant for the loan, and states that the cash value of the land is \$18,000, and of the buildings \$2,000. The other, dated December 3, 1889, shows the Cornellisons and Cline to be the applicants, and gives \$16,200 as the value of the land, and \$2,500 as the value of the improvements. Both recommend the amounts applied for as choice loans on the property. Reed testified: "I represented the Atlanta Trust & Banking Company in securing loans. Did not act as agent of plaintiff, but know that all the loans I negotiated were being placed with it by the company. I know that the amount was loaned on the valuation placed on the land by Fullerton and Mundy. If Lewis and his wife were in any way instrumental in securing this loan, I do not know it. It was secured on the statements made in Cornellisons' and Cline's application together, and especially upon the recommendation of the company's land inspectors. Lewis neither said nor did anything, so far as I know, to secure the loan for Cornellisons and Cline. He was not present when the affi-

affidavit of the valuation was made. I knew the lands, and believed them to be good security for the amount of the loan. I know that Lewis and his wife had nothing to do with securing the loan, because it was made on the application of Cornellisons and Cline and the inspection of Mundy. The application was made through me, and I was the correspondent of the Atlanta Company for the purpose of negotiating loans. I was paid by this company three per cent. on the loan for negotiating it, out of the 18 per cent. retained by them. Lewis had previously applied, through me, to that company for a loan on the same lands, which was approved by the company; and in the meantime he and his wife contracted for a sale of the land to Cornellisons and Cline, and the loan was to be obtained by them, and changed from Lewis. I went with B. W. Cornellison to Atlanta, and arranged it. The loan was made upon the affidavit referred to, and other representations made by Cornellisons and Cline, and upon the report of the inspector. Said affidavit was sworn to by each of the three persons named, and signed by each of them individually. B. W. Cornellison did not at any time refuse to sign it for any cause, and I did not tell him that it was a mere formality, and that he need not swear to it, nor anything of that kind. I did not know that \$8,000 in cash had not been paid on the place, as stated in the affidavit, and do not know it yet, for I was not present when the Cornellisons and Lewis traded; and, when I wrote the affidavit, I put in it just what they told me to state in answer to questions therein. B. W. Cornellison did not protest against signing it on the ground that the statement that \$8,000 cash had been paid was not true, nor upon any other ground. Nothing was said by any of them on that subject. My recollection is that Lewis was not present when the affidavit was being written and signed. If present at all, it was when we first began to write the papers. I remember distinctly that he then left us to attend to some business. The proceeds of the loan were to go to him, and were in fact paid to him, or to Beach at his direction and in his presence." Lewis testified: "I made application to the Atlanta Trust & Banking Company for a loan. I wanted money to pay the balance on the Spencer place [part of the 990 acres in question]. The inspector came to look at it with Reed. My wife had money of her own when I married. I bought the Bartow county property with her money; also, the John L. Lewis place. The deed was made by mistake to me, instead of her. That is part of the land I sold to Cornellison and Cline. Cline was the main man, because he had some money. I sold the place for \$8,000, but do not think I got over \$7,200 in fact. Knew nothing about the recited consideration of \$15,000, and had nothing to do with it. The deed was brought to me by Reed, and I signed it, as I thought, for a consideration of \$8,000. It was not read over to me. I was not present when the affidavit was

signed. Did not counsel, persuade, induce, or procure its signing by any act or word. Did not know it was executed until it was brought into court. As to what Cornellison said about getting him and his father into something good for them, I told him that I did not want to run the liquor business for another year; that, if his father would advance some money to buy me out, they could make some money out of it. I never persuaded or influenced any one to sign any paper pertaining to that sale. I went with the inspectors, and showed them the place as well as I could. I showed Mundy some corn that was the rent of the place. I was selling whisky that year, made no crop, and had no corn except said rent. There were about 225 acres of cleared land on the Lewis place in 1889, and 40 acres of bottom land. There were 275 acres out of the 60 that were rolling and out of the mountains. I considered the value of the place in 1889 as from \$12.50 to \$14 an acre. There are 360 acres in the Spencer place, and 640 in the Lewis place. The Spencer place ought to be worth \$8 an acre. I made no suggestions to the inspectors as to the value of the land. I did not know that Mundy would be here, but simply happened to be in town that day, and carried him out to the farm. I value the Lewis place at \$10,000, and the Spencer place at from \$2,500 to \$3,000. I gave it in for taxation in 1889 at about \$5,000. That was on the basis of what I thought it would bring if put on the market and sold. I did give in the place for \$3,500 for taxes at one time. I think the three places cost me \$3,500 to \$4,000. I thought it fair to give it in for taxes at the price I paid for it. I do not think I ever talked with Reed about the Cornellisons loan. I did not go out there with the inspectors, but did go with Mundy, who was inspector for Cornellison. I was going home at the time, and went out with him. I went over the place with Fullerton, but was at home there when he came. I did not go to Atlanta with Cornellison. Did nothing to prevent a fair estimate being put on the land by the inspectors. Showed them the place as fairly as I could. Did not advise or say anything to them as to their valuation." Mrs. Lewis gave testimony to the effect that the Lewis place was bought with her money; that her husband collected money for her, and traded with it; that she had nothing to do with these loans, and knew nothing of the circumstances; and that, after the money came in, she bought the Dyer place, where she now lives (in Bartow county), and had the bond transferred to her.

W. R. Rankin, O. N. Starr, and W. H. Dabney, for plaintiffs in error. W. R. Hammond and W. J. Cantrell & Son, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, J. (dissenting). In view of the evidence disclosed by the record in this case,

I am of the opinion that the trial judge was right in setting aside the second verdict, in favor of the plaintiffs in error. *Taylor v. Banking Co.*, 79 Ga. 330, 5 S. E. 114, and cases there cited.

(93 Ga. 543)

COMER et al. v. SHAW et al.

(Supreme Court of Georgia. June 8, 1896.)

RAILROADS—CROSSINGS—DUTY TO GIVE WARNINGS.

1. The provisions of section 708 of the Code have no application except to crossings where a public road established pursuant to law crosses the track of a railroad; and, consequently, the statutory duties of blowing the whistle of the locomotive, and checking the speed of the train, are not incumbent upon an engineer when approaching the intersection with a railroad of a road which, though to a greater or less extent used by the public, has never been established as a public road in the manner pointed out by law. It follows that no one has a right to assume that, in approaching a crossing of the kind last indicated, an engineer will observe these statutory requirements, and that the omission to do so is not, in law, negligence per se.

2. Applying what is said above to the evidence in the present case, the verdict for the plaintiff cannot be lawfully upheld, it appearing from the undisputed facts that, by the exercise of ordinary care, the plaintiff's husband, for whose homicide the action was brought, could have avoided the collision which resulted in his death.

3. It is unnecessary to deal with many of the questions presented by the motion for a new trial and the bill of exceptions, because, upon the substantial merits of the case, the only proper result would have been a verdict for the defendants.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Sarah V. O. Shaw and others against H. M. Comer and others, receivers. From a judgment for plaintiffs, defendants bring error. Reversed.

McNeill & Levy, for plaintiffs in error. Sanford & Son and Wimbish & Worrill, for defendants in error.

SIMMONS, C. J. This was an action against the receivers of a railroad company to recover for the homicide of the plaintiff's husband, who was run over by a train operated by the defendants, while he was attempting to cross the track of the railroad. The collision occurred about a mile from the city of Columbus, at a place where the railroad was crossed by a road which was used to a considerable extent by the public, but which was not a public road, established in the mode prescribed by law. This being so, the provisions of section 708 of the Code touching the checking of the speed of trains and the giving of signals were not applicable. Code, § 706; *Railroad Co. v. Cox*, 61 Ga. 455. Where a railroad crossing is in a populous locality, and is much used by the public, even though the provisions of this section are not applicable, greater care is required of railroad companies with respect to speed and signals than is to be expected at places where

the railroad is crossed by unfrequented country roads, not established by law as public roads; but noncompliance at such a place with the statutory requirements applicable to public roads established by law is not, as a matter of law, negligence per se. It is generally for the jury to say whether, under such circumstances, the railroad company was negligent or not. 4 Am. & Eng. Enc. Law, art. "Crossings," 915; 2 Jagg. Torts, 892, and cases cited; *Elliott, Roads & S.* 607, 608. This distinction is also to be taken into consideration when we come to consider the conduct of persons attempting to cross the railroad at such places. Where the crossing is one to which the statutory requirements above referred to are applicable, a person about to cross has a right to expect that the railroad company, in the running of its trains, will comply with these requirements; and his reliance upon the discharge of its duty in the premises may in some degree excuse a want of full diligence on his part in looking out for the approach of a train. Where, however, the statute is not applicable, a person about to cross must assume a greater burden of care than he would be required to assume if the crossing were one to which the statute applied.

Under the circumstances disclosed by the evidence in this case, we think the deceased was clearly wanting in ordinary care for his own safety. It appears that the train was running upon a regular schedule, and that on the occasion in question it was approaching the crossing on schedule time and at the usual rate of speed, and that this schedule had been in operation continuously for several months. The deceased was a resident of the neighborhood, and in the habit of crossing the railroad at that point daily, and was frequently there when this train was passing. He ought, therefore, to have known when he started to go across that the train was likely to be approaching, and, before driving his wagon upon the track, ought to have looked to see if the train was near. Had he looked, he could have seen it in ample time to have avoided the collision. He had to pass over one set of tracks before reaching that upon which the train was approaching, and after he had driven upon the first set of tracks, and before going upon the other, could have seen the train for a considerable distance. He did not look in that direction, however, until after his mule was on the track upon which the train was approaching; and then, after looking towards the train, he whipped up his mule, and continued on his way across, but was struck by the locomotive before he could get across. None of the defendants' employes on the train saw him until it was too late to stop the train in time to avoid running into him. It does not appear that there was anything to divert his attention from the approaching train when he was attempting to cross. Under this state of facts, we think it is clear that, whether the defendant was negligent or not in respect to

speed or signals before the deceased was discovered upon the track, the deceased himself was so far wanting in ordinary care as to render a verdict in favor of the plaintiff improper.

It is unnecessary to deal specifically with the numerous grounds of the motion for a new trial, since the only proper result of the case would have been a verdict for the defendants. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 787)

**FIDELITY & CASUALTY CO. v.  
EVERETT.**

(Supreme Court of Georgia. Feb. 21, 1896.)

**FOREIGN CORPORATIONS—SERVICE OF PROCESS—  
EXEMPTION OF WITNESS.**

Whether one not a resident of this state, who holds the position of inspector for a non-resident corporation doing a fidelity insurance business in this state, and whose duties are to audit claims for losses and make collections for the corporation within this state, is or is not such an agent of the corporation as may, under section 3369 of the Code, be served so as to effect service upon the corporation, such an agent of a foreign corporation who attends a court in this state for the sole purpose of testifying as a witness for the state in a criminal case is exempt from service upon him, as such agent, of a process against the corporation.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by R. H. Everett against the Fidelity & Casualty Company and W. L. Cochran. Judgment for plaintiff. The Fidelity Company brings error. Reversed.

Dessau & Hodges, for plaintiff in error. Atkinson & Dunwoody, for defendant in error.

CALLAWAY, Special Judge. R. H. Everett brought suit against the Fidelity & Casualty Company, a corporation under the laws of the state of New York, and against W. L. Cochran, a nonresident of the state of Georgia. The sheriff of Glynn county, where the suit was brought, on April 21, 1894, served a copy of the petition and process upon one R. T. Brennan, and made the following entry of service: "I have this day served the Fidelity & Casualty Co., by delivering a copy of the within petition and process to its agent, R. T. Brennan." At the appearance term the Fidelity & Casualty Company traversed this return, and upon the trial of the traverse the following facts were developed by the testimony: Brennan was the inspector for the Fidelity & Casualty Company, with headquarters in New York City, and his home at White Plains, in New York. He traveled throughout the Southern States, and his duties were to audit losses and make collections for the company, but he took no risks, and issued

no policies. The company has a general agent, located in Atlanta, Ga. On the day that he was served by the sheriff he came to Brunswick for the sole purpose of testifying as a witness for the state in a criminal case against R. H. Everett. He arrived in Brunswick in the morning, attended the trial of the criminal case that day, was served by the sheriff in the afternoon, and left that night on the earliest train that he could leave on after the trial of the criminal case. He had no other business in Brunswick nor in Georgia on that day, except to attend the trial of said criminal case as a witness for the state. The court directed a verdict against the traverse, and the Fidelity & Casualty Company excepted. In the case of Thornton v. Machine Co., 83 Ga. 288, 9 S. E. 679, Justice Simmons, delivering the opinion of this court, says: "The law seems to be that a suitor or a witness in attendance upon the trial of any case in court is privileged from arrest under any civil process, and is exempted from the service of any writ or summons upon him or them while in attendance upon such court, or in going to or returning therefrom." When the witness is a nonresident, and comes into the state for the sole purpose of attending one of its courts as a witness for the state in a criminal case, it would be poor policy and bad faith on the part of the state to allow its courts to take advantage of his commendable conduct to embroil him in litigation. However strong may be the right of the resident witness who attends the court in obedience to its mandate to protection from arrest or service of civil process, it cannot be stronger than that of the nonresident, who cannot be reached by the mandate of the state court, and whose submission to our jurisdiction is a voluntary performance of duty. Witnesses should not be frightened from attendance upon the courts where their testimony may be needed, whether they be voluntary or subpoenaed witnesses; and when they come from other states to testify in our courts their presence cannot be taken advantage of to give our courts jurisdiction to sue them. Such a policy would soon put an end to the presence of nonresident witnesses in our courts. The evidence showing that Brennan, the agent of the nonresident corporation, was himself a nonresident, and, on the occasion when he was served with a copy of the petition and process against said corporation, he had gone to Brunswick, and was present there for the sole and exclusive purpose of testifying as a witness in the case of State v. Everett, the service upon him should have been set aside at the instance of the defendant corporation, and it was error in the court to direct a verdict against the traverse. Judgment reversed.

CALLAWAY, J., presided, by designation of the governor, in place of ATKINSON, J., disqualified.

(30 Ga. 205)

**MONCRIEF v. STATE.**

(Supreme Court of Georgia. Aug. 10, 1896.)

**CRIMINAL LAW — APPEAL — OBJECTIONS TO EVIDENCE — BURGLARY — INSTRUCTIONS — EVIDENCE.**

1. Alleged error in admitting evidence cannot be considered by this court when the evidence objected to is not set out, and the record does not disclose what ground or grounds of objection were made to it when offered at the trial.

2. Where, on a trial for burglary, the state insisted that a certain house (in which goods alleged to have been taken from the burglarized premises were found) was in the possession of the accused, and there was evidence tending to show that his possession of such house was shared with another or others, there was no error in charging, in substance, that the possession of that house could not be treated as that of the accused, unless his possession and occupation of the same was exclusive, and not enjoyed by other parties jointly with him; nor in charging that, if the accused did in fact have possession with others, this fact could be considered in connection with all the other evidence in passing upon the question of his guilt or innocence.

3. There was no error at the trial, and, there being evidence sufficient to warrant the conviction, the verdict of guilty, after its approval by the trial judge, should not be disturbed.

Simmons, C. J., dissenting.

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

Lee Moncrief was convicted of burglary, and brings error. Affirmed.

The following is the official report:

Lee Moncrief was indicted for breaking and entering the carriage house of J. M. Arnold, and stealing therefrom a set of buggy harness, a saddle, and a buggy rug. He was found guilty, and his motion for new trial was overruled. The motion was upon the grounds that the verdict was contrary to law and evidence, and that the court erred: "In allowing and permitting evidence of Byron Dearing that defendant and himself had placed a gun in the fodder loft, which was not connected with the crime charged." It is not stated in this ground that this evidence was objected to. There was evidence that the harness stolen was found in the same loft in which, according to the evidence of Dearing, defendant and himself had placed a gun they had stolen. This fodder loft belonged to the father of the defendant. There was evidence for the state that the defendant kept his horse in a separate stable from his father's, there being three stables on his father's lot, and kept his fodder up above, and that it was in this fodder loft that the harness was found. For the defense there was evidence that the fodder loft belonged to the father of defendant; that others besides defendant had access to it; that it was now kept locked; there was no lock to it; that the fodder and corn in it belonged to defendant's father, etc. "In permitting any evidence, over objection of defendant's counsel, as to any other charge

made against defendant, not connected with the crime charged in the bill of indictment." Also: "In permitting any evidence going to show that defendant was or had been guilty of any other offense except the one for which he was being tried." It is not stated in either of these grounds what objection was made to the evidence, nor is the evidence set out therein. In charging: "When the possession sought to be proved on the part of the accused consists of the asserted fact that the stolen property was found in the house of the defendant, it must be shown that the possession and occupation of the house by the defendant was exclusive, and was not enjoyed by other parties jointly with him. If you find the house was used by others,—by others with him,—such evidence would not alone authorize a conviction, but such fact may and should be considered by the jury, together with all the evidence in the case, in passing upon the guilt or innocence of the person charged." In the following charge, which is a mere statement of defendant's theory, without further instructions as to the same: "The defendant denies the charge made by the state. He insists, in the first place, that the evidence submitted by the state is not sufficient to authorize a conviction in this case. He insists that if it is true that a burglary was committed, and the harness—the property described in the bill of indictment—was stolen, and if that property was subsequently found in the barn or loft that has been alleged to be here in the evidence, that this evidence does not show beyond a reasonable doubt that that house was his, or was in his control. He insists that the property was in the custody and control of another; therefore the state has not put the possession on him, and the evidence does not authorize a conviction. He further insists, if there be evidence of the fact that after these were found that he absconded and fled, he insists that the truth is he did not flee by reason of the fact that he was guilty of this charge, but he claims that part of his conduct is attributable to the fact that he was charged with complicity with another matter, and that was the reason he left, and that it had no connection with the charge made in this case."

McLaughlin & Jones, P. S. Whitley, and Geo. S. Peavy, for plaintiff in error. T. A. Atkinson, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

**SIMMONS, C. J.** (dissenting). The evidence in this case is wholly circumstantial, and does not exclude every other reasonable hypothesis than that of the guilt of the accused. It may tend to raise a suspicion of his guilt, but is not inconsistent with a reasonable supposition of his innocence.

(98 Ga. 783)

**BURTON et al. v. WESTERN & A. R. CO.**  
(Supreme Court of Georgia. Aug. 18, 1896.)

**RAILROADS—TRESPASSERS ON RIGHT OF WAY—  
LICENSE—NEGLIGENCE.**

1. Where a railroad company for a long time kept in a smooth and even condition a space lying longitudinally between its tracks, this space extending from one public street to another, in a much-frequented part of a town, though its only purpose in keeping it in such condition was to enable its passengers to safely alight from and board its trains, yet where this space, with the company's knowledge, had for a long period been daily, continuously, and regularly used by the general public as a footway,—“as much so as any street or way in the town,”—so that it could reasonably be inferred that, even if the company had not dedicated the space in question to the public use, its conduct at least amounted to a license or to an implied invitation to the public to pass over the same, it would be liable to one who, though not a passenger, was injured by stepping at night, without any negligence on his part, into a hole dug therein by the company, and which was negligently left unprotected and unguarded, so that one using the way would have no notice of its existence.

2. The court erred in dismissing the plaintiff's declaration.

(Syllabus by the Court.)

Error from superior court, Cobb county;  
Geo. F. Gober, Judge.

Action by Randall Burton and others against the Western & Atlantic Railroad Company to recover damages for personal injuries. From a judgment for defendant, plaintiffs bring error. Reversed.

O. D. Phillips, J. Z. Foster, and E. Faw, for plaintiffs in error. Payne & Tye and Clay & Blair, for defendant in error.

**SIMMONS, O. J.** It appears from the declaration that the plaintiff Silvia Burton, when passing along at night between two sets of tracks upon the defendant's right of way, in a space extending from one public street to another, in a much-frequented part of the town of Marietta, fell into a hole dug by agents of the defendant, which was unprotected and unguarded, thereby sustaining the injuries complained of. It appears also that the space referred to had for a long time been kept by the defendant in a smooth and even condition, for the use of passengers alighting from and boarding its trains, and had during that time, with the knowledge and acquiescence of the defendant, been daily, continuously, and regularly used by the general public as a footway,—“as much so as any street in the town,”—and that the plaintiff had been accustomed to use it herself, and did not know or suspect that the excavation had been made until she had fallen into it. It was alleged that she was free from negligence, and, by reason of the darkness at that point, was unable to see that an excavation had been made. It was contended on the part of the defendant that no cause of action was set forth, because it did not appear that at the time of the alleged injury the defendant was under any duty towards the plaintiff. The keeping up of the

way by the defendant, it was argued, could not be treated as giving rise to any duty towards the plaintiff or the public in general, since, as appeared from the declaration, the purpose of keeping it up was the accommodation of passengers on the defendant's trains, and hence the case did not come within the principle ruled in *Railroad Co. v. Robertson*, 95 Ga. 430, 22 S. E. 551, and similar cases relied on by counsel for the plaintiffs in error. Whether the conduct of the railroad company was such as to amount to a dedication, or to an implied invitation to the public in general, or not, it was at least such as to impose upon the company the obligation—which is due even to a bare licensee—of giving notice of hidden dangers or traps. 2 Jagg. Torts, 889 et seq., and cases cited. While an acquiescence by an owner of land in the use by others of a road or pathway thereon, under circumstances which do not amount to an invitation, does not impose upon him the duty of keeping the premises in suitable condition for such use, yet if he digs a dangerous hole, into which persons passing along the way are liable to fall if not warned of it, he is under the duty of warning them, or of guarding against such an occurrence. In the present instance the defendant, having permitted, without objection, the use of this space between its tracks as a street or passway, not merely by its passengers, but by the public in general, for a long period, and not having undertaken to confine the use of it to passengers on its trains, was bound to anticipate that on the occasion in question persons not passengers would be walking along the way; and it had no right to place a pitfall in their route, without such notice or safeguard as would prevent injury therefrom. The declaration stated a cause of action, and the court erred in dismissing it. Judgment reversed.

(99 Ga. 282)

**GOETTEE v. LANE.**

(Supreme Court of Georgia. Aug. 8, 1896.)

**INJUNCTION—TRESPASS.**

Under the facts disclosed by the record, there was no abuse of discretion in granting the interlocutory injunction.

(Syllabus by the Court.)

Error from superior court, Emanuel county;  
R. L. Gamble, Judge.

Action by E. W. Lane against J. G. Goettee. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

On February 14, 1896, E. W. Lane brought his petition against J. G. Goettee, alleging that defendant, his agents and servants, had entered upon plaintiff's land, and had cut and removed from 178 acres of the same a quantity of pine timber, to plaintiff's damage \$250. He prayed that, by verdict and decree, he be allowed full compensation for all past and future damages; that defendant and his employes

be enjoined from cutting or removing any more of the timber; and for general relief. The judge granted the injunction, and defendant excepted.

It appears that the timber was conveyed by plaintiff to J. W. Preston on June 3, 1890, by deed made in pursuance of a previous contract between them; that Preston conveyed this and other timber to the Central Georgia Lumber Company on February 2, 1891; and that on July 24, 1894, said company conveyed the timber in dispute to the defendant. The following was admitted at the hearing: This is the third application since November 25, 1895, by plaintiff, for injunction against defendant to restrain the cutting of the same lot of timber; and a temporary restraining order was granted upon each of the first two applications, similar to that granted in this case. At the hearing of the first case, plaintiff having submitted his affidavits and defendant his sworn answer denying all the material averments of the petition, the court intimated that he would refuse the injunction; whereupon plaintiff dismissed his case. When the second application was heard, upon like submission of plaintiff's affidavits and defendant's answer, the court again stating that he would decide adversely to plaintiff, he moved again to dismiss his case. Defendant objected, on the ground that his answer set up a cross demand, for which he prayed judgment against plaintiff. The court sustained the objection, but granted an order allowing plaintiff to withdraw only his application for injunction, and providing that the suit was to remain pending. In these first two suits the injunction was sought on two grounds only: (1) Because of an alleged surrender of the timber by defendant's predecessors in title; and (2) because, at the time the timber was sold by plaintiff to Preston, it was expressly agreed verbally between plaintiff and Preston's agent and attorney at law that five years was a reasonable time in which to cut it. The present suit insists upon both these grounds, and sets up that, aside from the verbal agreement, five years was a reasonable time within which to cut the timber. In neither of the first two hearings did defendant offer any testimony beyond his sworn answer. In his order granting the injunction, the judge states: "The first case was dismissed by the plaintiff before any decision was made by the court. The second petition for injunction was withdrawn, but the suit upon which the application was based is still pending in court. Upon the hearing of said application, plaintiff offered affidavits tending to show that five years was a reasonable time to cut timber under the deed from plaintiff to Preston. Defendant objected to their introduction, upon the ground that the suit was based upon an alleged express contract between plaintiff and Preston, and not upon the ground that five years would constitute a reasonable time according to the usages and customs of the business of sawmilling. The objection was sustained, and the

affidavits rejected. Plaintiff then moved to amend his petition so as to meet the objection, to which amendment defendant objected, upon the ground that the same would make a new cause of action. This objection also was sustained, and the amendment rejected. Plaintiff then moved to dismiss his case, to which defendant objected, because his answer set up an equitable recoupment against plaintiff's demand. This objection also was sustained. Plaintiff then withdrew his petition for injunction, the suit remaining in court. The court has never passed upon the merits of either of the former petitions for injunction. This third petition is the only one which evoked a decision upon the merits. After carefully considering the petition, answer, and the evidence submitted, the judge is of the opinion that the questions made should be submitted to a jury."

In evidence appear the following documents: Contract between plaintiff and Preston, dated September 12, 1889, reciting that, "in consideration of \$55 in hand paid, plaintiff agrees to grant, bargain, sell, and convey to Preston, on the terms hereafter mentioned, all the suitable pine timber for sawmill purposes standing on all the land owned by plaintiff in Emanuel county, consisting of 2,000 acres, more or less, with permanent and extension right of way through any lands owned by plaintiff for rail and other roads, together with the right and privilege to Preston, his heirs, administrators, assigns, and successors, to enter upon, box for turpentine, and cut and carry off said timber, or such portion of it as he may wish, at any time, and within three months from this date, for and in consideration of the further sum of \$2 per acre (less \$55) to be paid by Preston, his heirs and assigns, as purchase money for said above-described timber, to wit, one-half cash when deeds are drawn, balance to be paid within two years from date of deeds to timber, with interest; the exact contents of the above tracts of timber to be determined by a survey of the land. In consideration of the above sum so paid, plaintiff agrees to allow Preston the exclusive privilege of mill and still sites, to build and operate roads, tramroads, and railroads for the purpose of hauling logs, lumber, merchandise, etc., over said land, so long as they may see fit to use or occupy the same, with the exclusive privilege to Preston of removing all such property except buildings. If Preston shall, on or before December 12, 1889, accept the offer and terms herein named, plaintiff agrees and binds himself, his heirs, administrators, and assigns, to make good and sufficient warranty titles to said timber and turpentine privileges to Preston, his heirs, administrators, and assigns, or successors; it being understood that Preston shall have three months from this date to decide whether or not he will accept the offer herein named, and that plaintiff shall be bound by this agreement for said three months, and no longer." On December 6,

1889, Preston wrote to Lane, referring to the foregoing agreement, and stating: "I will purchase the said timber, with the rights and privileges in said agreement mentioned, on the terms therein stated." He further stated that he would agree that the survey should be completed within six months, and would pay half cash as soon as the deeds were drawn, but did not see how they could be drawn until the survey was made. He asked that plaintiff signify if this was satisfactory, and inclosed a draft for \$750, said amount to apply upon first payment when deeds were drawn. To this plaintiff answered: "The above is satisfactory to me, and I accept your proposition," and acknowledged receipt of the \$750 to be applied as stated. Two other receipts signed by plaintiff appear,—one for \$150, dated February 20, 1890, the other for \$250, dated March 21, 1890,—each stating: "Said amount to apply upon first payment which said Preston has agreed to make to me upon my giving him deeds to two thousand acres of timber, more or less, in Emanuel county, Ga., upon which he holds option good until June 6th, 1890." The deed of June 3, 1890, between plaintiff, of the first part, and Preston, of the second part, "witnesseth: That the said party of the first part, for and in consideration of the sum of two (\$2.00) dollars per acre to be paid to him by the said party of the second part as hereinafter stated, has granted, bargained, sold, conveyed, and confirmed unto the said party of the second part, his heirs and assigns, all of the pine timber suitable for sawmill purposes now being or standing upon all of the following described lands, situate, lying, and being in the county of Emanuel, \* \* \* the exact number of acres of sawmill timber contained in the above tract of land to be determined by a survey of the land to be made by said party of the second part, his heirs or assigns, together with the right and privilege to said party of the second part, his heirs or assigns, to enter upon the said lands with his servants, agents, and stock, for the purpose of boxing the said timber for turpentine, and of cutting, manufacturing, hauling, and taking away said timber and turpentine, or such portion of it as he may wish, at any time within reason, and also with the exclusive right and privilege of having sites for sawmills and turpentine stills on said lands, and to build and operate on and over said lands roads, tramroads, and railroads for the purpose of taking and hauling logs, lumber, merchandise, and all other kinds of freight over said lands and over said roads, so long as the said party of the second part, his heirs or assigns, may see fit to use or occupy the same, and with the privilege to said party of the second part, his heirs or assigns, of removing all such property as may be put upon said lands, except the buildings, with permanent and exclusive right of way for rail and other roads through

any and all lands owned by said party of the first part. To have and to hold all and singular the said timber now standing or being on said lands, and the rights of way, right to mill and turpentine still sites, and the right to build and operate roads, tramroads, and railroads, and the right of ingress and egress over said lands in manner aforesaid, and the right to the quiet and peaceable possession of said lands at any and all times for the purpose of turpentine, cutting, manufacturing, hauling, and taking away said timber and trees as aforesaid, unto the said party of the second part, his heirs and assigns, forever. And, lastly, the said party of the first part, for himself and his heirs, covenants and agrees with the said party of the second part, his heirs and assigns, that he, the said party of the first part, the timber and turpentine privileges and all other of said rights and privileges above mentioned, unto the said party of the second part, his heirs and assigns, shall and will warrant and forever defend by these presents. The said party of the second part, in consideration of the conveyance of said timber rights and privileges, as above set forth, agrees to pay to the said party of the first part, his heirs or assigns, for said timber rights and privileges, as aforesaid, at the rate of two (\$2.00) dollars per acre for every acre upon which there is standing what is known as 'sawmill timber,' as follows: The sum of eighteen hundred and forty-one (1,841) dollars in cash, the receipt of which the said party of the first part hereby acknowledges, which cash is estimated to be one-half of the purchase money of said timber and other privileges, at the rate of two dollars per acre, and to pay the balance within two years from date of this deed, with interest," etc. Indorsed on this deed is a receipt signed by plaintiff, dated June 29, 1892, acknowledging the payment by Preston of \$2,107.92, "deferred payment and interest due me under this deed, same being in full satisfaction to date."

The plaintiff introduced the affidavits of a number of persons that, by the customs of the country and of sawmill men, five years is a reasonable time to cut timber off the lands of a grantor; that, in fact, it is rare that sawmill men do not cut off the sawmill timber in less than five years, and generally they cut it off in two or three years after they purchase it; that five years would be a sufficient time in which to cut and remove the timber from the land included in the deed from plaintiff to Preston, and to extend the time beyond five years would be unreasonable; that the limit by the general custom in Emanuel county is from one to five years; that such a sawmill as that run by Preston and the Central Georgia Lumber Company will saw up the timber from 2,000 acres of land in a year, etc. These witnesses are residents of Emanuel county, and are familiar with the land in dispute and with the sawmill business, some of them having

been engaged therein for many years, and having experience therein, and others having sold lumber to sawmill men. It further appears from their testimony that the Millen & Southern Railroad runs within less than three miles of the timber in dispute. The defendant objected to the admission of so much of the affidavits as was intended to prove that, by the "custom of the country" or "custom of sawmill men," five years is a reasonable time to cut timber off of land, upon the grounds that none of the witnesses who so swore appeared to be an expert; that none of them gave (nor was there otherwise given) any definite information as to what his experience was; that it did not appear what were the facts upon which they swore to the existence of the alleged custom; and that the testimony was a conclusion of law, and not a statement of facts, from which the court could determine whether such a custom existed. The objection was overruled. By other affidavits, plaintiff proved that when the deed to Preston was executed, there being present, among others, A. R. Wright, attorney, for Preston, who received the deed for him, and J. D. Overstreet, an agent of Preston, plaintiff read the deed before signing it, and then handed it back to Wright, with the statement that he would not sign such a lease as that for his timber. Wright asked what was wrong with it, and plaintiff replied that there was no limit as to the time to move the timber off his land. Then Wright wrote in the words, "at any time within reason," and plaintiff asked, "What do you mean by a time within reason? There must be a limit of time to move the timber off of my land, for I am not going to raise or grow timber for you." To this Wright replied, "Oh, four or five years is all the time we care to cut and remove the timber off of your land." Plaintiff then said that if this was all Wright claimed for a reasonable time, with the understanding that he get it off within that time, plaintiff would sign the deed, and thereupon executed it. The witnesses then went with Wright and Overstreet, at their request, to one Aarons, whom they were expecting to sign a deed or lease for sawmill timber. One of them (a son of the plaintiff) remarked on the way that, if Aarons knew that plaintiff had refused to sign the deed to Preston until they had agreed on a certain time or limit to remove the timber from the land, Aarons also would refuse to sign until there was a limit of time to remove the timber from his land. Wright asked the witnesses not to say anything to Aarons about this agreement, and they did not at that time. Defendant objected to so much of the affidavits as sought to prove a verbal agreement that four or five years was all the time needed in which to cut the timber, upon the grounds that there was no evidence that either Wright or Overstreet had authority so to contract; that the written contract could not be varied or altered by such contemporaneous parol agreement; and that no notice of such agreement was shown either

to defendant or to his grantor, the Central Georgia Lumber Company. The objection was overruled. Defendant further objected to so much of the testimony as related to the conversation with reference to Aarons, on the ground that the same was *res inter alios acta*; and this objection also was overruled. One Brinson testified for plaintiff that before July 24, 1894, and when defendant was looking after the timber in dispute, and before his purchase of it, deponent told him that the timber was the property of plaintiff, as the lease had about expired. To this defendant objected, because it did not appear that Brinson had authority to speak for plaintiff, or that he had any definite information about what he said to defendant, or that what he said was anything more than the repetition of an idle rumor. The objection was overruled. One Butler swore that he heard plaintiff tell an authorized agent of Preston to remove the timber off of plaintiff's land; that he did not care to grow timber for that firm. To the best of deponent's recollection and belief, this notice was given in the early part of 1893. To this defendant objected, because it did not appear who the "authorized agent" was, nor whether he was authorized or not, nor what the scope of his authority was, and because Preston had conveyed the property to the Central Georgia Lumber Company before this occurred, and therefore it was irrelevant. The objection was overruled.

Other testimony for the plaintiff was, in brief, as follows: The 178 acres in question are the timbered land on 318 acres described as lot No. 1 in the deed to Preston, as shown by survey made in June, 1890, for Preston. The deed embraced various other tracts or lots. In April, 1893, plaintiff notified Preston that the time would expire for cutting the timber in June, 1895, and to remove it before said date, as the time would not be extended. Preston and the lumber company entered upon nearly all of plaintiff's lands, and cut and removed any and all the timber they desired to move, without any interference from plaintiff or any one else, until they voluntarily abandoned cutting the timber, took up all their mill fixtures of every kind, and moved 35 or 40 miles away. Defendant entered upon plaintiff's lands, and cut and removed any and all sawmill timber that he desired, without objection from plaintiff prior to June 3, 1895. In January, 1896, defendant and his employees entered upon the 178 acres in dispute, and cut and removed some of the timber therefrom, without authority from plaintiff, and is threatening to cut and remove the balance. Plaintiff gave him notice on April 26, 1895, that the time for cutting the timber would expire on June 3, 1895, and to govern himself accordingly. He could have removed said timber before the expiration of the lease to Preston. While the deed to Preston conveyed the turpentine privileges, nearly all the timber had previously been tapped and worked for turpentine purposes, which fact was well known to

Preston before June 3, 1890. Neither he nor any one under him has tapped or worked any of said timber for turpentine; hence the consideration of said timber was two dollars per acre. He commenced cutting said timber in 1890. He was superintendent of the Central Georgia Lumber Company, which was a corporation, on June 3, 1890, and during the years 1890, 1891, 1892, 1893, and possibly for a short period in 1894. He bought between 1,500 and 2,000 acres of timber of Dr. Gay within less than a week of the time he bought plaintiff's timber; and Gay made the same agreement with A. R. Wright, who was attorney at law for Preston, that plaintiff claims to have made. Preston and the lumber company failed to cut over all the timbered lands of Gay, but did carry out their agreement, verbally made, that they would not cut any after the expiration of five years. Before the expiration of that time, one Hurst, acting as woods boss, whose duty it was to have the logs cut, hauled, and carried to their mill, etc., came to Gay, and told him that he had come to turn over all timbers standing and cut down on Gay's land; and Preston and the lumber company abandoned Gay's timber and the mill business in Emanuel county. They moved all their machinery, stock, mills, and fixtures out of the reach of plaintiff's timber, and not only abandoned standing timber thereon, but abandoned stock logs cut and felled in the woods, at the log yards on their railroad, and at their sawmill, amounting to several hundred logs in all.

Defendant introduced, besides the affidavit of Preston, the affidavit of six persons who have been engaged in the business of manufacturing and selling pine lumber in Georgia for periods of from 6 to 28 years past, during which periods they have bought several hundred thousand acres of pine timber for sawmill purposes, two of them having bought from 20,000 to 30,000 acres in Emanuel county. They swear that, where a sawmill location or plant comprising from 15,000 to 20,000 acres of timber is being bought, no prudent or capable sawmill man would accept leases or conveyances which limit the time within which it is to be cut to less than 20 years. There is always more or less risk to the purchasers of timber in such quantities where any limitation at all is fixed; and where, in individual instances, the vendor insists upon any limitation of time, there must be some special circumstance, such as nearness to the sawmill, to induce the purchaser, if a sensible and prudent sawmill man, to accept it. For this reason, nearly all the leases or conveyances of sawmill timber contain no limitation at all as to the time within which the timber shall be cut. Almost the only limitation to which the purchasers will consent is a limit to the number of years within which the cutting of each separate lot must be finished after once commencing on it. It would be impossible to box and work for turpentine all the timber at once on such a

body of land as just mentioned. It could only be boxed and worked by tracts of from one to two thousand acres at a time. Each tract would require at least three years from the time of boxing before the working of it for turpentine purposes could be completed. Where the turpentine privilege is sold with the sawmill timber, 17 years would be the least limitation; within reason, which could be accepted by the purchaser for cutting and boxing the timber of such a body of land, or which could be called reasonable, where no time is fixed in the deed or lease. The timber included in the deed from plaintiff was bought by Preston as a part of a sawmill plant or location that was then intended to comprise 30,000 or more acres of timber, and which actually comprised between 19,000 and 20,000 acres of pine timber for sawmill purposes, actually bought. Neither A. R. Wright, as attorney, nor J. D. Overstreet, as agent, was ever authorized by Preston to stipulate or agree with the plaintiff that the timber conveyed in the deed of June 3, 1890, should be cut off and removed within four or five years from that date; nor would Preston have bought the timber with any such limitation, because, from the location of the timber in relation to the balance of the 20,000 acres, the conveyance would have been valueless with such a limitation in it, as it would have been wholly impracticable, with any sort of regard to the rules of business prudence or economy, to have reached the same and cut it in that length of time, to say nothing of the time that would have been required to box and farm the same for turpentine, before cutting it for the sawmill. There is no custom, either in Emanuel county or elsewhere in the pine belt of Georgia, which limits the time for cutting to five years. If any such custom had prevailed, deponents could not have escaped knowledge of it. On February 2, 1891, Preston conveyed the timber in question (with vast quantities of other timber and timbered lands) to the Central Georgia Lumber Company, and since that date he has not been the appropriate person to whom to address any notice with reference to the limitation claimed by plaintiff; nor has he ever received any such notice. Not until last summer (and then in connection with a suit filed by the same plaintiff against other defendants) did Preston or the president of the lumber company ever hear that plaintiff claimed any such construction of the words "reasonable time" as he now claims; nor had the president before then heard, nor had any other officer of the company, so far as he knows, heard, of the alleged verbal explanation and agreement. It is untrue that either Preston or the company ever, by word or act, abandoned any of the timber conveyed by the deed, or ever relinquished any right to cut or use any part of it, otherwise than by the deeds to the company and to defendant. The action which plaintiff terms an "abandonment" was nothing more

than the exercise of the company's right to suspend operations in that precise locality for such time as it considered judicious, to be renewed when it thought proper; and, had not the property been sold to defendant, the company itself would have milled the timber.

The judge says, in a statement following the certificate to the bill of exceptions, that, when objections to affidavits were made, the court stated to counsel that it would hear the whole affidavit, and reject from consideration such facts as were inadmissible or illegal, all of which was done by the court in deciding the case. Three days after the order of injunction was granted, plaintiff in error applied to the presiding judge to dissolve the injunction or restraining order, offering to make and file a bond, with good security, for any sum that his honor might think necessary, payable to the plaintiff, for his protection against loss and damage from cutting the timber on the land in question, in the event that the verdict and the final judgment should go against plaintiff in error; offering also, if the judge should so direct, to make the bond as peremptory in its terms and obligations as are appeal bonds under the statute. This application was denied, and plaintiff in error excepts to this ruling. He also alleges that the judgment granting the injunction was contrary to law and evidence, and assigns error upon the overruling of his objections to testimony, before noted.

A. C. Wright, for plaintiff in error. Henry B. Daniel, for defendant in error.

PER CURIAM. Judgment affirmed.

(119 N. C. 77)

SNOW STEAM PUMP CO. v. DUNN et al.  
(Supreme Court of North Carolina. Oct. 20, 1898.)

#### RES JUDICATA.

Plaintiff, who held two claims against defendant,—one for an open unsecured account, the other for a sum secured by mortgage,—was, at its own request, allowed to interplead and become a party to a creditors' bill against defendant, as to the first claim only, the order of the court reciting that plaintiff "be made party defendant for said purpose"; and the judgment did not purport to pass upon the second claim. Held, that such action was no bar to a subsequent suit against defendant on the mortgage debt.

Appeal from superior court, Craven county; Graham, Judge.

Action by the Snow Steam Pump Company against William Dunn and others. Judgment for defendants, and plaintiff appeals. Reversed.

Allen & Dortch and C. R. Thomas, for appellant. Clark & Guion and M. D. W. Stevenson, for appellees.

CLARK, J. The plaintiff held two claims against the defendant, one for an open unse-

cured account of \$92, the other for \$2,573, secured by mortgage. In the creditors' bill brought by Delafield and others against the defendant, the Snow Steam Pump Company was not a plaintiff, nor was it made a defendant by service of summons, nor by general appearance either in the action or before the referee. Indeed, the Snow Pump Company, when summoned before the referee, refused to take any part, and, appearing specially, excepted; so there was no ground to hold that the Snow Pump Company was a party to the Delafield action generally, so as to be estopped by any judgment therein. In truth, the Snow Pump Company asked and was allowed to interplead, but only "as to the \$92 claim," the order of Graves, J., reciting "that said Snow Steam Pump Company be made party defendant for said purpose." For no other purpose, and to no other extent, was said Snow Steam Pump Company a party to the Delafield action. Its application to withdraw even that claim was denied by the court, and hence it is estopped as to the said \$92 claim by the judgment in that case, but no further. As to the \$2,573 mortgage, which is the subject of this action, the Snow Steam Pump Company was not only never a party in the Delafield action, but, when receivers were appointed in that action, it applied to the judge who appointed the receivers, and obtained leave to bring this action against said receivers. Thus, not only the Snow Steam Pump Company was never a party to the Delafield action, as to the claim which is the subject of this action, either by service or general appearance, but it appears (to exclude a conclusion) that, on the contrary, during the pendency of that action, it brought the present action, not only with the knowledge, but with the assent, of the judge having jurisdiction of the Delafield action, and said court twice refused motions by this defendant to consolidate this action with the Delafield action. The Snow Steam Pump Company not being a party thereto as to this matter, the judgment therein did not purport to pass upon the claim which is the subject of this action, and could not have passed upon it. It is true, in the Delafield action, in which this plaintiff was a party as to the \$92 claim, it appealed, but on the ground that there should be no final judgment till this independent action and another independent action had been decided (*Delafield v. Construction Co.*, 118 N. C. 105, 24 S. E. 10); thus emphasizing that the subject-matter of this action was not before the court in the Delafield Case, so as to be passed upon by the judgment therein. This independent action was not, then, before the court, and any reference to it in the former opinion of this court was merely incidental and obiter. In holding that the plaintiff is estopped as to this action by the judgment in the Delafield Case, there was error. *Jones v. Beaman*, 117 N. C. 250, 263, 23 S. E. 248; *Jordan v. Farthing*, 117 N. C.

181, 188, 23 S. E. 244; *Temple v. Williams*, 91 N. C. 82. Upon the agreed state of facts, the judgment should be entered below in favor of the plaintiff. Reversed.

(119 N. C. 39)

**SILLIMAN et ux. v. WHITAKER et ux.**  
(Supreme Court of North Carolina. Oct. 20, 1896.)

**WILLS—CONSTRUCTION OF DEVISE.**

A devise of land in trust for a daughter of the testator "and all her children, if she shall have any," vested an estate in fee in the daughter, she having no children at the death of the testator; and such estate was not divested by the subsequent birth of children.

Appeal from superior court, Franklin county; Boykin, Judge.

Action in ejectment by Abraham Silliman and wife against T. H. Whitaker and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

The land in question was devised in trust by Richard Ward, deceased, for his daughter Sarah Ward "and all her children, if she shall have any." Sarah Ward was an infant and without children when her father died, but subsequently married, and became the mother of the plaintiff Mrs. Silliman. During the minority of said Sarah Ward, the land was sold by order of a court of equity, made on her petition, by her next friend, and passed by mesne conveyances from the purchaser to the defendants.

W. M. Person, F. S. Spruill, and Shepherd & Busbee, for appellants. J. B. Batchelor, A. C. Zollcoffer, and N. Y. Gulley, for appellees.

**CLARK, J.** The devise was to trustees, "in trust for Sarah Ward and all her children, if she shall have any." It was settled in *Wild's Case*, 6 Oke, 17, decided in the forty-first year of Elizabeth (1595), that a devise to B. and his (or her) children, B. having no children when the testator died, is an estate tail. If he have children at that time, the children take as joint tenants with the parent. This has been uniformly followed in England. In the late case in the House of Lords of *Clifford v. Koe*, 5 App. Cas. 447, *Wild's Case* was reaffirmed; opinions being delivered seriatim by Lord Chancellor Selborne, Lord Hatherly, Lord Blackburn, and Lord Watson, unanimously sustaining *Wild's Case*, and stating that "for these three hundred years it has been the uniform ruling" in England. *Theob. Wills*, 334; *Hawk. Wills*, 198. In this country, estates tail having been turned into fee simple, while *Wild's Case* has been as uniformly followed as in England, it has been with the necessary modification that, where the devise is to B. and his children, if he have no children at the testator's death B. takes a fee simple, instead of an estate tail, and further (by virtue of our statutes), if there are

children of B. at the testator's death, the father and children take as tenants in common, instead of joint tenants. *Wheatland v. Dodge*, 10 Metc. (Mass.) 502; *Nightingale v. Burrell*, 15 Pick. 104, on page 114; 3 Jarm. Wills, 174; *Schouler, Wills*, §§ 555, 556. This has always been the ruling in North Carolina, as was held in *Hunt v. Satterwhite*, 85 N. C. 74, citing with approval *Wild's Case* and precedents in our Reports; and *Smith, C. J.*, adds that the interposition of a trustee is obviously to secure the property for the use of the mother and her children, and cannot change the construction of the devise. This case, in turn, was approved by *Merriam, J.*, in *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236, in which he cites the additional cases of *Moore v. Leach*, 50 N. C. 88, *Chesnut v. Meares*, 56 N. C. 416, and *Gay v. Baker*, 58 N. C. 344, and states that "the rule is clearly settled, and we need not advert further to it." It is true, the words here are to "Sarah and her children, if she shall have any." We do not see that these added words change the construction in any wise. At most, they merely indicate that at the time of writing the will the testator knew his daughter had no children; and, doubtless, the same was true in all the numerous cases above cited in which the devise was to "B. and his children," in which uniformly, when B. had no children at the testator's death, he was held in England to take an estate tail, and in this country a fee simple. In the present case there is nothing on the face of the will to show a contrary intent to take it out of the long-settled rule. From the allegations of the complaint it appears that Sarah was 11 or 12 years of age at the testator's death, but non constat that he might not have expected that at his death she would have been married and the mother of a child. In a very similar case (*Gillespie v. Schuman* [1879] 62 Ga. 252), where the devise was to a woman and "her children, if any living," it was held to mean living at the death of the testator,—almost our very case,—and, as none were then living, the woman took a fee simple estate, and the birth of a child subsequently to the death of her testator could not divest the fee; and parol testimony to show a contrary intent in the testator was held inadmissible. The rulings above cited are not only uniform in England and in this country, but they are consonant with our public policy, which is adverse to tying up estates; and, further, in the present case the ruling is consonant with justice, which would be outraged by turning out the parties who have held the realty undisturbed for 40 years under mesne conveyances from a purchaser who bought in reliance upon the decree of a court of equity, which, after careful investigation, had adjudged that it had power to order the sale, and by whom the purchase money in full (which is, doubtless, more than the property would bring now) was paid over

to the trustee named in the will for the benefit of the mother, whose only child is now seeking to recover the premises, which have passed from hand to hand in reliance upon the solemn adjudication of the court of equity.

It is proper to say that if the devise had been to A. for life, remainder to such children as may be living at her death, a very different case would have been presented (*Williams v. Hassell*, 73 N. C. 174, 74 N. C. 434; *Young v. Young*, 97 N. C. 132, 2 S. E. 78); or even if the devise had been to A. for life, with remainder to her children. But here the devise to "B. and her children, if she shall have any," is, in substance, that which has been construed in *Wild's Case* and others above cited to confer upon B., when she has no children at the death of the testator, not a life estate, but an estate tail in England and a fee simple in this country. When words used in a will have received a settled judicial construction, the testator is taken as using them in that sense, unless a different intent plainly appears. Applying that rule, the devise here was, in legal effect, to "Sarah and her children, if she shall have any at the death of the testator, and, if not, then to Sarah in fee simple"; and the law hath been so written "these three hundred years," say the authorities. No error.

(119 N. C. 53)

#### HUGHES v. LONG et al.

(Supreme Court of North Carolina. Oct. 20, 1896.)

##### NOTARY PUBLIC—OFFICER DE FACTO.

In an action in which the issue was whether plaintiff's mortgage was legally probated before a person who acted as a notary public, it appeared that it was nearly two years after his commission expired, and that the clerk decided when the mortgage was presented for registry that "the certificate is correct and sufficient." There was no proof that such person attempted any act as a notary public after his commission expired until the probate of such mortgage. *Held*, that he was not a notary de facto.

Appeal from superior court, Warren county: Robinson, Judge.

Action by William H. Hughes against William W. Long and A. L. Richardson to foreclose a mortgage. From a judgment against defendant Long only, plaintiff appeals. Affirmed.

Cook & Green, for appellant. B. M. Gatling and R. O. Burton, for appellee Richardson.

**FAIRCLOTH, C. J.** The plaintiff instituted this action to foreclose a mortgage executed to him by W. W. Long, on January 21, 1891, conveying a piece of land "known as a part of the Tom Thompson Alston Tract," containing 613 acres, and described by the adjacent lands of other parties. This deed purports to have been registered in Warren county on January 21, 1891. On February 20, 1890, said Long had executed to A. R. Shattuck a deed

of trust to secure the British & American Mortgage Company, including "all those tracts or parcels of land lying in one body in the counties of Warren and Halifax of which the late Samuel A. Williams was seised and possessed at the time of his death," bounded by the adjacent lands of other parties, containing 7,000 acres, more or less. This deed was duly registered in Warren county, September 18, 1890. This deed of trust, being of prior date and registration, would have precedence, provided it embraced the land conveyed in the mortgage deed to the plaintiff. In an action to which the plaintiff was not a party, to foreclose the said trust deed, a sale was ordered, and the lands were sold in parcels, and one piece, containing 1,344 acres, was sold and purchased by the defendant A. L. Richardson, and deed made accordingly. It was admitted on the trial that the land in controversy was owned by Samuel A. Williams at his death, and by W. W. Long at the date of the deed of trust. Section 16 of the answer avers that the lands claimed by the plaintiff are a part of the said 1,344-acre tract. At the trial a jury trial was waived, and the court was permitted to find the facts; and his honor, among his findings of fact, finds that said section 16 of the answer is true, and adjudges that the defendant Richardson is the owner of the land in controversy. The defendant further contends that the plaintiff's mortgage deed has never been registered. The facts appearing in the record are as follows: The probate was taken before Douglass Williams on January 23, 1891, who was appointed a notary public on February 8, 1887. His commission expired on February 8, 1889. On said probate the clerk of the superior court passed as follows: "North Carolina, Warren County. The foregoing certificate of Douglass Williams, a notary public of Warren county, is adjudged to be correct and sufficient. Let the instrument, with the certificate, be registered." Under the maxim, "*Omnia presumuntur bene gesta*," etc., which means that the officer has power by law to decide a question, the decision is to be taken as true, and every presumption is to be made in support of it, unless rebutted by proper proof, so that the question of the validity of the certificate is left open; and, where there is a want of authority, the above maxim does not apply, and the absence of authority or jurisdiction may be shown aliunde, as it would be strange if a usurpation of authority could not be met by proof.

It is conceded in the case before us that Douglass Williams, at the time he took the probate of the deed in question, was not an officer de jure. Was he an officer de facto? The acts of de facto officers, acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual when they concern the rights of third persons or the public as if they were the acts of rightful officers. *Gilliam v. Riddick*, 4 Ired. 368. There may be some doubt in different cases what shall constitute an officer de facto. The mere assumption of the office by perform-

ing one or several acts, without any recognition of the appointing power or the public, may not be sufficient. There must be an exercise of the office, and acquiescence of the public authorities, long enough to raise in the mind of the citizen a strong presumption that he was duly appointed, so that he might be compelled to attend to the citizen's business, and require submission to his authority as an officer. *Burke v. Elliott*, 4 Ired. 355; *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, and 13 S. E. 247.

On the trial, when the probate of an instrument becomes material, it may be shown or disproved by competent evidence, and the presumption arising from the clerk's decision that "the certificate is correct and sufficient" may in this way be rebutted; and, when it appears or is admitted that the act was not done by an officer de jure, it is then incumbent on the party offering the instrument to show that he was an officer de facto. In the present case there is no proof, nor any attempt to prove, that Douglass Williams, for a period of nearly two years after his commission expired, attempted any act as a notary public until in the present case; nor does it appear in any manner that he was recognized in the community in which he lived as such an official.

There are other exceptions in the record and other questions argued before us, but we need not consider them, as what we have said disposes of the appeal. Affirmed.

(47 S. C. 464)

# LEITZSEY v. COLUMBIA WATER POWER CO.

(Supreme Court of South Carolina. Oct. 17, 1896.)

## NUISANCE — PLEADING — EMINENT DOMAIN — COMPENSATION.

1. In an action against a grantee for maintaining a nuisance, consisting of a dam erected by his grantor, a complaint alleging a request to the grantee for the removal of the dam; that plaintiff's damages were caused by "keeping up, maintaining, and continuing the dam"; that the natural flow of the water through the river and a branch has been and "now is" prevented; that the branch and river have been and "now are" prevented from effecting the natural drainage of plaintiff's land; and that the waters are caused to percolate through the land,—sufficiently avers damages to plaintiff after the request for the removal of the dam.

2. Act Dec. 24, 1887, authorized the board of trustees of the Columbia Canal, for the improvement of the canal for navigation, and to furnish the city of Columbia with water, etc., to erect a dam across a river at the head of the canal, so as to raise the level of the river in the canal to a certain height, and gave the board the "right of way in and along the course of the canal" for the construction of the dam, and provided that, if it became necessary to use private property, the board should have the power to acquire such right of way in the manner now provided by law. *Held*, that the board was authorized to condemn the right to flow land by raising the level of the water in the river.

3. Where a riparian owner permits the dam to be constructed without objection, his consent thereto will be presumed; and therefore he will

be required, under Rev. St. 1893, § 1752, to entitle him to recover damages, to bring his petition therefor within 12 months after the completion of the dam.

Appeal from common pleas circuit court of Richland county; Buchanan, Judge.

Action by George F. Leitzsey against the Columbia Water-Power Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

The complaint was as follows:

"The plaintiff above named, complaining of the defendant herein, alleges:

"First. For a first cause of action: (1) That the defendant was at the times hereinafter mentioned, and now is, a corporation duly created and organized under and by virtue of the laws of the said state. (2) That the plaintiff was at the time of the commission of the grievances hereinafter set forth, and now is, the owner in fee and in possession of a tract of land containing four hundred and twenty acres, more or less, lying on the right bank of Broad river, in the said county and state, bounded on the north by lands of F. W. Wagener, on the east by the said river, on the south by lands of the state penitentiary, and on the west by the Newberry road, separating this tract from lands of the estates of Eli Huffman and Isaiah Haltiwanger, and also by lands of the estate of Godfrey B. Nunamaker, and that running across or near to the said land, leading into the said river, is a branch and a ditch, by means of which, and the said river, the said land was, prior to the commission of the said grievances, and from time immemorial, accustomed to be drained for agricultural purposes. (3) That on or about the — day of —, 1889, the board of trustees of the Columbia Canal, a corporation duly created and organized under and by virtue of the laws of the said state, raised and erected a dam, known as the 'Columbia Canal Dam,' across the current of the said river, at a point a short distance below the plaintiff's said tract of land; that thereafter, on or about the 11th day of January, 1892, the said board of trustees of the Columbia Canal transferred and conveyed to the said defendant the said dam, and all and singular the property thereto appertaining, and that the said defendant has since been and now is the owner and in possession thereof. (4) That since the said 11th day of January, 1892, the said defendant has kept up, maintained, and continued, and now maintains, keeps up, and continues, the said dam as aforesaid, so that by reason thereof the waters of the said river are raised six feet in the channel thereof, and greatly increased in quantity therein, and in the said branch and ditch, and the free, natural, and accustomed flow of the said water, and of sand and other sterile earth, through the channels of the said river and of the said branch and ditch, has been and now is hindered and obstruct-

ed; and the said river and the said branch and ditch have been and now are prevented and hindered from effecting the proper, natural, and usual drainage of the said land; the said waters are caused to percolate through, and water-log and water-soak, forty acres of the said land lying on the said river; and in times of ordinary freshet the waters of the said river are caused to flow back upon and inundate the said forty acres of the said land, depositing thereon quantities of sand and other sterile earth, all of which, prior to the commission of the said grievances, and from time immemorial, the said waters were not accustomed to do. And the plaintiff further avers that prior to the grievances hereinbefore complained of the said forty acres of the said land were of unusual and great fertility, and were not subject to overflow by the waters of the said river so as to destroy or materially injure the crops growing thereon, and that since the commission of the said grievances, and by reason thereof, the said lands have become liable to frequent and prolonged freshets, overflowing and inundating the said lands to such an extent as to destroy the crops growing thereon, and wholly to deter and prevent the use of the said lands for agricultural purposes, or for any valuable purpose whatever. And the plaintiff further avers that by reason of the said grievances so as aforesaid caused by the keeping up, maintaining, and continuing of the said dam by the said defendant as aforesaid, the said forty acres of land, which prior thereto were reasonably worth seventy-five dollars per acre, have become water-logged, unproductive, uncultivable, and wholly valueless to the plaintiff, to the great nuisance and injury of the plaintiff, and to his damage four thousand dollars. (5) That on the 2d day of August, 1894, the plaintiff gave the defendant notice of the said nuisance, and then requested the defendant to remove the same, but that the said defendant has failed and refused so to do. (6) That the said keeping up, maintaining, and continuing of the said dam has heretofore been and now is without the consent of the plaintiff; that the said plaintiff has received no compensation for the injury sustained by him as hereinbefore set forth; and by reason of the premises, the plaintiff is entitled to have, of and from the said defendant, compensation in the said amount of four thousand dollars.

"Second. And for a second cause of action: (1) That the defendant was at the times hereinafter mentioned, and now is, a corporation duly created and organized under and by virtue of the laws of the said state. (2) That the plaintiff was at the time of the commission of the grievances herein-after set forth, and now is, the owner in fee and in possession of a tract of land known as 'Mickler's Island,' lying in, and surrounded by the waters of, Broad river,

in the said county and state, and being situated opposite to, and off from, a tract of land adjoining the tract described in the second paragraph of the first cause of action hereof, known as 'Swygert's Mill Tract,' and that prior to the commission of the said grievances, and from time immemorial, the said river was accustomed to flow past and by the said island without material injury thereto. (3) That on or about the — day of —, 1889, the board of trustees of the Columbia Canal, a corporation duly created and organized under and by virtue of the laws of the said state, raised and erected a dam, known as the 'Columbia Canal Dam,' across the current of the said river, at a point below the plaintiff's said tract of land; that thereafter, on or about the 11th day of January, 1892, the said board of trustees of the Columbia Canal transferred and conveyed to the defendant herein the said dam, and all and singular the property thereto appertaining; and that the said defendant has since been and is now the owner and in possession thereof. (4) That since the said 11th day of January, 1892, the said defendant has kept up, maintained, and continued, and now keeps up, maintains, and continues, the said dam as aforesaid, so that by reason thereof the waters of the said river are raised six feet in the channel thereof, and greatly increased in quantity therein, and the free, natural, and accustomed flow of the water, and of sand and other sterile earth, through the channel of the said river, and past the plaintiff's said land, has been and now is hindered and obstructed, and the said river has been and now is prevented from effecting the proper, natural, and usual drainage of the said land; the said waters are caused to percolate through, and water-log and water-soak, the whole of the said tract of land, and in times of ordinary freshet the waters of the said river are caused to flow back upon and inundate the said land, depositing thereon quantities of sand and other sterile earth, all of which, prior to the commission of the said grievances, and from time immemorial, the said waters were not accustomed to do. And the plaintiff further avers that, prior to the grievances hereinbefore complained of, the said tract of land was of unusual and great fertility, and was not subject to overflow by the waters of the said river so as to destroy or materially injure the crops growing thereon, and that since the commission of the said grievances, and by reason thereof, the said lands have become liable to frequent and prolonged freshets, overflowing and inundating the said lands to such an extent as to destroy the crops growing thereon, and wholly to deter and prevent the use of the said lands for agricultural purposes, and for any valuable purpose whatever. And the plaintiff further avers that by reason of the said grievances so as aforesaid caused by the keeping up, maintaining, and continu-

ing of the said dam by the said defendant as aforesaid, the said tract of land, which prior thereto was reasonably worth one hundred dollars per acre, has become water-logged, unproductive, uncultivable, and wholly valueless to the plaintiff, to the great nuisance and injury of the plaintiff, and to his damage two thousand dollars. (5) That on the 2d day of August, 1894, the plaintiff gave the defendant notice of the said nuisance, and then requested the defendant to remove the same, but that the said defendant has failed and refused so to do. (6) That the said keeping up, maintaining, and continuing of the said dam by the said defendant has heretofore been and now is without the consent of the plaintiff; that the said plaintiff has received no compensation for the injury sustained by him as hereinbefore set forth, and by reason of the premises the plaintiff is entitled to have, of and from the said defendant compensation in the said amount of two thousand dollars. Wherefore the plaintiff demands judgment against the defendant in the sum of six thousand dollars, and for the costs of this action.

"Melton & Melton, Plaintiff's Attorneys.

"Dated at Columbia, S. C., 15th August, 1894."

The demurrer was as follows:

"The defendant, the Columbia Water-Power Company, moves the court to dismiss the complaint in this action on the ground that it appears from the face of the complaint that neither in what is therein stated to be a first cause of action, nor in that which is stated to be a second cause of action, does it state facts sufficient to constitute a cause of action against this defendant. Both of said causes of action objected to are insufficient, in this: That after it is alleged in the third paragraph of each of said causes of action 'that on the — day of —, 1889, the board of trustees of the Columbia Canal, a corporation duly created and organized under and by virtue of the laws of said state, raised and erected a dam, known as the "Columbia Canal Dam" across the current of the said river, at a point a short distance below the plaintiff's said tract of land, and that thereafter, on or about the 11th day of January, 1892, the said board of trustees of the Columbia Canal transferred and conveyed to the said defendant the said dam, and all and singular the property thereto appertaining, and that the said defendant has since been and now is the owner and is in possession thereof,' it does not allege any negligence or want of care on the part of the board of trustees, or their grantee, either in the construction of the dam, or in its maintenance or repair, or that the defendant has done anything contrary to any contract or obligation arising out of any agreement with the plaintiff with reference to the construction, maintenance, or repair of the said dam, and its effect upon the land claimed to be injured in the said cause of action. The action brought by the plaintiff by said complaint is a com-

mon-law action for injury to his freehold, or at least for compensation for the taking for the use of a public purpose of a private property. The court will take cognizance of the fact that, under the constitution and laws of the state, Broad river is a navigable stream, and declared to be a public highway. The court is bound to take further judicial notice of the act of the general assembly referred to in said third paragraph, creating the board of trustees of the Columbia Canal, and all of its provisions,—the same being a public act, passed for a public purpose,—and of the act of 1890 amendatory thereof. Taking such judicial notice, it appears: That under its provisions the said board of trustees had full authority, and were commanded and directed, to erect said dam, and to flow back the waters of the said navigable stream, and to use private property in the construction and maintenance of the said canal and dam, and that for the taking and use of such private property said act makes provision for the condemnation of such lands, and a remedy to the owner to secure compensation for the taking and use of such private property. That the court therefore must hold that said remedy is exclusive, unless the board of trustees exceeded their authority, or did not conform to such provisions. There is no allegation in the complaint that they exceeded their authority, or did not conform to such provisions; but it is alleged in paragraph 6 of each of said causes of action 'that the said keeping up, maintaining, and continuing of the said dam has heretofore been and now is without the consent of the plaintiff; that the said plaintiff has received no compensation for the injury received by him as heretofore set forth; and by reason of the premises the plaintiff is entitled to have, of and from the said defendant, compensation,' etc. That said allegation is insufficient because it does not aver that the dam was erected without the consent of the plaintiff, nor that entry and use was made of the private property without the permission of the plaintiff. Further, it fails to allege that the taking complained of was after notification in writing by plaintiff to defendant of plaintiff's refusal of consent thereto, or that said taking and use complained of was and is without the permission of the plaintiff. The complaint therefore does not show that the plaintiff did not have his remedy under section 1752 of the Revised Statutes of 1893. The statute incorporating the board of trustees, authorizing the erection of the dam, having then provided a remedy for the taking and use of plaintiff's property, he is confined to such remedy; and, the complaint not showing upon its face that the case there alleged is one not provided for by said statute, it fails to state a cause of action. It is further submitted by the defendant that the complaint, upon its face, shows no actionable injury to the plaintiff between the time of the commencement of the action and of the refusal of the defendant to remove the dam. The re-

refusal of the defendant to remove the dam was dated the 14th August, 1894. The action was commenced the 17th of August, 1894. During this interval it is not alleged that any damage occurred to the plaintiff by reason of the flowing of his land by prolonged freshets in the river, or any injury thereto, as in law the defendant, assuming that, if liable at all, it could only be liable for such injury as arose from the time of its refusal to remove, and, the complaint showing on its face no actionable injury from said time of refusal to remove to the commencement of the action, it does not state facts sufficient to constitute a cause of action.

"Abney & Thomas, Attorneys for Defendant.

"I hereby certify that the foregoing demurrer is meritorious, and is not intended merely for delay.  
B. L. Abney."

The order sustaining the demurrer was as follows:

"The defendant interposes an oral demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, and moves to dismiss the said complaint upon the ground that the same does not state a cause of action, as set forth in the written grounds filed in the cause pursuant to rule 18 of the circuit court. Now, upon hearing argument of counsel for plaintiff and defendant, it is ordered and adjudged that the said oral demurrer be sustained, and the said complaint is hereby dismissed. The court reserves the right hereafter to file its grounds and reasons for sustaining the demurrer and dismissing the complaint, if it may see fit.

"O. W. Buchanan, Presiding Judge.

"December 11, 1895."

Melton & Melton, J. S. Muller, and Obear & Douglass, for appellant. Abney & Thomas, for respondent.

JONES, J. This is an appeal from an order sustaining a demurrer to the complaint herein on the grounds that it did not state facts sufficient to constitute a cause of action. The action was begun August 17, 1894, to recover damages or compensation for injuries to the lands of plaintiff, situated in Lexington county, caused by a dam erected in 1889 across Broad river by the board of trustees of the Columbia Canal under authority of an act approved December 24, 1887. The complaint (which will be set out in full, at least as one of the causes of action, in the report of this case) sets up two causes of action,—one referring to injuries to an island in Broad river known as "Mickler's Island"; the other to injuries to a tract of 420 acres lying on the western bank of the river, on which was a branch and a ditch leading to the river, by which, together with the river, this tract had been accustomed to be drained for agricultural purposes. At the hearing the court properly took judicial notice of the act approved December 24, 1887, entitled "An act to incorporate the board of trustees of the Columbia Canal, to transfer to the

said board the Columbia Canal and the lands now held therewith and its appurtenances, and to develop the same," and of the amendatory act approved December 24, 1890. The court also took judicial notice of the fact that Broad river is declared to be a navigable stream and a public highway. To this the plaintiff did not object, and, as appellant, does not object here. These acts and this fact then must be read into the complaint, as a part thereof. It appears that under authority of the said act of 1887 the board of trustees of the Columbia Canal completed said dam in 1889, and by authority of the amendatory act of 1890 the trustees on the 11th of January, 1892, conveyed the canal and dam, and the property appurtenant, to the defendant company, and the defendant has ever since maintained and continued said dam. The complaint further alleges, substantially, that by reason of the maintenance of the dam the water of Broad river at plaintiff's land is raised six feet in the channel, thereby obstructing the free and accustomed flow of water, and of sand and other sterile earth, through the channel of the river and of the branch and ditch, and preventing the proper and usual drainage of these lands, thereby causing the waters to percolate through, and water-log and soak, these lands; that in times of ordinary freshet the waters of the river are caused to frequently overflow and inundate large portions of said land to such extent as to destroy the crops growing thereon, and wholly prevent the use of said lands for agricultural purposes; that the keeping up, maintaining, and continuing of the said dam by the defendant have been and now are without the consent of the plaintiff; and that the plaintiff has received no compensation for said injuries. The complaint also shows that on the 2d day of August, 1894, the plaintiff gave defendant notice of said nuisance, and requested defendant to remove the same, but that defendant has failed and refused so to do. The date of defendant's refusal does not appear. In the order sustaining the demurrer the presiding judge, Hon. O. N. Buchanan, reserved the right to file his grounds and reasons for sustaining the demurrer and dismissing the complaint, if he saw fit. These grounds and reasons have not been filed, but it appears in the case that "the demurrer was sustained for the several grounds set forth therein." The demurrer specifying the order sustaining the same will appear in the report of the case. The demurrer, and the exceptions to the order sustaining the same, raise practically the following questions: (1) Whether the statute of 1887 gave authority for the acts resulting in the injuries complained of, and afforded therefor a remedy which is exclusive. (2) Whether, assuming the affirmative of the first proposition, the complaint contains any statement of facts showing a case outside of the application of such a provision of law, such as acts of negligence in the construction or maintenance of the dam, or acts in excess of the authority conferred. (3) Distinct from the foregoing, and assuming the right to bring an ac-

tion at common law, whether the complaint is fatally defective in not stating that plaintiff had been injured by defendant after notice of the alleged nuisance, and demand for its removal. We will consider the last proposition first.

1. It appears that the dam was constructed, and the water raised in the channel of the river, by the grantors of the defendant. The defendant was not the original creator of the alleged nuisance. "Where a defendant was not the original creator of a disturbance of an easement, an action will not lie against him until he has been requested to remove the cause of the disturbance which is on his land." *Elliott v. Rhett*, 5 Rich. (S. C.) 420. In *Ang. Water Courses*, 403, the same doctrine is announced as follows: "It has been held ever since *Penruddock's Case*, 5 Coke, 101, that where a party was not the original creator of a nuisance he must have notice of it, and a request must be made to remove it before any action can be brought. Where a dam was erected, and land in consequence flowed by the grantor of an individual, the grantee will not be liable for the damages in continuing the dam and flowing the land as before, except on proof of notice of damage, and of a special request to remove the nuisance." This rule is based on the reason that it would be unjust to subject a person, not the creator of the nuisance, to a suit for the nuisance of which he was ignorant, and which he did not intend to continue. In this case notice of the nuisance, and request for its removal, were received by the defendant 15 days before the commencement of this action. The alleged grievances were caused by the "keeping up, maintaining, and continuing the dam." The natural and accustomed flow of the water, etc., through the channel of the river, of the branch, and of the ditch "has been and now is hindered and obstructed." The river, branch, and ditch "have been and now are prevented and hindered from effecting the proper, natural, and usual drainage of said land"; "the said waters are caused to percolate," etc. It is clear that the complaint alleges injury after as well as before the notice to remove the nuisance, and up to the commencement of the action. It may be that the injury sustained by plaintiff for which action would lie is small, but that was for the jury. We do not think the demurrer could be sustained on this ground.

2. Taking the first proposition stated above: This is the crucial question in the case. Does the act of 1887 provide a remedy for the injuries complained of by plaintiff? Section 2 of this act provides "that the said board of trustees are hereby authorized and directed for the development of said canal to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered and directed to im-

prove and develop the same." Section 3 provides "that in order to improve and develop the power of said canal for navigation to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad river at, above or below the head of the present canal, as by survey already made, may be deemed advisable for the development of the said water power, and in locating and constructing the said dam, they shall have the right to raise the water in the Broad river to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais street at mean low water," etc. Section 4 provides: "That the said board of trustees shall have the right of way, and the same is hereby granted in and along said course of the canal, for the construction and operation of the same: If in enlarging and developing the said canal, or in constructing the said dam, it become necessary to use the private property of any person or corporation for the purpose, the said board of trustees, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the Broad river and Congaree river, and the transportation of supplies to market, shall have the right to acquire such right of way in the manner now provided by law." Appellants contend for a strict construction of this act, and that, while the power of eminent domain has been conferred, the manner prescribed for the exercise of it has been carefully and expressly limited to the securing the right of way properly so called, along the line of the canal, and for the purpose of the construction of the dam. It is undoubtedly true, as a general rule, that statutes granting power to condemn private property for public use should be strictly construed. This principle was very strongly asserted in *Railroad Co. v. Nunnamaker*, 4 Rich. (S. C.) 111, but this case asserts also another well-settled rule of construction, in this language (page 115): "But in the construction of a charter, when the strict signification of a word is opposed to the apparent intention, it is proper to maintain the design and purpose of the charter, even by neglect of the meaning of the word." Mr. Endlich, in his work on *Interpretation of Statutes* (section 343), shows that, while the rule of strict construction applies to such statutes, the application of such rule must stop short of defeating the object of the enactment. Mr. Black, in his work on the same subject (page 303), says that such statutes "are to receive a reasonably strict and guarded interpretation, and the power granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purposes of the grant." So in *Ross v. Railway Co.*, 33 S. C. 482, 12 S. E. 101, Chief Justice McIver, speaking for the court, said: "When the legislature granted a charter to the defendant company authorizing it to construct a railway between the points designat-

ed, it must be regarded as having conferred upon said company the right to take and condemn such land and rights of way as might be necessary to effect the purpose." This is the rule of construction as applied to such enterprises as railroads built for private gain, but serving a useful public purpose. The construction of the Columbia Canal was a great public work, begun by the state itself, for important public purposes; among others, "for providing an adequate water power for the use of the penitentiary"; "to improve and develop the power of said canal for navigation"; "furnishing the city of Columbia with an adequate supply of water." The state created the board of trustees, giving it large discretionary powers, and directed it to improve and develop the said canal for the purposes named. "The principle of strict construction is less applicable where the powers are conferred on public bodies for essentially public purposes." *End. Interp. St. § 355.* "The right to condemn will be more readily inferred in favor of public corporations exercising powers solely for the public benefit than in favor of private individuals, or corporations organized for pecuniary profit." *Lewis, Em. Dom. § 241.* Article 1, § 23, of the constitution of 1863, under which the case arises, provides: "Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and, for works of internal improvement, the right to establish depots, stations, turnouts," etc.; "but a just compensation shall, in all cases, be first made to the owner." This provision of the constitution "was inserted for the double purpose of maintaining the sanctity of private property, and at the same time promoting internal improvement, especially in respect to rights of way over land, and in establishing stations, etc., to facilitate transportation." *Ex parte Bacot, 36 S. C. 133, 15 S. E. 204.*

The statute in question must be interpreted in the light of the foregoing principles. It is expressly provided in the third section of said act that in locating and constructing the said dam the board of trustees shall have the right to raise the water in Broad river to a specified height at a given point. This was deemed essential to the development of the canal, which the trustees were directed to do. The right to locate and construct the dam necessarily, and by the terms of the act, includes the right to raise the water in the channel of Broad river. Assuming that plaintiff, as a proprietor on Broad river, a fresh-water, navigable stream, owned to the middle of the stream, as contended for by appellant, this act, by necessary inference, if not in express words, when it authorized the raising of the water in Broad river to a given

height authorized the entry and invasion of the plaintiff's land to the extent necessary to maintain such height of water. Now, in the fourth section of the act the board of trustees is granted necessary right of way in and along the course of the canal for the construction and development of the same. Under the well-settled rule of statutory construction, that when the subject-matter of an act is clearly ascertained, in order to effect the legislative intent, and carry out the general scope and purpose of the act, general words will be restrained, and words of narrow signification will be enlarged, a court would be justified in enlarging the words above quoted to include, not only lands strictly in and along the course of the canal, but all lands necessary to be used in maintaining the dam and the specified height of water which are essential for the development and operation of the canal. But section 4 goes further, and provides, "If in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use private property," etc., "the said board of trustees," etc., "shall have the right to acquire such right of way in the manner now provided by law." It will be observed that in section 3 the right to raise the water in the river was complied with, and made a part of the construction of the dam; and now, in section 4, the right to use private property necessary in the construction of the dam is expressly given. Construing the terms used in the light of the manifest purpose of the act, we cannot give them the narrow and restricted interpretation contended for by appellant, limiting the right of way to the actual line of the canal, and to the land actually occupied by the structure called the "dam," but must give them the enlarged meaning indicated above. The real dam is the damming of the water to the specified height, and must include all lands or easements necessary to maintain it. The legislature, having directed the development of a great public work for essentially public purposes, certainly meant to grant all rights without which the power granted would be worthless.

It is contended further that, granting that the statute of 1887 vests the board of trustees with all the powers conferred by the condemnation statutes of this state (sections 1550-1561, *Gen. St. 1882*; sections 1743-1755, *Rev. St. 1893*), still the defendant could reap no benefit thereby without showing that the provisions of the statute have been called into actual operation in the manner provided. Section 1743 provides, "Whenever any person or corporation shall be authorized by charter to construct \* \* \* a canal \* \* \* in this state such person or corporation, before entering upon any lands for the purpose of construction, shall give to the owner thereof \* \* \* notice in writing that the right of way over said lands is required," etc. It does not appear on the face of the complaint that any such notice was given. But in Ver-

dler v. Railroad Co., 15 S. C. 476, it is held that an owner may give permission to enter for purpose of construction of a highway without first receiving the notice, and that such may be inferred from facts and circumstances. See, also, to the same effect, Tutt v. Railway Co., 28 S. C. 400, 5 S. E. 831, which was an appeal from an order sustaining a demurrer. The complaint does not show that the plaintiff objected at all to the raising of the water in the river six feet on plaintiff's banks. This was done in 1889 by defendant's grantor, without objection, so far as appears. The allegation of the sixth paragraph of the complaint, "that the said keeping up, maintaining, and continuing of the said dam by the defendant has heretofore been and now is without the consent of the plaintiff," etc., relates to time beginning January 11, 1892, when the dam, etc., was conveyed to defendant. The first and only evidence of objection was given on the 2d day of August, 1894, when the notice to remove the nuisance was served. The act authorizing the construction of the dam and raising the water in the river's channel was a public act, of which plaintiff is presumed to have known. The extensive and permanent character of so large a public work, so near plaintiff's land, with the manifest and avowed purpose of raising the water on plaintiff's land, with the inevitable result of interfering with the drainage of lands accustomed to be drained into the river in the territory necessary to maintain the specified head of water in the river, the immediate elevation of the water in the branch and ditch spoken of, and the overflow of plaintiff's land in times of ordinary freshet, must surely have attracted plaintiff's attention. The entry upon and appropriation of plaintiff's land for the construction of the dam was open and patent. The projection and maintenance of the water of the river six feet against his banks, above the former level, with its inevitable results, were all the entry and use of plaintiff's land necessary to be made, and were as effective for the construction of the dam and canal as an entry by workmen with pick and shovel to dig up the soil would be in the case of constructing a railroad. From the absence of objection, under these circumstances, permission to enter must be inferred. Section 1752, Rev. St. 1893, provides for such a case: "If in any case the owner of any land shall permit the person or corporation acquiring the right of way over the same to enter upon the construction of a highway without previous compensation the owner shall have the right, after the highway shall have been constructed, to demand compensation, and to petition for an assessment of the same in the manner hereinbefore directed: provided such petition shall be filed within twelve months after the highway shall have been completed through his or her lands." This section has received interpretation in the case of Aull v. Railroad Co., 42 S. C. 436,

20 S. E. 302, where Chief Justice McIver, as the court's organ, says: "In section 1558, Gen. St. (section 1752, Rev. St. 1893) the word used is 'permit,' showing an intention to provide for cases, which oftentimes have occurred, where the railway company, without first obtaining the 'consent' of the landowner, either expressly or by presumption, has been suffered or permitted to construct its road 'over the land of another.' \* \* \* If, therefore, a railway company, without first obtaining the consent of a landowner, and without first resorting to the proper proceedings to condemn the land and have the compensation to which the landowner is entitled ascertained, proceeds to construct its road over the land of another, without objection, or by the implied permission, of the landowner, such landowner may at any time within one year after the completion of the road, under the provision of section 1558 (section 1752, Rev. St. 1893), demand compensation in the manner therein provided."

It is contended that the right to condemn lands does not include such use of or injury to the lands of plaintiff as complained of in this case; but in *Ross v. Railway Co.*, 33 S. C. 477, 12 S. E. 101, it was held that the word "lands" includes all rights or easements growing thereout. The compensation allowed by the statute is for the right of way, not simply the land. "The act, in effect, defines the term 'compensation' to be the value of the land, together with such special damages as may be sustained by the landowner by reason of the construction of the road through his lands." *Bowen v. Railroad Co.*, 17 S. C. 579. Since the compensation is for the right of way, the right of way must include such use of land as subjects the landowner to any special damage for which compensation is allowed. There is no doubt that the injuries complained of in this case could have been submitted to a jury to assess the amount of compensation, as matter of special damages. Of course, the permission granted by plaintiff to the board of trustees to enter for construction of the dam and appurtenances did not deprive plaintiff of his constitutional right of compensation, for which a remedy was provided. It simply relieved the board of trustees, so entering, from the character of trespassers. *Tompkins v. Railroad Co.*, 21 S. C. 481. Neither is the defendant grantee a trespasser for continuing the use. The remedy provided by the statute is exclusive. *McLaughlin v. Railroad Co.*, 5 Rich. (S. C.) 584; *Fuller v. Edings*, 11 Rich. (S. C.) 239; *Verdier v. Railroad Co.*, 15 S. C. 483; *Sams v. Railroad Co.*, Id. 487; *Ross v. Railway Co.*, 33 S. C. 477, 12 S. E. 101.

2. Notwithstanding the legislature authorized the erection of the dam and the raising of the water in the river, and provided an exclusive remedy to enable plaintiff to secure compensation for the lands taken, and special damages, nevertheless an action at common law would be sustained for any injury

resulting from negligence in the performance of authorized acts, as compensation for injury from such a cause was not contemplated by the legislature. The complaint, however, contains no allegations to bring the case within this rule. *Wallace v. Railroad Co.*, 34 S. C. 68, 12 S. E. 815, is in point here: "There must be some allegation of fact showing that the defendant, in doing the act which it was authorized to do, has, either wantonly or through negligence, done the act in such a manner as unnecessarily impaired or injured the right of the plaintiff. \* \* \* The wrong, if any, which was done to the plaintiff by the defendant, did not consist in constructing its roadbed over streams flowing through the lands of the plaintiff, for that it had a legal right to do. Nor did it consist necessarily in the fact that the natural flow of the water was obstructed, for that may have been the inevitable and unavoidable consequence of the construction of the railroad. But it may have consisted in the unskillful or negligent manner in which the work was done." Authorities on this subject are numerous. The point is tersely stated in *Watts v. Railroad Co.* (W. Va.) 19 S. E. 528: "The grant is a defense as to all acts done within it, not outside of it." Neither a right of way conferred by grant, nor one conferred by condemnation, will give exemption from damages consequential upon the improper or negligent exercise of the rights, and not from the fair, proper, and reasonable exercise of it; for the reason that neither in making such grant, nor in the assessment upon an inquisition, are damages contemplated or included that are to be solely attributed to such misuse of the right.

The demurrer was properly sustained upon the grounds discussed in the second and third propositions above stated. The judgment of the circuit court sustaining the demurrer and dismissing the complaint is affirmed.

(47 S. C. 486)

#### NUNAMAKER v. COLUMBIA WATER-POWER CO.

(Supreme Court of South Carolina. Oct. 17, 1896.)

#### CANALS—GRANT OF RIGHT TO FLOOD LAND—INCIDENTAL DAMAGES.

A grant by the owner of the right to flood a portion of a tract of land for the maintenance of a canal has the same effect as though such right had been acquired by condemnation proceedings, and the owner cannot recover damages for an injury to the remainder of the tract resulting from the exercise of such right in a proper manner.

Appeal from common pleas circuit court of Richland county; Buchanan, Judge.

Action by Arthur S. Nunamaker against the Columbia Water-Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Melton & Melton, J. S. Muller, and Obear & Douglass, for appellant. Abney & Thomas, for respondent.

JONES, J. This case, being in all respects, except in one particular, to be hereinafter noticed, like the case of *Leitzsey v. Water-Power Co.* (just decided by this court) 25 S. E. 744, is ruled by the principles therein announced. The point of difference in this case and the one just referred to is this: In the third paragraph of the complaint it is alleged that "on or about the 13th day of March, 1891, the said board of trustees of the Columbia Canal purchased from the plaintiff herein the right to overflow and cover with water, and keep covered with water, fourteen and two-thirds acres, part and parcel of the tract of land described in the second paragraph, and bordering on the said river." These acres, however, are not included in the 60 acres, for injuries to which damages are demanded. To this defendant demurred as follows: "The complaint, upon its face, shows no cause of action, in that it appears therein that the plaintiff granted to the board of trustees, under whom defendant claims, the right to overflow and cover with water, and keep covered with water, fourteen and two-thirds acres of land, being part and parcel of the same tract alleged now to be damaged by reason of the keeping up and maintaining of the dam alleged in the complaint to be a nuisance. In law, this grant of the easement to overflow this portion of the particular tract of land has the same effect as if condemnation proceedings had been taken under the provisions of law, and all injuries to the residue of the tract of land are conclusively presumed to have been taken into consideration in fixing the amount of the purchase money of the parcel of land so granted." The demurrer was sustained on this ground, as well as upon the other grounds stated in said *Leitzsey's Case*, and appellant's third exception in this case alleges error. The circuit court did not err. In *Lewis, Em. Dom.* § 566, it is stated, "If one individual should convey to another a strip of land to be used for a railroad, there would be a release of all damages resulting from the operation of the road in a reasonable and proper manner." This is precisely what this court decided in *Wallace v. Railroad Co.*, 34 S. C. 62, 12 S. E. 815. In the last-mentioned case the railroad company acquired a right of way by agreement with the landowner, and it was held that the landowner could not maintain an action against the company for damages resulting to the landowner from the construction and maintenance of its roadbed, without showing that the damage was the result of the unskillful and negligent manner in which the work was done. *Rand, Em. Dom.* § 129, says, "There is a well-settled rule to the effect that where property is purchased, when it might have been condemned, the consideration is conclusively presumed to cover all damages to the remainder

of the tract for which the owner could have obtained compensation in condemnation proceedings." In *Railway Co. v. Smith*, 111 Ill. 363, it is held that, where a person conveys a right of way over his land, it will be conclusively "presumed that all the damages to the balance of the land, past, present, and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace." To the same effect is the well-considered case of *Watts v. Railroad Co.*, 19 S. E. 521, which holds that, when one grants to a railroad company a strip of land for its use in the construction of its road, all damages to the residue of the tract, arising from construction, which can be taken into consideration in the assessment of compensation under proceedings for condemnation, are released. There are many other cases to this effect. It would be unreasonable to hold that a voluntary grant of a right of way is not as effectual to protect the grantee from suit for damages arising from its proper use as a right of way taken under compulsory proceedings. This, which is settled law as to railroads, applies, on principle, to canals as well. We have shown in *Leitzsey's Case* that this land, including its use for the purpose for which it was granted, may have been condemned for the necessary use of the canal. The plaintiff, having seen fit to grant a license to permanently flood a part of his tract of land for the maintenance of the canal, is presumed to have taken into consideration the damage to the residue of his tract which would accrue to him from the proper and reasonable use of the right granted. If for such damage he did not get adequate compensation in the price paid for the grant or license, and greater injury than he contemplated has resulted from such reasonable use, it is *damnum absque injuria*. The judgment of the circuit court is affirmed.

(98 Ga. 791)

#### PASS v. PASS et al.

(Supreme Court of Georgia. Aug. 24, 1896.)

#### FRAUDULENT DISCHARGE OF EXECUTOR—COLLATERAL ATTACK.

1. A discharge obtained by an executor by means of a fraud practiced upon the legatees or the ordinary is void; and, while it may be set aside on motion in the court of ordinary upon proof of the fraud, it may also be collaterally attacked as a nullity by an equitable petition in the superior court.

2. The court erred in sustaining the demurrer to the plaintiff's declaration.

(Syllabus by the Court.)

Error from superior court, Hall county; J. J. Kimsey, Judge.

Action by R. H. Pass against Aaron Pass and another. From a judgment sustaining a demurrer to the declaration, plaintiff brings error. Reversed.

The following is the official report:

A general demurrer to the petition of R. H. Pass against Aaron Pass and A. D. Candler

was sustained, and plaintiff excepted. It appears that Jordan Wheelchel left a will, dated July 20, 1880, in which he bequeathed to his sister lots of land 147 and 148, in the Tenth district of Hall county, during her life or widowhood, with remainder in fee to her children, nephews and nieces of testator, in equal shares. By another item he gave the residue of his estate, real and personal, subject to the payment of his debts, expenses of last sickness, and of funeral and monument, to said nephews and nieces, five in number, including Richard Pass, Aaron Pass, and John Marion Pass; and the last two were appointed executors, with the requirement that, upon the qualification of each, he give bond and security as in cases of administrators. On October 1, 1885, Aaron Pass, as principal, and A. D. Candler, as security, executed a bond to the ordinary in the sum of \$18,000, conditioned to be void if Aaron Pass, executor, do make a true and perfect inventory of all the estate of Jordan Wheelchel, deceased, which has or shall come into his hands, possession, or knowledge as executor, or of any person for him, and the same so made shall exhibit to the ordinary when he shall be hereunto requested, and such goods, credits, lands, and tenements shall well and truly administer according to law, and shall make a just and true account of his actings and doings according to law when he shall be thereunto required by the court, and the balance shall deliver and pay to such person or persons as are or may be entitled to the same by law, etc. Plaintiff alleges that Aaron Pass, executor, has not made a true and perfect inventory of all the estate of said deceased that came into his hands, and exhibited the same to the ordinary as required by law; nor has he well and truly administered the same according to law; nor has he made a just and true account of his actings and doings according to law; nor has he delivered and paid to the persons who are entitled to the same under the will, and as under the law he should have done. He failed to make any inventory, or any return of, or to account for, one-third interest in lots of land 186, 187, and 125 in the Tenth district of Hall county, of the value of \$550, and a number of notes on sundry persons (giving the names and amounts), aggregating \$2,157.23, and including one for \$800 on Mrs. Aaron Pass, wife of the executor, all of which were or should have been collected by him. The note on his wife was well secured by a deed to a valuable piece of land, and no part of said claim has at any time been accounted for, and is now or should be in the hands of said executor. On or about May 6, 1890, plaintiff, with the other legatees under the will, had a settlement with the executors upon the basis of \$6,824.80, said executor fraudulently representing said amount to be the net sum of said estate, concealing the true condition and net amount for distribution among the legatees. The true amount that should have been accounted for and distributed among the lega-

tees at that time was not less than \$9,000, which true condition was so kept concealed and hidden by the executors from plaintiff that it was impossible for him to find out and know, nor did he find out and know, of the fraud attempted to be perpetrated upon him for a long time afterwards. The executors having taken receipts in full from the legatees at the time of said settlement, when they found out the fraud, and tried to get them to correct it, and to settle the estate justly, they refused to do so, saying they had receipts in full, and had been discharged from the trust by a judgment of the ordinary, and that the settlement made must stand and be conclusive. On the — day of —, the executors procured a judgment of the ordinary, discharging, exonerating, and dismissing them from the administration of said estate; but said discharge was procured by fraud. The executors represented to the ordinary that they had well and truly administered the estate; that they had settled honestly and truly with the legatees. They fraudulently concealed from the ordinary at the time of said discharge that Aaron Pass, one of the executors, was concealing a debt owed by his wife to the estate of \$800; that he had at that time collected \$500 as interest on notes belonging to the estate, which he concealed from the ordinary, and never mentioned, and the other large sum of money collected by him as before mentioned was concealed, and not made known at the time of said discharge, which fraudulent representation and concealment of the true facts was in law and morals a fraud perpetrated upon the ordinary at the time of said discharge, and, if allowed to stand, would be a fraud upon the legatees entitled to the estate. Plaintiff has purchased and owns the shares of two of the legatees named in the will, and is entitled to recover three-fifths of the estate that is yet in the hands of Aaron Pass, one of the executors. John Marlon Pass, the other executor, has accounted for and paid over all of the estate that ever came into his hands as executor. Plaintiff prays that the judgment of the ordinary, discharging Aaron Pass, executor, from the administration of the estate, be set aside and made void, or be treated as a nullity by the superior court, for the fraud in procuring the same; and that he be required by decree to make a fair, full, and complete settlement of the estate, and to pay to plaintiff whatever amount may be found justly due and owing to him from the estate; and for general relief. The petition was filed on November 21, 1894. The bill of exceptions recites, as special grounds of demurrer urged at the trial, that the suit was barred, its object being to set aside the judgment of the court of ordinary rendered more than three years before, and that said judgment could not be collaterally attacked and set aside in any court other than that rendering it.

J. M. Towery, for plaintiff in error. Perry & Oraig, for defendants in error.

v.25s.E.no.15—48

SIMMONS, C. J. Whether a judgment can be attacked collaterally by a party therein as void, because of fraud in its procurement, is a question upon which courts have differed. See Van Fleet, Coll. Attack, § 550 et seq.; Black, Judgm. §§ 280, 170; Freem. Judgm. (Ed. 1892) § 336; Steph. Dig. Ev. art. 40; Tayl. Ev. § 1713; Whart. Ev. § 797. As to a judgment discharging an administrator, however, the question is settled in this state by our Code, which declares: "A discharge obtained by the administrator by means of any fraud practiced on the heirs or the ordinary is void, and may be set aside on motion and proof of the fraud" (section 2608); and "a judgment that is void may be attacked in any court and by anybody" (section 3828). "The judgment of a court having no jurisdiction of the person and subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it." Section 3594. See, also, *Jacobs v. Pou*, 18 Ga. 346, where it was said that a judgment by a court of ordinary discharging an administrator could be impeached in the superior court for fraud. The court below, in the present case, erred, therefore, in holding that the judgment discharging the administrator could not be impeached in the superior court.

Whether the three-years limitation provided for by the act of 1876 (Code, § 2914a) is applicable in a case of this character is a question we are not required in this case to decide, for, even if the limitation be applicable in such cases, the declaration does not on its face disclose that the action is barred. It appears that the action was filed in November, 1894; that the settlement with the heirs was had in 1890; and that between these dates the judgment discharging the administrator was rendered; and that the fraud was not discovered until after the judgment was rendered; but nothing further appears as to the time of its rendition or of the discovery of the fraud. Where it does not affirmatively appear upon the face of the declaration that the cause of action is barred by the statute of limitations, this defense cannot be made by a general demurrer setting up that the action is barred by the statute, but is matter for plea. *Stringer v. Stringer*, 93 Ga. 321, 20 S. E. 242; *Coney v. Horne*, 98 Ga. 726, 20 S. E. 213. The declaration stated a cause of action, and the court below erred in sustaining the demurrer. Judgment reversed.

(98 Ga. 788)

ROGERS et al. v. SMITH.

(Supreme Court of Georgia. Aug. 24, 1896.)

LEVY OF EXECUTION—DORMANT JUDGMENT—RUNNING OF STATUTE.

1. Although an execution founded upon promissory notes given for the purchase money of land of which the plaintiff in execution retained title cannot, under section 3654 of the Code, be lawfully levied upon the land until such plaintiff has executed and had recorded a deed con-

veying the land to the defendant in execution, yet causing a levy thereon to be made before these things have been done may nevertheless be treated as a bona fide and public act of the plaintiff asserting his right to collect the execution, and an entry of such a levy by the sheriff will constitute a new point from which the statute as to dormant judgments will begin to run. This conclusion results from the established doctrine, as laid down in repeated adjudications of this court, that this statute should receive a liberal construction.

2. Where such a levy was made, and a claim to the land was interposed by a third person, the running of the statute in question was suspended so long as the claim case remained pending in the court to which the claim was returned.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by T. E. Smith, administrator, on certain notes. Judgment for plaintiff. M. B. Rogers and others filed affidavits of illegality. The cases were consolidated. Illegality was overruled, and defendants except and bring error. Affirmed.

Jno. W. Akin, for plaintiffs in error. J. W. Harris, Jr., for defendant in error.

**SIMMONS, O. J.** Several illegalities to levies between the same parties, and involving the same issues, were consolidated and submitted as one case to the judge without a jury, upon the following facts, the ground of illegality being that the judgments were dormant: The plaintiff sold to the defendants certain land, gave them a bond for titles, and took their promissory notes for the purchase money. He sued upon the notes, and obtained judgments thereon,—the first judgment being rendered on the 22d of November, 1877, and the last on the 12th of February, 1881,—and executions were issued as of the same dates. On May 2, 1883, the executions were levied upon the land; an entry of levy, signed by the sheriff, being made on each execution. A person not a party to the executions, nor in privity with the defendant, filed a claim to the property, which it was admitted remained pending in the superior court long enough to prevent dormancy if the levies made in 1883 were valid. In April, 1895, a deed of conveyance of the land to the defendant was made and filed by the plaintiff in the office of the clerk of the superior court, and was recorded on the same day, and the levies to which these illegalities were taken were thereupon made. The illegalities were overruled, and the defendants excepted.

Section 2914 of the Code provides that no judgment shall be enforced after the expiration of seven years from the time of its rendition, unless execution has been issued thereon, nor after seven years have expired from the time of the last entry on the execution, made by an officer authorized to execute and return the same. The levies made in 1883, it is true, were illegal, as contended by counsel for the plaintiff in error, for the reason that no deed of conveyance of the land to the defendant was filed and recorded before the levies were

made. Code, § 3634; *Bank v. Danforth*, 30 Ga. 58, 7 S. E. 546; *McCalla v. Mortgage Co.*, 90 Ga. 114, 15 S. E. 687. It does not follow from this, however, that the levies were ineffectual for the purpose of preventing dormancy of the judgments. This court has repeatedly held that section 2914, *supra*, is to be construed liberally, and that any bona fide and public act on the part of the plaintiff asserting his right to collect the execution will prevent dormancy; and an entry has been held sufficient for this purpose, even where the levy was illegal. *Long v. Wight*, 82 Ga. 484, 9 S. E. 535; *Gholston v. O'Kelley*, 81 Ga. 21, 7 S. E. 107, and cases cited; *Stanford v. Connery*, 84 Ga. 741, 11 S. E. 507; *Neal v. Brockham*, 87 Ga. 183, 18 S. E. 283. The statute is satisfied where there is any proceeding by the plaintiff, entered of record, which notifies the world that he claims that his judgment is subsisting. So far as appears, the levies made in 1883 were made in good faith, and they are therefore to be treated as bona fide public acts on the part of the plaintiff, asserting his right to collect the executions, and as constituting a new point for the beginning of the prescribed period of limitation. The claim then interposed suspended the running of the statute, and it remained suspended until the claim case was disposed of, for so long as the claim was pending the plaintiff was prevented from enforcing his execution against the land. *Cox v. Montford*, 66 Ga. 62; *Stanford v. Connery*, *supra*. Under the facts of this case, therefore, the court was right in overruling the illegalities. Judgment affirmed.

(97 Ga. 673)

#### **JAMES et al. v. CROSTHWAIT.**

(Supreme Court of Georgia. Jan. 27, 1896.)

**BANKS AND BANKING—ESTOPPEL TO DEBT CREDIT IN PASS BOOK.**

1. While a bank may, without requiring the deposit of any money, give to a customer a valid credit upon its books in a stated amount, to be used by him for a special and limited purpose only, this cannot be accomplished merely by entering the credit in the customer's favor, and immediately canceling it by another entry predicated upon the fact that the customer is required to draw at once a check for the full amount of such credit, the result of which is to deprive the customer of any right at all to draw further upon the bank, so far as this particular credit is concerned. Such a transaction amounts to giving such customer no credit whatever.

2. An entry upon a "pass book" purporting to show that the owner of the book has credit in a bank for a specified balance, is not, of course, conclusive, or binding upon the bank; but where a banker issued and delivered such a book containing an entry of this kind which was at first false, and where, after this had been done, a third person, who had seen the book, applied to the banker for information as to the genuineness and accuracy of the apparent credit, at the same time disclosing his reasons for making the inquiry, and the banker, while expressly declining to give, in terms, the information thus sought, did, by concealing the truth, or by other means, induce the inquirer to believe the entry in the book was true and correct, and, in consequence of such belief, to make with the

owner of the book a contract whereby such inquirer, though exercising due care in the premises, was defrauded, and suffered a loss, the banker, if from the particular circumstances of the case he was under an obligation to communicate to the inquirer the exact truth of the matter, was, within proper limits, liable in damages to the latter on account of such loss. Whether or not, in a given case, such an obligation on the part of the banker existed, was a question of fact for determination by the jury in the light of all the surrounding circumstances.

3. Although it may not, upon the trial of a case of this kind, appear that in entering the credit and issuing the "pass book" there was originally any intention to thereby mislead the plaintiff, nevertheless, if he was an employé of the owner of the book in a given business to which the entry of the credit directly related, and contemplated, on the faith of such entry, purchasing an interest in that business, and at the time of making the inquiry above mentioned informed the banker of all these facts, thus making it apparent to the latter that it was essential to the inquirer's protection for him to know whether or not the credit was real, and for the amount stated, a finding that the banker was under the duty of revealing the whole truth was not unwarranted; and if, because of his failure to do so, and of other conduct on his part, the plaintiff was misled as to the truth, and in consequence made the contemplated purchase, whereby he sustained a loss less in amount than that represented by the false credit, the banker was liable to him for the same.

4. The evidence in this case was sufficient to warrant the finding in the plaintiff's favor for the amount stated in the verdict. There was no material error, if any at all, in admitting, in rejecting, or in refusing to rule out evidence. The requests to charge, so far as legal and appropriate, were covered by the charge given, which was free from error, and which, as a whole, fully and fairly presented the law of the case.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by H. C. Crosthwait against J. H. & A. L. James and J. H. James to recover damages for false representations. From a judgment for plaintiff, defendants bring error. Affirmed.

Hillyer, Alexander & Lambdin, for plaintiffs in error. R. J. Jordan and Goodwin & Westmoreland, for defendant in error.

SIMMONS, C. J. H. C. Crosthwait sued J. H. & A. L. James, a banking partnership, and J. H. James individually, alleging that they had damaged him in the sum of \$2,675, as follows: About May 20, 1892, plaintiff was employed as bookkeeper by David Lamar, president of the International Railway & Employees Accident Association, being required, in lieu of giving bond, to deposit \$1,000 in defendant's bank as security, the same not to be subject to check. Lamar represented to plaintiff that the association had a paid-in capital of \$6,500, and, after making certain charges against that sum, an apparent balance of \$4,146.23 was left. Lamar also furnished plaintiff with a pass book from defendant's bank, which showed a credit of the last-named sum in the bank in favor of the association. The business of the association seemed to be good, and plaintiff inquired of the secretary if any stock

was for sale. In a day or two Lamar came to him, and offered to sell him an interest of one-third for \$2,500. Plaintiff called on J. H. James, informed him of the contemplated purchase, and asked him if the amount apparently to the credit of the association was correct. James declined to give any statement as to the balance then in bank, but referred the plaintiff to Lamar, saying: "You go to Lamar. He will tell you just how it is. You put yourself in his hands. He will treat you right, and make you money." Relying on this statement, plaintiff bought, and paid \$2,500 for, a one-third interest in the association, but in a few days, Lamar becoming engaged in a controversy, and being arrested, plaintiff grew suspicious, and called on James, and asked him, "How much money has the association in the bank?" James at first hesitated, but finally said: "The association has no money in the bank. It is overdrawn about \$200." In response to further questions, James stated that the money had not been in the bank, but the credit on the book was allowed at the instance of Lamar, who at the same time was required to give a check against the apparent amount. The representations made by James, it is alleged, were false and fraudulent, were made to deceive some one, and did deceive plaintiff, because he relied and acted on them; and, but for them, he would not have paid the money to Lamar for the interest he bought. He discovered their falsity in July, 1892. He avers that there was collusion between James and Lamar to deceive him and defraud him out of the sum he paid. The one-third interest he purchased was absolutely worthless, and this was known to James when he made the representation before alleged, which representation was made in bad faith, and with intent to mislead plaintiff to his damage. By referring plaintiff to Lamar for further information, James vouched for the truth of Lamar's statements; and Lamar, when approached, concurred in the false statements of James. They conspired for the purpose of defrauding plaintiff as alleged, etc. The jury found for the plaintiff \$2,215.25. Defendants' motion for a new trial was overruled, and they excepted.

There is some conflict in the evidence, but accepting, as we must, that version of the facts which the jury have found to be true, there can be no doubt that the recovery in the plaintiff's favor was warranted. According to the evidence of the defendant J. H. James, the credit entered by him on the "pass book" was merely a fictitious credit. A banker may, it is true, without requiring the deposit of any money, give to a customer a valid credit upon his books in a stated amount, to be used for a special and limited purpose only; but this cannot be accomplished by entering the credit in the customer's favor, and immediately canceling it by another entry, predicated upon the fact that the customer is required to draw at once a

check for the full amount of the credit, thus depriving the customer of any right at all to draw further upon the bank, so far as the particular credit is concerned. Such a transaction amounts to giving the customer no credit whatever. It is also true that an entry upon a "pass book," purporting to show that the owner of the book has credit in the bank for a specified balance, is not conclusive or binding upon the bank; and that a banker, when inquired of by a third person as to the amount which a customer has to his credit, is ordinarily under no duty to give any information on the subject. Where, however, the banker has issued and delivered to a customer a deposit book containing a credit in his favor which is ab initio false, and a third person, who has seen the book, comes to him, and inquires as to the truth of the apparent credit, explaining at the same time that his reason for doing so is that he contemplates purchasing an interest in the particular business to which the credit relates, a very different case is presented. We think the court properly submitted to the jury whether, under the circumstances, James was under any obligation to communicate to the plaintiff any more than he did communicate, or not to have said what he did say to him; and we think the jury were warranted in finding that his conduct, under the circumstances, amounted to a fraud which would entitle the plaintiff to recover. Here, in the first instance, as the testimony of James himself shows, was a false statement, made by him for the purpose of deceiving others as to the amount deposited in the bank to the credit of Lamar's "association," and of inducing such persons to enter into business relations with the "association." It was not necessary, in order to entitle the plaintiff to recover for the deceit, that the representation should have been made directly to him. One who willfully makes false representations, to be fraudulently used by another as an inducement to a third person to enter into a contract with the party repeating them, is as much guilty of deceit as the latter, and is equally liable to the party deceived. *Cheney v. Powell*, 88 Ga. 634, 15 S. E. 750. And see notes to *Pasley v. Freeman*, 2 Smith, Lead. Cas. (9th Am. Ed. from 9th Eng. Ed. 1889) p. 1334; *Barry v. Croskey*, 2 Johns. & H. 1; *Watson v. Crandall*, 78 Mo. 583.

The main purpose in view in making the false entry appears to have been to enable Lamar to exhibit it to certain railroad engineers, who were to aid in securing business for the "association," and who were to use it as a basis of representations to be made by them as to the solvency and standing of the "association"; and it was argued that no liability to the plaintiff resulted, since the representation was not intended for him, and the effect it was claimed to have had upon the plaintiff was not within the contemplation of the defendant at the time the entry was made. When

approached by the plaintiff, however, and inquired of as to the truth of the entry, James was made aware that the representation would not be confined in its operation to the purpose originally intended, but that its effect would probably be to mislead the plaintiff, and induce him to invest his money in the purchase of an interest in the business from Lamar, unless something were said or done to prevent its having this effect. So that, whether James originally intended the representation to mislead the plaintiff or not, the jury might well conclude that when he was brought face to face with the plaintiff, and given to understand that it was essential to the latter's protection to know whether the credit was real for the amount stated, it was his duty to reveal the truth, and that the failure to do so was, in effect, a direct misrepresentation to the plaintiff. Whether or not such a duty existed on his part, under all the circumstances, was a question for the jury. Code, § 3175.

It was argued that James did all that could be required of him when he referred the plaintiff to Lamar, and that the presumption would be that Lamar would tell the truth. Where two persons unite in putting forth a false statement for the purpose of deceiving and misleading others, we think it would be going very far to say that one of them, when approached by a third person as to the truth of the statement, has a right to assume that the inquirer, if referred to the other party to the falsehood, will get the truth from him. So far from James having a right to assume that the plaintiff would get the truth by going to Lamar, the contrary assumption would have been very much more consistent with the circumstances. Yet, according to the plaintiff's evidence, James did not content himself with referring the plaintiff, for the truth of his own misrepresentation, to the man at whose instance he had made it, but went so far as to vouch for the latter, assuring the plaintiff that Lamar would tell him just how it was, and advised him to put himself in Lamar's hands; he would treat him right, and make him money. Under this state of facts we cannot say that there is nothing to warrant an inference that James intended to deceive and defraud the plaintiff. Fraud being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence (Code, § 2751), and it is peculiarly the province of the jury to pass on these circumstances.

It appears further that the plaintiff was in fact deceived and defrauded. He returned to Lamar, and asked him why he supposed James did not answer his question, and Lamar said he supposed it was because the plaintiff was a comparative stranger to James, but said "it was not because the money was not in the bank." The plaintiff then raised the money to purchase an interest in the business from Lamar, and paid him \$2,500 for it. He testified that he did this upon the faith of the entry in the deposit book, in connection with the conduct and statements of James at the inter-

view above referred to. It soon after turned out that the interest he had purchased was practically worthless, and that his loss amounted fully to the sum found in his favor by the jury. It was not necessary, in order for the plaintiff to recover, that the deceit in question should have been the sole inducement which led him to make the investment. It was sufficient if it influenced his conduct materially. *Kerr, Fraud & M. 74; 1 Jagg. Torts, 589, 593.* Nor was it necessary that the defendant should be benefited by the deception. *Bank v. Sibbey, 71 Ga. 781; 1 Jagg. Torts, 592.* Nor is a recovery precluded by the fact that James was not informed as to the extent of the proposed investment. In the cases referred to on this subject by the plaintiff (*Slade v. Little, 20 Ga. 371; Hopkins v. Cooper, 28 Ga. 392; Glover v. Townsend, 30 Ga. 90*) there was merely a general representation as to the credit of a person, without any indication in the representation or the circumstances as to the extent to which the credit might safely go. Here there was a representation that a specified sum stood to the credit of the "association" in the defendant's bank, and the amount of the recovery in this action is considerably less than that amount.

We do not deem it necessary to deal specifically with the numerous grounds of the motion for a new trial. What we have said covers the main and controlling questions made in the record. Several of the grounds relating to the admission and rejection of testimony and to the charge of the court are too vague, general, and indefinite to be considered; it not appearing what the testimony referred to was, or what particular portion of the charge is complained of. So far as we can discover from the motion, there was no material error in rejecting or in refusing to rule out evidence. The requests to charge, so far as legal and pertinent, were covered by the charge given, which was free from error, and which, as a whole, fully and ably presented the law of the case. This is the second verdict in favor of the plaintiff, and, under the evidence in the record, we are constrained to hold that the court did not err in refusing to set it aside. Judgment affirmed.

(97 Ga. 782)

**BERRIE, Sheriff, v. SMITH.**

(Supreme Court of Georgia. Feb. 21, 1896.)

**MORTGAGE FORECLOSURE—DISTRIBUTION OF FUND—RULE AGAINST SHERIFF—PARTIES—PRACTICE.**

1. A petition for a rule against a sheriff by one claiming funds in his hands, alleging that a mortgage had been given to secure a principal note and certain notes for interest thereon, maturing at different dates; that the mortgage and all the notes had been transferred to one who subsequently, for value, transferred to the petitioner some of these interest notes, and, after so doing, had foreclosed the mortgage for the principal debt only, erroneously alleging in the foreclosure petition that the transferred interest notes had been paid; the petition for the rule further alleging that the mortgage *fi. fa.* had been levied upon the mortgaged property; that the

same had been sold, and bought in by the plaintiff in that *fi. fa.* for less than its value, and for less than the principal debt; that the mortgagor was insolvent, and petitioner had no other means of collecting his notes; that he had been prevented from being made a party plaintiff to the foreclosure proceeding because of a misunderstanding between himself and the counsel for the plaintiff in the mortgage *fi. fa.*; that written notice had been given to the sheriff at the mortgage sale to hold up funds sufficient to pay the interest notes belonging to petitioner; and that the sheriff had held up the fund in his hands,—is not without equity.

2. The method of procedure against a sheriff for the distribution of funds in his hands raised by levy and sale, and claimed by several parties, where the applicant asks for equitable relief, does not differ from the form of procedure where he only insists upon his common-law rights, save that in the former case he must allege such facts as entitle him to equitable relief, the difference being one of substance, and not of form.

3. It is not essential, in the first instance, that an applicant for a rule against a sheriff for a fund in his hands should make parties to the proceeding other claimants of this fund. After the granting of the rule, upon proper notice to such other claimants, either by the applicant or by the sheriff, they can, if they desire, come in and be made parties; and, whether they do so or not, they will be bound by the judgment rendered upon the rule, if they actually participate in the hearing had upon the same.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Petition by Ira E. Smith for a rule against W. H. Berrie, sheriff. The rule was granted, and from a judgment overruling a demurrer to the petition respondent brings error. Affirmed.

Atkinson & Dunwoody, for plaintiff in error. Johnson & Krauss, for defendant in error.

**CALLAWAY, Special Judge.** Ira E. Smith filed his petition for a rule against W. H. Berrie, sheriff, alleging that on the 7th of January, 1889, W. M. Mason executed to J. F. Avery eleven promissory notes, one of which represented the principal debt, and was for \$3,500, and matured five years after date. The other 10 represented the interest, and were each for \$140. The first of the series fell due six months after date, and the others matured, one at the end of each period of six months, respectively, thereafter, until all had matured. These eleven notes were secured by a mortgage from Mason to Avery upon real estate in the city of Brunswick, valued at the time of the loan at \$6,000. Mason paid the first four notes of the \$140 series, but failed to pay any of the other notes. All of the notes and the mortgage were transferred in writing, before maturity, by Avery to Henry Clay. Clay transferred four of the unpaid interest notes to E. A. Nelson, who transferred them to Smith, the petitioner, each of these transfers being in writing and for value. Clay had foreclosed his mortgage, reciting in his petition for foreclosure: That the notes held by Smith had been paid. Pending the foreclosure, Smith had applied to Clay's counsel for permission to be made

a party plaintiff, and requested that the petition for foreclosure be amended by alleging that the notes held by him had not been paid. Counsel for Clay, without objecting or consenting, requested further time to investigate the matter, but without ever answering Smith, or further notice to him, which he expected from them, obtained a rule absolute, had execution issued thereon, and levied it upon the mortgage property, which was sold and bought by Clay for \$3,050. That on the day of sale, and before the sale took place, Smith notified the sheriff, in writing, to hold up a sufficient sum out of the proceeds of the sale to pay the notes held by him. That the sheriff had held up the funds under said notice. And that Mason was insolvent. He prayed for a rule against the sheriff requiring him to show cause why he should not pay out of the funds arising from the sale of said mortgaged property the amount due on said notes. A rule against the sheriff was granted, who, instead of answering through his counsel (who were also counsel for Clay), demurred to the petition, because the facts alleged did not entitle the petitioner to a rule against the sheriff or to the funds in his hands, because he had mistaken his remedy, because he was seeking equitable relief in a strictly legal proceeding, for the want of proper and necessary parties, because copies of the notes and notice served on the sheriff were not attached, and because the mortgage lien of the notes had not been foreclosed. The court, after allowing the movant to amend by attaching copies of the notes and the notice served upon the sheriff, overruled the demurrer, and the sheriff excepted. All of the exceptions to this ruling may be considered and determined by answering the following questions: (1) Under the facts stated in the petition, was Smith entitled to any of the funds in the sheriff's hands arising from the sale of the mortgaged property? (2) Was he using the proper proceeding to enforce his rights? (3) Has he omitted any essential part of the proceedings? We will discuss these questions in the order named above.

The mortgage executed by Mason was given to secure the notes held by Smith, as well as those held by Clay. The several transfers of these notes from Clay to Nelson, and from Nelson to Smith, did not strip them of the protecting lien of the mortgage. This court has held several times that the transfer of a note secured by a mortgage carries with it the lien of the mortgage. *Wellborn v. Williams*, 9 Ga. 86; *Roberts v. Mansfield*, 32 Ga. 228; *Murray v. Jones*, 50 Ga. 109. But Clay, the holder of the mortgage, was an indorser upon these notes for value; and in the case of *Roberts v. Mansfield*, supra, the court, in the second head-note, says: "When one holds two notes secured by mortgage, and transfers the one, retaining the other, the mortgage lien ac-

companies the transfer as an incident; and it would seem that, in case the security falls short of paying both notes, the holder of the transferred note has a preference over the mortgagee, who retains the other." In addition to this, the notes held by Smith represented interest due on the debt secured by the mortgage, while the larger part, at least, of the debt held by Clay, was principal. Section 2055 of the Code provides that, "when a payment is made on any debt, it shall be applied first to the discharge of any interest due at the time, and the balance, if any, to the reduction of the principal." In view of these principles of the law, it can hardly be questioned that Smith is entitled to share in the proceeds of the sale of the mortgaged property, if not to have his notes paid in full out of said funds.

But it is contended by counsel for plaintiff in error that Smith has mistaken his remedy; that, not having final process, he cannot proceed by rule against the sheriff, nor can he participate in the distribution of the fund in court; and the decisions of this court in the following cases are cited in support of this contention: *Sims v. Kidd*, 55 Ga. 626; *Strickland v. Smith*, 53 Ga. 79; *Love v. Cox*, 68 Ga. 269; *Cumming v. Wright*, 72 Ga. 767. If there were no facts in this case which entitled Smith to equitable relief, he would be held down to the strict rule of law as announced in the cases cited above; and before he could, even with a superior lien, participate in a distribution of this fund, he would have to come into court clothed with final process.

But Smith cannot foreclose the mortgage which secures his notes, because it has been legally foreclosed once, and has had its lien upon the mortgaged property exhausted by a sale of the property, and the lien of his debt was transferred by the sale from the mortgaged property to the proceeds of the sale. *Smith v. Bowne*, 60 Ga. 484. Mason, the maker of the notes, is alleged to be insolvent, so that it would be useless to obtain a judgment against him; and the fact that Clay, the other party interested in this fund, might be liable to him as an indorser, will not defeat his more complete and ample remedy of earlier payment out of this fund. From his allegations it appears that it was not his fault that his debt was not represented in the foreclosure proceedings. Having alleged facts which entitled him to equitable relief, the court will enforce his equitable rights, and failure to come clothed with final process will not debar him from participating in the funds in court. The method of procedure is the same whether the claimant seeks to enforce his legal rights or his equitable rights in the distribution of such a fund, and the proceeding in each case is commenced by a petition for a rule against the officer. When the claimant alleges and proves such facts only as entitled him to strict legal rights, the court will enforce only

his legal rights, and these according to the strict rules of law; but, when he alleges and proves such facts as entitle him to equitable relief, the court will enforce his equitable rights. The difference is one of substance, and not of form, and this was the practice of the courts in this state even prior to the passage of the uniform procedure act of 1887. *Smith v. Bowne*, supra; *Baker v. Gladden*, 72 Ga. 469; *Crawford v. Williams*, 76 Ga. 792.

The only remaining objection to the petition was that Mason, the maker of the note, and Avery, the original payee and mortgagee, and Clay, the present holder of the mortgages *in fa.*, were not made parties. Neither Avery nor Mason had any interest in this fund, nor does it appear from the petition how either one of them would be affected by this distribution; so they are not necessary parties. The third headnote, which follows the ruling of this court in the case of *Foster v. Rutherford*, 20 Ga. 668, sufficiently defines how and when Clay is to be made a party. Judgment affirmed.

CALLAWAY, J., presided, by designation of the governor, in place of ATKINSON, J., disqualified.

(97 Ga. 777)

# BRUNSWICK & W. R. CO. v. SMITH.

(Supreme Court of Georgia. Feb. 21, 1896.)

## RAILROADS—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE.

Where two freight cars, one of which was used as a station warehouse, had been left "unchocked" and "unbraked" upon a side track having a slight downward grade, and, upon being put in motion by a sudden storm of wind, ran over and killed the railroad agent, who at the time was crossing the side track, holding an umbrella over himself, inclined towards a blowing rain, so as to obstruct from his view the approaching cars, the railroad company was not liable for the homicide, it appearing that the deceased was the sole employe of the company at this station, having at the time full charge of the locating of these cars upon the side track in question; that on this particular occasion they were left exactly as he directed; that he actually knew that the car by which he was stricken had not been "chocked" or "braked," and that it was within the scope of his duty to know whether or not the other car (it being the warehouse car) had also been left in this condition. If leaving the cars without "chocking" or applying brakes to the same was, under the circumstances, an act of negligence, it was negligence attributable to the agent himself.

(Syllabus by the Court.)

Error from superior court, Pierce county; J. L. Sweat, Judge.

Action by Fannie Ida Smith against the Brunswick & Western Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Goodyear & Kay, for plaintiff in error. Atkinson & Dunwoody, for defendant in error.

CALLAWAY, Special Judge. Mrs. Smith brought suit against the Brunswick & Western

Railroad Company to recover damages for the homicide of her husband, J. D. Smith, who was the agent of said railroad company at Hoboken, in Pierce county. The evidence on the trial of the case disclosed that J. D. Smith, the deceased, was the agent, telegraph operator, and sole representative of the defendant railroad company at Hoboken. There was a side track at the station, with a slightly inclined grade. Smith's office consisted of a stationary box car just beyond the side track from the main line, and he used an empty, movable freight car for a freight warehouse, into which he received and from which he delivered freight. On the morning of the day on which Smith was killed this warehouse car and another freight car, which was being loaded with charcoal, were both on the inclined side track, the coal car with its brakes applied, and the warehouse car with its brakes off, when the engineer of Baxley, Boles & Co., whose tram road made a Y with the Brunswick & Western side track, with his engine, by permission of the deceased agent, moved both cars from the siding, carried the warehouse car to Baxley, Boles & Co.'s warehouse, unloaded freight from it, and then replaced said warehouse car and said coal car on said side track at the places designated by Smith, who signaled with his hands to the engineer where to place each car, directing the coal car to be placed just above the public road crossing, and the warehouse car on the same side track, about three car lengths above the coal car, near the switch. Both cars were left unscotched, and with brakes unapplied. Smith was present when the engine cut loose from the coal car, and knew that it was left unscotched and without brakes. It is not known whether he knew that the warehouse car was left in the same condition. He gave no instructions as to scotching or applying brakes to either car. Baxley, Boles & Co. had a general permission from the authorities of the Brunswick & Western Railroad Company to use this side track in getting cars from its road, and for the necessary switching and shifting incident thereto; but at the time Smith was killed, and for some time previous, it was never used without the express permission of Smith on each occasion, the switch key being obtained from him whenever it was desired to so use it. It is the business of the men who operate the train to apply brakes and scotch the cars whenever necessary. About 1 o'clock in the day, a freight train, bound for Brunswick, stopped at Hoboken, and Smith went into the cab to get some waybills. As the freight train moved off, Smith left the cab, and started towards his office in a direct line, which lay diagonally across the side track. Just at this time a sudden storm of wind and rain began, the wind blowing down the track from the direction in which the coal car and warehouse car were situated. The wind and rain were blowing in Smith's face, and, to protect himself and the waybills, he raised an umbrella over himself, inclined towards the blowing rain, and

this shut from his view the coal car and the warehouse car, which, having been put in motion by the wind, were both rolling down the side track a short distance apart; and, while Smith was crossing the side track, he was knocked down by the moving coal car, and his body run over by both cars, killing him instantly. The supposition is that the wind put the warehouse car in motion, which, rolling down the side track, struck the coal car, and put that in motion. If the two cars had been properly "chocked," or had their brakes properly applied, the wind would not have put them in motion; or, if the coal car had been properly "chocked," or had its brakes applied, it would not have been put in motion when struck by the moving warehouse car. Smith was in the discharge of his duties when killed. The windstorm, while sudden and severe, could not be considered an unusual storm. The steepest grade of the side track was between the places where the coal car and the warehouse car were standing when put in motion by the wind. There was other evidence as to Smith's earning capacity, his age, etc. The jury returned a verdict against the railroad company for \$2,000. A motion for new trial was made on the usual grounds, which, being refused by the court, the railroad company excepted, and brings the case to this court for review.

We cannot agree with learned counsel for the plaintiff in error in his contention that the railroad company is relieved from liability in this case because the killing of Smith was occasioned by the act of God. To excuse a common carrier from liability on this ground, it must appear that the casualty was caused by the Divine agency alone, and not aided or contributed to by the negligence of the carrier. And when we consider the well-known but terrible history of wild, uncontrolled cars on inclined railroad tracks, and their tendency, in obedience to the well-known laws of nature, to move on slight provocation, and the fickleness of the wind, which is capable of blowing with varying force and velocity from every point of the compass in the short space of an hour, we cannot escape the conclusion that leaving these detached cars on an inclined side track at a station, where people were liable to be crossing the track at all times, unscotched, and without brakes, was negligence. It can hardly be denied that leaving the cars as they were left in this case, without proper means to hold them stationary, constituted one of the essential causes of this accident. But in determining the liability of the railroad company in this case it is necessary to ascertain whether this act of leaving these cars "unattached" and "unscotched" on an inclined side track was the negligence of the railroad company or the negligence of the deceased agent. The railroad company is not excused for any negligence which may be justly charged to the engineer and train hands of Baxley, Boles & Co. in leaving those cars in their dangerous condition, for it was by the railroad

company's permission that they were using its tracks and moving its cars. *Railroad Co. v. Liddell*, 85 Ga. 494, 11 S. E. 538; *Railroad v. Mayes*, 49 Ga. 355; *Railroad Co. v. Passmore*, 90 Ga. 208, 15 S. E. 760; *Railroad Co. v. Phinazee*, 98 Ga. 488, 21 S. E. 66. But it is likewise well-established law in this state that, in order to recover damages from a railroad company for the homicide of an employé, it must be shown that the employé was without fault or negligence, and that he did nothing to contribute to the homicide, and neglected to do nothing to prevent the consequences of the negligence of others. *Railroad Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279. The evidence discloses that, while the train crew of Baxley, Boles & Co. had a general permission from the authorities of the Brunswick & Western Railroad Company to use this side track in moving their cars, this privilege was exercised in each particular instance by the express permission and consent of the deceased agent, and on the occasion in question the cars were moved and placed by his direction. He was present, and indicated by signal with his hands to the engineer exactly where to place each car. He saw the engine cut loose from the coal car, and saw the train hands leave it without applying the brakes or scotching it; and, if it was dangerous to so leave a car on an inclined side track, he was charged with notice of the danger, and the railroad company could only receive its notice of such danger through him, as he was its only representative on the ground. Whether it was his duty to have had the car scotched or not, he knew the danger, and ordinary prudence on his part required that he should either have had the car made fast and safe or else keep out of its path. It is not disclosed by the evidence whether Smith actually knew that the warehouse car was left "unchecked" and without brakes, but this car was his warehouse, where he received, delivered, and stored his freight. It was a movable warehouse, with an inclined foundation. It was his duty to know the stability of its position, and it was placed, by his express direction, at or near the steepest grade of the side track. So whether he actually knew its dangerous condition or not, it was his failure to perform his duty which made it dangerous, and this, as we have seen, relieves the railroad company from liability. It follows that the judgment refusing a new trial in this case must be reversed.

CALLAWAY, J., presided, by designation of the governor, in place of ATKINSON, J., who was disqualified.

(39 Ga. 50)

#### BRUCE v. STATE.

(Supreme Court of Georgia. June 8, 1896.)  
CRIMINAL LAW—MURDER—CONVICTION OF PRINCIPAL OF MANSLAUGHTER.

Where two persons are indicted for murder, one as principal in the first degree, and the other as principal in the second degree, the latter

may be tried and convicted of murder, although the former had been previously tried and convicted of voluntary manslaughter only.

(Syllabus by the Court.)

Error from superior court, Fulton county; John S. Candler, Judge.

William Bruce was convicted of murder, and brings error. Affirmed.

A. C. Perry, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

SIMMONS, C. J. The sole question presented for decision in this case is whether a person who is charged in an indictment for murder as principal in the second degree can be convicted of murder when the person charged as principal in the first degree has been convicted by a former jury of manslaughter. Under our Code, a principal in the second degree is he who is present, aiding and abetting the act to be done, and, except where it is otherwise provided, shall receive the same punishment which the law prescribes for the principal in the first degree. Pen. Code, §§ 42, 43. In several decisions this court has held that the trial of a person indicted as principal in the second degree may be had before that of the person charged as principal in the first degree (Boyd v. State, 17 Ga. 194; Brown v. State, 28 Ga. 217; Williams v. State, 69 Ga. 29); and this, of course, could not be done if the result in the case of the former were dependent upon the result in the case of the person charged as principal in the first degree. If the person charged as principal in the second degree can be tried before a person charged as principal in the first degree, and found guilty, without regard to what may be the result in the case of the other principal, it follows that the same verdict may be rendered if he is tried afterwards, whether the other principal has been found guilty of a lesser offense or not. This view is fully sustained by authority outside of our own decisions. In 1 Starkie, Cr. Pl. (2d Ed.) 81, it is said: "Where A. and B. are present, and A. commits an offense in which B. aids and assists him, the indictment may either allege the matter according to the fact, or charge them both as principals in the first degree; for the act of one is the act of the other. And, upon such an indictment, B., who was present, aiding and abetting, may be convicted, though A. is acquitted. \* \* \* If an indictment for murder charge that A. gave the mortal stroke, and that B. was present, aiding and abetting, both A. and B. may be convicted, though it turn out that B. struck the blow, and that A. was present, aiding and abetting. To go one step further, upon a similar indictment, charging A. as a principal in the first degree, and B. as present, aiding and abetting, B. may be convicted though A. be acquitted." In Clark, Cr. Law, p. 90, it is said: "A principal in the second degree may be punished without having first tried and convicted the principal in the first degree, and it seems that he may be convicted of a higher offense than the principal in the first degree; for mur-

der, for instance, where the latter has been convicted of manslaughter only." See, also, 2 Bish. New Cr. Proc. § 3. A case directly in point is that of *Goina v. State*, 46 Ohio St. 457, 21 N. E. 476, where it was held that "one indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense, notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter." In *Jackson v. State*, 54 Ga. 439, relied upon by counsel for the plaintiff in error, Judge McCay gave, as the reason why the principal in the second degree ought to have a new trial on account of the grant of a new trial to the principal in the first degree, that the record of the conviction of the principal in the first degree had been used on the trial of the other case, and may have injured the accused; and that, this record having been expunged by setting the verdict aside, the principal in the second degree ought to have a new trial, without this evidence bearing against him. The decision in that case, therefore, is not in conflict with what we now hold. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(97 Ga. 772)

#### MAYER v. THOMAS.

(Supreme Court of Georgia. Feb. 21, 1894.)

BILLS AND NOTES—PLEADING—OWNERSHIP—ACCOMMODATION MAKER—DEFENSES.

1. Where a suit was brought by the receiver of a bank, suing for the use of the bank, on a promissory note payable at that bank to a named person as cashier, a plea by the maker of the note admitting the truth of an allegation in the plaintiff's petition that the note sued on was a part of the assets of the bank, although denying that the plaintiff was the holder or owner of the note, was properly stricken on demurrer, it not appearing that an inquiry into the ownership of the note was necessary to any defense insisted upon by the defendant, or that the form in which the suit was brought affected or changed the defendant's rights.

2. Where a person signed a promissory note as maker, payable to a named person as cashier, and delivered it to a firm, which wrote its name across the back of the note, carried it to the bank at which it was made payable, and obtained full value therefor, the fact that the maker was only an accommodation maker, and did not receive or use any of the money obtained upon the note, will not change his character from that of maker to that of indorser, so as to entitle him to notice of nonpayment by the firm, even though the bank knew that he was merely an accommodation maker. Nor was such a note without consideration to the maker, since it accomplished the purpose for which he signed it. A plea by the maker of such a note, setting out the above facts, was properly stricken.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Jordan S. Thomas, receiver of the First National Bank of Brunswick, for the use of said bank, against Moses Mayer and another. From a judgment striking his pleas, defendant Moses Mayer brings error. Affirmed.

Atkinson & Dunwody, for plaintiff in error.  
Goodyear & Kay, for defendant in error.

**CALLAWAY**, Special Judge. **Jordan S. Thomas**, as receiver of the First National Bank of Brunswick, brought suit for the use of said bank against **Moses Mayer** as maker, and **S. Mayer**, surviving partner of **S. Mayer & Ullman**, as indorser, upon a promissory note, of which the following is a copy: "\$3,000.00. Brunswick, Ga., March 11th, 1893. Sixty days after date I promise to pay to the order of **James Herr Smith**, cashier, three thousand dollars, at the First National Bank. Value rec'd. [Signed] **Moses Mayer**." Indorsed on the back: "**S. Mayer & Ullman**;" and across the face of the note was written: "Noted this 13th of June, 1893. **J. W. Conoley**, Notary Public, Glynn County, Ga." The suit was filed April 30, 1894. The first paragraph of the petition alleged that **Thomas** was the duly-appointed receiver of said bank, and entitled to collect all its assets. The second paragraph set out a copy of the note, as above, and stated that it was among the assets of the bank, and that **Moses Mayer** was indebted thereon as principal, and **S. Mayer**, as surviving partner of **S. Mayer & Ullman**, was indebted thereon as indorser. **Moses Mayer** filed his defense, denying that **Thomas**, receiver of said bank, was the owner or holder of said note, and called for strict proof that he was the duly-appointed receiver of said bank. He admitted all the second paragraph of the petition except that portion which alleged that he was indebted to the plaintiff. He denied his indebtedness on the note, alleging that, while he signed the note as principal, it was merely for the accommodation of **S. Mayer & Ullman**, and without benefit or interest to him; that, at the request of **Mayer & Ullman**, he executed the note in the manner and form stated, without any consideration to himself, and delivered it to **S. Mayer & Ullman**, who indorsed it, and delivered it to the bank for their own use and benefit; that the bank, through its officers, knew all these facts when it received the note, and looked to **Mayer & Ullman** as the parties primarily liable, and who were to make payment thereof; that he was liable on said note only as indorser; that no demand for the payment of said note was made upon **Mayer & Ullman**, or upon him, on the day it fell due, and it was not protested in terms of the law, nor was notice of its nonpayment given, and for this reason he was discharged from liability on the note. For further plea he said that, if he was held as principal on the note, he was not liable, because the note was wholly without consideration, and, as to him, a *nudum pactum*. On motion of counsel for plaintiff, the court struck all these pleas as insufficient in law, and rendered judgment for the plaintiff against **Moses Mayer** as maker, and **S. Mayer**, as surviving partner of **S. Mayer & Ullman**, as indorser, for the

amount due on said note, and the defendant **Moses Mayer** excepted.

It is not clear what was the defendant's purpose or meaning in denying that **Thomas**, as receiver of the bank, was the holder and owner of the note, when he expressly admitted that the note was given as alleged, and that it was among the assets of the bank. This amounts to an admission that the bank was the owner of the note. While the suit was brought by **Thomas** as receiver, it was brought for the use of the bank, and the defendant need not fear another suit on this note by the bank as the owner, since a judgment has already been obtained for its use by one who alleges himself to be its receiver. He sets up no defense that would be good against the bank and not good against its receiver. Having admitted the bank's ownership of the note, the mere physical holding of it is immaterial, so far as his interests are concerned, in a suit brought for the use of the bank. Not having shown how it was necessary for his protection, nor what defense such an inquiry would have opened to him, he cannot raise the question of ownership in this case. Code, § 2789; *Insurance Co. v. Vining*, 67 Ga. 661.

His other pleas raise two questions: First, whether one who signs a negotiable note payable at a bank, to the cashier thereof, merely as an accommodation maker for a firm who indorse their names across the back of the note, and deliver it to the bank, receiving value therefor, the maker receiving none of the funds, and no consideration passing from the firm to him, and the facts being known to the bank, is such an indorser as is entitled to notice of nonpayment and protest; second, whether the note has any consideration passing from the bank to such a maker. It has been several times decided by this court that an accommodation indorser of a negotiable instrument, who indorses the same in blank, not for the purpose of negotiation or to transfer the title, but for the purpose of strengthening the credit of the maker, or guarantying payment by the maker, is not such an indorser as is entitled to notice of nonpayment and protest in order to make him liable. The contract of indorsement proper is a separate and distinct contract from that entered into in the original execution of the note or draft, and is not a part of the original undertaking. It is the contract by which the title to the note or draft originally in the payee passes to another. It is the contract which effects the negotiation of the bill or note. Each indorsement is a separate and distinct contract, and each constitutes one link in the chain of title between the payee and the holder of the note. To become such an indorser on a note payable to order, one must first be the holder of the note, either as payee or as indorsee, else he cannot effect its negotiation by a transfer of title. The accommodation indorser, who never owns the note, and who does not in-

dorse for the purpose of transferring the title for value, but indorses merely for the purpose of strengthening the credit of the maker, is liable as a surety, and is not entitled to notice of nonpayment and protest in order to make him liable. Act 1826, Cobb Dig. 594; *Collins v. Everett*, 4 Ga. 266; *Camp v. Simmons*, 62 Ga. 73; *Neal v. Wilson*, 79 Ga. 736, 5 S. E. 54; *Eppens v. Forbes*, 82 Ga. 748, 9 S. E. 723; *Sibley v. Bank* (Ga.) 25 S. E. 470. The defendant in this case certainly comes no nearer being an indorser proper than would such an accommodation indorser. The liability of an accommodation maker is incurred in the original contract; and while this liability may be that of either a principal or a surety, according to the real intention of the parties to the transaction, it cannot be that of an indorser proper. Moses Mayer was not the owner of this note, either as payee or indorsee, so as to enable him to transfer its title. His indorsement was not necessary, and would not affect its negotiability; and, whether he was to be primarily or secondarily liable, he was in no sense an indorser proper, and was not entitled to notice of dishonor to make him liable. Neither was this transaction without consideration to the defendant so far as the bank was concerned. It was a sufficient consideration to the maker that it accomplished the purpose for which he signed it, namely, the payment by the bank of its value to S. Mayer & Ullman. *Farrar v. Bank*, 90 Ga. 331, 17 S. E. 87. We have been unable to discover any merit in any of these pleas, and the court committed no error in striking them. Judgment affirmed.

<sup>3</sup> **CALLAWAY, J.**, presided, by designation of the governor, in place of **ATKINSON, J.**, disqualified.

(87 Ga. 769)

**PARKER et al. v. ROSENHEIM et al.**  
(Supreme Court of Georgia. Feb. 21, 1896.)

**EXECUTION—AFFIDAVIT OF ILLLEGALITY—SUFFICIENCY—PROCESS—VACATION OF SERVICE—PRACTICE.**

1. An illegality filed to the levy of an execution issued upon a common-law judgment, which stated as its only ground "that no part of the amount of the execution was due," and which did not allege that the defendant had not had his day in court, nor any other fact which entitled him to go behind the judgment, or that the same had been satisfied, was properly dismissed on motion.

2. Where a *fi. fa.* issued upon a judgment rendered in 1889 was levied upon property of the defendant in October, 1892, and an affidavit of illegality was filed by the defendant in December, 1892, and at the May term, 1894, of the court in which the illegality was still pending, the defendant filed a traverse to the return of service made by the sheriff in the original suit, praying that the latter be made a party, setting out the entry of service, denying its truth, alleging that he had never been served, and designating the May term above mentioned as the first term of the court after notice to him of the return of the sheriff, such traverse was an entirely separate and distinct proceeding from the illegality,

and raised issues of fact to be passed upon by the jury. Under the decision of this court in *Dosier v. Lamb*, 59 Ga. 461, it was error to dismiss such traverse on mere motion.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Execution issued on the application of Joseph Rosenheim & Co. and others against O. S. Parker and others. From a judgment dismissing an affidavit of illegality, and a traverse to the return of service of process in the action in which the judgment was rendered, defendants bring error. Reversed in part, and in part affirmed.

The following is the official report:

An execution in favor of Rosenheim & Co. against Parker, based on a judgment of the superior court of Coffee county of November 13, 1889, was levied October 11, 1892, on property of the defendant. He interposed an affidavit of illegality on December 30, 1892, in which he swore that the execution "is proceeding against deponent illegally, for that no part of said amount is due." At the March term, 1894, of the superior court, the defendant traversed the return of the sheriff upon the declaration in the suit in which the judgment was rendered, the return being a return of personal service, and alleged that he was never served in any way; that he did not appear and plead, nor authorize any one to do so for him; that he did not waive or accept service; that he has a meritorious defense to the action, in that he is not indebted to plaintiffs in any sum; that the present is the first term of the court after notice to him of said return. And thereupon he prayed that the sheriff be made a party to this traverse, and that a rule issue requiring the plaintiffs and the sheriff to show cause why said return should not be vacated. The sheriff was made a party defendant to the traverse, and rule issued as prayed for. By consent the two causes—the illegality and the traverse—were heard together. Without hearing any evidence, but upon mere motion of counsel to dismiss both the illegality and the traverse, the court dismissed both, and gave judgment against Parker and the sureties on his illegality bond for costs. Parker and his sureties excepted to said ruling.

Atkinson & Dunwoody, for plaintiffs in error. G. J. Holton & Son, for defendants in error.

**CALLAWAY, Special Judge.** The illegality and the traverse to the sheriff's return of service, though heard together by consent, were separate and distinct proceedings. The affidavit of illegality is entirely without merit, and fatally defective. It does not allege that the defendant has not been served, nor that he did not appear, nor any other fact showing that he had not had his day in court; and without these allegations he cannot go behind the judgment. The court committed no error in dismissing it on motion.

The traverse to the sheriff's return of service contained all the essential elements of such a traverse. It denied the truth of the return of service made by the sheriff, and alleged that he had never been served in any manner; that he had never waived service, nor appeared or pleaded to said cause. He also alleged the term at which the traverse was filed to be the first term of said court after notice to him of said entry of service. He prayed for a rule requiring the plaintiff and the sheriff to show cause why said return of service should not be vacated and set aside. This complies with all the requirements of section 3340 of the Code, and raises two questions of fact to be passed upon by a jury: First, whether the traverse was made at the first term of the court after notice of the entry of service, and before pleading to the merits; and, second, whether, the traverse being in time, the return of the officer was true or false. *Dozier v. Lamb*, 59 Ga. 461. The fact that the defendant knew of the existence of the judgment in October, 1892, when the execution was levied upon his property, and in December, 1892, when he filed his illegality, does not negative his allegation in the traverse of a want of knowledge of the return of service. Knowledge of the existence of a judgment, and ignorance of the existence of a return of service upon the declaration and process whereon the judgment is founded, are not necessarily inconsistent. The traverse raised issues of fact which should have been passed upon by the jury, and the court erred in dismissing the same on motion. Judgment dismissing illegality affirmed. Judgment dismissing traverse reversed.

**CALLAWAY, J.**, presided, by designation of the governor, in place of Associate Justice **ATKINSON**, disqualified.

(97 Ga. 764)

**BRUNSWICK GROCERY CO. v.  
SPENCER et al.**

(Supreme Court of Georgia. Feb. 21, 1896.)

**LANDLORD AND TENANT—INJURIES TO TENANTS' GOODS—LIABILITY—MEASURE OF DAMAGES—PLEADING AND PROOF—WAIVER OF OBJECTIONS.**

1. Where a landlord rented a storehouse to a tenant to be used for the storage of groceries, and a violent and unusual storm of wind and rain unroofed the building and let in the rain, which damaged the goods therein, the landlord, in the absence of a contract to protect the tenant against such extraordinary and unforeseen occurrences, was not liable for damages thus resulting; nor for further damages occasioned by a second rainstorm, unless in the meantime there had been sufficient time and opportunity to make the needed repairs upon the roof.

2. The measure of the damages which a tenant is entitled to recover from his landlord for injury to goods caused by the leaking of water through a defective roof, in case the landlord is liable therefor, is the difference between the market value of the goods immediately preceding the injury and their market value immediately thereafter.

3. The action being for the rent of a storehouse, a plea alleging that the defendant rented the premises "upon the understanding that the storehouse was in a safe and sound condition, free from all leaks, and suitable for the purposes for which the defendant desired to use the same; that the plaintiffs knew for what purpose the same was rented by the defendant; and that after said storehouse was rented and occupied by the defendant for only a short space of time, owing to the unsound condition of the roof upon said building, the storehouse was flooded with rainwater, and the property of the defendant \* \* \* was injured and damaged [in an amount stated], and became a total loss to the defendant,"—cannot be supported by proof that the building was unroofed by a sudden and violent storm, and that the landlord failed to exercise due diligence in having the necessary repairs made.

4. Where, although a case was tried upon an entirely erroneous theory, the evidence, upon the real merits of the case, demanded a verdict for the plaintiff, such verdict will not be set aside because of errors committed by the judge during the progress of the trial.

5. Although the principal sum sued for in the declaration (as it appears in the record) was only \$900, and the verdict in favor of the plaintiff was for \$1,157, yet as the judge, in his charge to the jury, stated that the amount claimed in the suit was \$1,200 for the rental of a building, and that the defendant admitted owing the sum thus claimed, but relied upon the defense of set-off, inasmuch as no objection was made to the verdict either in the trial court or in this court, upon the ground that the recovery was in excess of the amount sued for, it will be presumed that the declaration was amended so as to support the verdict, so far as the question of amount is concerned.

(Syllabus by the Court.)

Error from superior court, Glynn county; **J. L. Sweat**, Judge.

Action by **Samuel Spencer** and others, receivers of the East Tennessee, Virginia & Georgia Railroad Company, against the **Brunswick Grocery Company**. From a judgment for plaintiffs, defendant brings error. Affirmed.

**Atkinson & Dunwoody**, for plaintiff in error.  
**Goodyear, Kay & Brantley**, for defendants in error.

**CALLAWAY**, Special Judge. **Spencer** and others, as receivers of the East Tennessee, Virginia & Georgia Railroad Company, brought suit against the **Brunswick Grocery Company** to recover \$900, alleged to be due for rent of a brick warehouse in Brunswick, from August 1, 1893, to May 1, 1894, at \$100 per month. The **Brunswick Grocery Company** filed its answer, admitting the indebtedness for rent, as claimed, but alleged "that the plaintiffs ought not to recover, for the reason that the defendant rented the premises from the plaintiffs upon the understanding that the storehouse was in a safe and sound condition, free from all leaks, and suitable for the purposes for which the defendant desired to use the same; that the plaintiffs knew for what purposes the same was rented by the defendant, and that after said storehouse was rented and occupied by the defendant for only a short space of time, owing to the unsound condition of the roof

upon said building, the storehouse was flooded with rainwater, and the property of the defendant, to the amount of \$1,624.70, was injured and damaged, and became a total loss; that the condition of the roof was unknown to the defendant at the time of renting said property, but plaintiffs at that time knew the same to be unsafe and unsound, and not in a tenable condition, and, although knowing these facts, warranted the same to be safe and sound and in every way suitable for the purposes for which the same was rented; that, by reason of such representations made upon the part of the plaintiffs, the defendant occupied said building, storing valuable and costly groceries therein, and was damaged in the amount stated above." To this answer was attached a bill of particulars, stating the items damaged, their value, and the amount of damage to each item. This answer was subsequently amended by adding an additional bill of particulars, and increasing the amount of damages claimed from \$1,624.70 to \$2,364.11, and by adding an item of \$43 paid by defendant for repairing an elevator in said building. The plaintiffs rested their case upon the defendant's admission of indebtedness for rent. The defendant introduced considerable testimony which showed that a violent and unusual storm passed over Brunswick on Sunday night, August 27, 1893, which unroofed several buildings in the city, blew down the tower of the Oglethorpe Hotel, blew off a large portion of the Mallory steamship warehouse, blew a tugboat from its mooring, blew the steamer City of Brunswick and a pilot boat up into the marsh, and did considerable damage along the entire South Atlantic coast. The rented building was covered with tin, was partly unroofed by this storm, and the rain, pouring through on the night of August 27th, damaged the goods of defendant to an extent estimated at from \$150 to \$200. Plaintiffs were notified on the morning of August 28th of the condition of the roof, and were requested to repair the same, but failed to do so for some time; and in the meanwhile, on the following Thursday night, a heavy rain fell in Brunswick, and the water poured through the open and unrepared roof of the building upon defendant's goods, and damaged them to the extent set out in the bill of particulars attached. This was during the yellow fever epidemic in Brunswick, and all business and railroad schedules were demoralized. There were no tin nor competent tanners in Brunswick, and these had to be carried there by plaintiffs from Macon and Atlanta. The evidence was somewhat conflicting as to the amount of diligence exercised by the plaintiffs in repairing the roof, but there was no evidence that the roof was in an unsound or unsafe condition at the time of rental, or when it was injured by the storm. The \$43 paid by defendant for repairing the elevator was admitted by plaintiffs to be a

just deduction from the rent; and it seems that the original suit, for \$900 rent, was converted into a suit for \$1,200, we presume, by amendment, though no such amendment appears in the record. But the judge, in his charge, stated that it was admitted that \$1,200 was due for rent, and the verdict for the plaintiffs was for \$1,157, and it was not excepted to as being in excess of the amount sued for, so that it is a reasonable presumption that the declaration was amended in this respect. The defendant filed a motion for a new trial, upon the statutory grounds and upon alleged error in numerous extracts from the charge of the court. The motion was overruled, and the defendant excepted upon all the grounds set out in the motion.

In the extracts from the charge excepted to in the fourth, fifth, seventh, eighth, and thirteenth grounds of the motion for a new trial, the court charged the jury the principles of law substantially as set out in the first headnote, which we think sound in principle, and sustained by the decisions of this court in the cases of *Guthman v. Castleberry*, 49 Ga. 272, and *Whittle v. Webster*, 55 Ga. 180.

The charge complained of in the tenth ground of the motion for new trial was as follows: "That the true test of damages, if any, sustained by the defendant, would be the difference between the market value of the goods before they were damaged and the price they were sold for afterwards in open market." This charge is not accurate. The amount of damage to injured goods is the amount of depreciation in value caused by the injury, and this is the difference between their market value immediately before the injury and their market value immediately after the injury. Goods may be sold in the market at a price very different from their market value, either higher or lower; and, while the price at which they are sold is a circumstance which may be considered in determining what is their market value, such a price is not necessarily the market value. The correct rule for measuring damages in such cases is that stated in the second headnote.

Under the view which we take of this case, it is not necessary to set out or discuss the other exceptions to the charge. The case made by the defendant in its answer, and the cause which it sought to establish by its testimony, are so entirely different that neither one can support the other. In the pleadings, it alleges as its only source of injury and damage the unsound condition of the roof of the building, which was rented on the understanding and with the warranty that it was safe and sound and free from leaks. There was no testimony whatever that the roof was unsound at the time of renting or that it failed to come fully up to the alleged warranty. The evidence established the fact that the building was unroofed by a very violent and unusually se-

vere storm. There is not even an intimation that its unsound condition contributed to its unroofing. The evidence further discloses that a very small portion of the damages claimed was caused by the storm which unroofed the building. The defendant cannot recover the damages caused by this storm, because it was not alleged or proved that it had a contract with the plaintiffs to protect it against such an unforeseen and extraordinary occurrence. The greater part of the damage to the goods was caused by a heavy rain four days after the storm, when the rainwater poured through the open places in the injured roof, which had not been repaired, and by wetting the goods damaged them. The landlords had been notified of the injured and exposed condition of the building on the day after the storm, but had not repaired it when this rain fell. If they had reasonable opportunity and time to repair it after notice, and before the rain which caused the damage, and failed to repair it, they would unquestionably be liable for the consequent damages. The question of their liability for failure to repair, and whether they had reasonable time and opportunity to make the repairs after notice and before the damaging rain, would have been proper questions to submit to the jury for determination, had such a cause of injury been properly set out or declared upon in the defendant's answer; but no such acts of negligence or cause of injury are alleged or even suggested, and the law confines the right to recover to the causes set out in the pleadings. *Railroad Co. v. Avant*, 80 Ga. 195, 5 S. E. 78; *Railroad Co. v. Nash*, 81 Ga. 580, 7 S. E. 808; *Railroad Co. v. Oaks*, 52 Ga. 410. So that, had the proof attested the jury that the plaintiffs' negligence in failing to repair caused their damage, which it does not seem to have done, the defendant would not have been entitled to recover, not having set out such a cause of action. The verdict was demanded by the evidence, and there was no error in refusing a new trial. Judgment affirmed.

CALLAWAY, J., presided, by designation of the governor, in place of ATKINSON, J., disqualified.

(97 Ga. 763)

#### DUNN v. ABRAMS.

(Supreme Court of Georgia. Feb. 22, 1896.)

INSURANCE—PREMIUM—PAYMENT AS CONDITION  
PRECEDENT—ACTION TO RECOVER—DEFENSES.

1. Although a policy of life insurance stipulated on its face that it should not take effect until the first premium was paid, it was not rendered invalid because the application signed by the insured before he received the policy (and which was copied in and made a part of the policy) stated that the first premium had not been paid, when, as a matter of fact, this first premium was, before the delivery of the policy, paid to the company by the agent who wrote the insurance; and the payment of such premium by the agent, in pursuance of an agreement between him and the insured, was a valuable

consideration for a promissory note given to the agent by the insured.

2. A statement by an insurance agent that the first premium upon a policy would be \$213, when in fact it was \$222.50, is not such a misrepresentation as will make void a promissory note for the former sum, given by the insured to the agent, who, by agreement, paid the first premium, and sought to collect from the insured only the amount of the note.

3. The verdict was demanded by the evidence, and therefore the court did not err in directing the jury to find the same, nor in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Action by J. B. Abrams against J. D. Dunn. From a judgment for plaintiff, defendant brings error. Affirmed.

E. D. Graham and E. P. Padgett, for plaintiff in error. T. A. Parker and Atkinson & Dunwoody, for defendant in error.

CALLAWAY, Special Judge. J. B. Abrams sued J. D. Dunn for \$213 principal, besides interest and attorneys' fees, due on a promissory note dated March 15, 1898. The note was given by Dunn to Abrams, who was an insurance agent, for a loan of \$213, to pay the first premium on a policy of life insurance, written for Dunn by the company which Abrams represented. Dunn pleaded failure of consideration in the note because the policy contained on its face the following requirement: "This policy shall not take effect until the first premium is paid while the insured is in good health," and also contained in a copy of the application for insurance, which was attached to and made a part of the policy, a statement that the first premium had not been paid. Abrams was to pay the first premium, and, as a matter of fact, did pay it in the regular course of his dealings with the company, and received from the company the proper receipt for the premium, before the policy was delivered to the insured. The recital of nonpayment in the application is not conclusive as to the fact of payment, and when, as a matter of fact, it was paid, and the company issued its regular receipt therefor, this was a compliance with the above requirement on the face of the policy, and it was not invalid because of such recital in the application. The payment of this premium by Abrams was a valuable consideration for the note sued on. Dunn further pleaded that the note was void because of misrepresentations made by Abrams as to the policy, to induce him to take the insurance and give the note; that Abrams represented that the first premium would be \$213, and that no future annual premium would amount to as much as \$200, whereas the policy, which was in evidence, recited that each annual premium, including the first, was \$222.50. The notice of the call for the second annual premium, which was the only evidence as to the

amount of future premiums, stated that the premium was \$222.50, diminished by a dividend of \$46.13, leaving the amount due by Dunn on the premium \$176.37. These facts do not support a plea of misrepresentation. The first premium was \$222.50, instead of \$213, as Abrams represented it would be; but, whatever it was, Abrams paid it, and only called on Dunn to pay the amount of the note, \$213, which was the amount that he represented the first premium would be. The misrepresentation was immaterial and harmless to Dunn, and he cannot avoid payment of the note on that account. The evidence further disclosed that Dunn kept the policy for the entire period covered by the first premium, and never offered to surrender it to the company, or have it changed in any respect. We do not think the court erred in directing a verdict for the plaintiff. Judgment affirmed.

OALLAWAY, J., presided, by designation of the governor, in place of ATKINSON, J., disqualified.

(98 Ga. 381)

MCCORD et al. v. WHITEHEAD.

(Supreme Court of Georgia. April 27, 1896.)

WILLS — CONSTRUCTION — ESTATES IN COMMON — DEED — EFFECT.

1. Where, by a will executed and probated in 1854, a testatrix devised and bequeathed her entire estate to certain named persons as trustees, upon uses and trusts declared in the following words: "In trust, nevertheless, for the uses and purposes hereinafter expressed; that is to say, in trust for the support and maintenance of my children not provided for, and to have a home for them under the supervision of my husband alone. In trust, also, that that part or portion that may be set apart for each of my daughters may be made over to trustee or trustees for each of them and their children, and not subject to the debts or contracts of said trustee or any husband with which any of them now have or may hereafter intermarry; and, in the event of having no children, such as have none are authorized to devise it in any manner they think proper,"—*held*, that the title to that portion of the estate which, under this will, went to a daughter of the testatrix and a child of this daughter who was in life at the time of the execution of the will, and who survived the testatrix, vested in the daughter and this child as tenants in common.

2. Upon a bill in equity filed in 1860, the executors of an estate were removed from their trust, and it was thereupon decreed that the property in their hands be, by a receiver acting in conjunction with certain commissioners, divided among the devisees and legatees, and that the receiver "do by his deed convey to and settle the several portions of said property delivered to the *femes covert* [who were parties to the bill] upon a trustee or trustees, in conformity with the provisions and directions in said will contained." The decree adjudicated nothing as to the nature of the title vested by the will in any of the devisees. The receiver, in pursuance of a division made under this decree, conveyed to a trustee, for one of the *femes covert*, a portion of the property, and in the deed recited that it was made by virtue of the decree, "and in conformity to the last will and testament" of the deceased, but, erroneously construing the will, undertook by the deed to vest the

title to the property thereby conveyed in the trustee for the use of the *cestui que trust* for life, with remainder to such children as she might leave surviving her. *Held*, that the receiver had no power to convey except in conformity to the provisions of the will, and therefore the deed made by him, even without a reformation, should not be so construed as to defeat the purpose of the will in relation to vesting the title to the property thereby disposed of, and that the only effect of the deed was to pass title in accordance with the provisions of the will itself.

(Syllabus by the Court.)

Error from superior court, Warren county; Seaborn Reese, Judge.

Action by H. A. McCord, executrix, and another, against James Whitehead, to quiet title. A demurrer to the petition was sustained, and plaintiffs bring error. Reversed.

W. K. Miller, C. Z. McCord, Harrison & Peoples, and H. Phinizy, for plaintiffs in error. H. T. Lewis, for defendant in error.

SIMMONS, C. J. By a will executed and probated in 1854, Mrs. Mary Ann Harper devised and bequeathed, to the persons named as executors therein, her entire estate, upon uses and trusts declared in the following words: "In trust, nevertheless, for the uses and purposes hereinafter expressed; that is to say, in trust for the support and maintenance of my children not provided for, and to have a home for them under the supervision of my husband alone. In trust, also, that that part or portion that may be set apart for each of my daughters may be made over to trustee or trustees for each of them and their children, and not subject to the debts or contracts of said trustee or any husband with which any of them now have or may hereafter intermarry; and, in the event of having no children, such as have none are authorized to devise it in any manner they think proper." At the time of the execution of the will, one of the daughters, Mrs. Mary Ann Whitehead, had a child, James Whitehead, who was born in 1852. In 1861, upon a bill filed by certain of the daughters of the testatrix, a decree was rendered whereby the executors were removed from their trust, and it was decreed that the property in their hands be, by a receiver acting in conjunction with certain commissioners, divided among the devisees and legatees, and that the receiver "do by his deed convey to and settle the several portions of said property delivered to the *femes covert* [who were parties to the bill] upon a trustee or trustees, in conformity with the provisions and directions in said will contained." The property was divided accordingly, and the receiver executed to James Troup Whitehead, the husband of Mary Ann Whitehead, as trustee for her, a deed reciting that it was made by virtue of the decree, "and in conformity to the last will and testament" of the deceased, and purporting to convey a certain portion of the property to the trustee for the use of the *cestui que trust* "for life, and, if she should

die leaving issue, to be divided among her children or their representatives, and, in case she should have no children, to devise it in such manner as she might see proper." In 1863 the trustee sold this property, under an order of court granted upon his *ex parte* petition, and executed to the purchaser a deed which purported to convey the title in fee simple. In 1891, Z. McCord, a successor in title to the purchaser, died, in possession of the property; and shortly thereafter his executrix, Mrs. Harriet A. McCord, and the Georgia Building & Loan Association (to the latter of whom he had conveyed the land as security for a debt), filed their petition in the superior court of Warren county against James Whitehead, in which the facts above stated were set out, and in which it was alleged, among other things, that the plaintiffs and their privies in estate had been in open, uninterrupted, continuous, peaceable, and undisturbed possession for over 80 years; that their title had been unimpugned and unquestioned until within the last 2 years, when James Whitehead had set up a claim on his own behalf; that he sets up the same under the habendum clause of the receiver's deed, averring that he is not bound by the sale under the deed from his father, James T. Whitehead, trustee, above mentioned; that the receiver's deed, properly construed, conveyed an estate similar to that devised by the will, and not that claimed by Whitehead; that the devise created an estate tail in his mother, which by law was converted into a fee simple, or, if not a fee simple in her, then she and her son took as tenants in common, with the title in said trustee to hold for her until it was executed by the married woman's law of 1866, and for James Whitehead until he reached his majority; that, if Mrs. Whitehead took as a tenant in common with her son, her interest as such passed to the purchaser under the trustee's deed, and the interest of the son also passed by the same deed, he being a minor at the time, and represented by the trustee, and, if it did not pass thereby, he has long since become barred; and that the receiver's deed is, in the habendum clause, in conflict with the terms and provisions of the will, in violation of the order appointing the receiver, and has never been approved by the court appointing him. It was alleged that said claim of James Whitehead disturbed and disquieted the title of the plaintiffs, and cast a cloud thereon, and rendered the property unsalable, etc. The petitioners prayed for the reformation of the receiver's deed, the removal of the cloud upon their title, and other equitable relief. A demurrer to the petition was sustained by the court below, upon the ground that Mrs. Whitehead, the mother of the defendant, took a life estate, remainder over to the defendant should he survive his mother. To this ruling the plaintiffs excepted.

1. A devise to a parent, and to his or her children, there being a child in life at the

date of the will and at the time of the testator's death, creates an absolute estate in fee in the parent and the child in common. See *Loyless v. Blackshear*, 43 Ga. 327; *Lee v. Tucker*, 56 Ga. 9; *Chess-Carley Co. v. Purtell*, 74 Ga. 467; *Ewing v. Shropshire*, 80 Ga. 334, 335, 7 S. E. 554; *Baird v. Brookin*, 86 Ga. 709, 12 S. E. 981; *Mortgage Co. v. Gordon*, 95 Ga. 782, 22 S. E. 706; 3 Jarm. Wills (Randolph & Talcott's Ed., 1881), pp. 174, 180, and cases cited. It was contended, however, that "the superadded words defining what was to become of the property if there were no children imply a fee in remainder in the children, if any." Estates by implication are not favored, and every conveyance should be construed to convey the fee unless a less estate is mentioned and limited. "The law inhibits the construction of lesser estates where no words of limitation are used, \* \* \* and where no such intent appears by clear and necessary words in the instrument." Here we have a will providing for a daughter and her child in terms which, in the absence of anything further, would create in them a fee-simple estate in common; and this is followed by the grant of a power, to such as have no children, to dispose of their portions by will. Why this should reduce the estate of the daughter who had a child, and that of the child, to a life estate in the daughter, with remainder to the child, we are unable to see. In support of the contention above stated, we were referred by counsel to the following cases: *Benton v. Patterson*, 8 Ga. 146; *Kemp v. Daniel*, Id. 385; *Carlton v. Price*, 10 Ga. 495; *Jones v. Jones*, 20 Ga. 699; *Burton v. Black*, 30 Ga. 638; *Wetter v. Press Co.*, 75 Ga. 540; *Bray v. McGinty*, 94 Ga. 192, 21 S. E. 284. In each of these cases, however, the will expressly provided for a remainder or other limitation over. At the time the will now before us was executed, it was quite common, in view of the restrictions which the law then placed upon married women, to annex to the devise of an estate in fee to a woman the power to dispose of it by will; and, so far from operating as a limitation, this was not only consistent with, but was regarded as indicative of, an intention to create an estate in fee. See *Cook v. Walker*, 15 Ga. 458; *Wetter v. Walker*, 62 Ga. 144. In 4 Kent, Comm. 319, it is said: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion." Nor can any implication that less than a fee is given to the daughters having children be drawn from the fact that the power to devise is given only to such as have no children. The reason for this omission in the case of such as have children is explained by the fact that in the part or portion set apart to such a daughter and her children the children had an interest which their

mother could not devise. We think it is apparent from the language of the will that the testatrix intended to provide directly for her grandchildren, as well as her daughters, and that her grandson James Whitehead, who, as we have already said, was in life at the date of the will, took an estate in common with his mother.

2. The decree rendered on the bill filed in 1860 adjudicated nothing as to the nature of the title vested by the will in any of the devisees. It provided simply for the removal of the executors from their trust, and that the property in their hands be divided by the receiver and certain commissioners, and that the receiver "do by his deed convey the title and settle the several portions of said property delivered [not "devised," as stated in the argument for the defendant in error] to the femes covert [who were parties to the bill] upon a trustee or trustees, in conformity with the provisions and directions in said will contained." The receiver, therefore, in conveying the property to the trustee, had no power to depart in any respect from the will itself; and the receiver's deed, which recites upon its face that it is made by virtue of the decree, and "in conformity with the last will and testament of the deceased," is to be construed in conformity therewith, and not so as to defeat the purpose of the will in relation to the vesting of the title to the property thereby disposed of. The deed was merely a ministerial act, and is to be referred to the power under which it was executed, and could have no validity in so far as it departed from the terms of the power. Its legal effect, therefore, was to pass the title in accordance with the provisions of the will itself. The error appearing upon the face of the instrument itself, the question is not one of mistake, but of construction, and reformation is unnecessary. The interest of the defendant in the land conveyed by the receiver's deed being therefore an estate in common, his right to recover the same was barred long before the petition in this case was filed. *Edwards v. Worley*, 70 Ga. 667; *Lee v. Ogden*, 83 Ga. 325, 10 S. E. 849; *Cain v. Furlow*, 47 Ga. 674. Judgment reversed.

(98 Ga. 548)

#### SCHOFIELD et al. v. WOOLLEY.

(Supreme Court of Georgia. June 12, 1896.)

ATTORNEY AND CLIENT—ACTION FOR MONEY COLLECTED—LIMITATION—INTERRUPTION BY LEGAL PROCEEDINGS—ACKNOWLEDGMENT—TRUSTS.

1. Ordinarily the right of action against an attorney at law for money collected by him when he had made no written contract for its collection becomes barred after the lapse of four years from the time the fact that the collection had been made came to the knowledge of his client.

2. The general rule, as above stated, is not varied in a case where the attorney collected the money by effecting a settlement of the suit brought for its recovery, because the client, upon

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being informed of the settlement, refused to ratify it, or to accept the money, and instituted legal proceedings to set the settlement aside, and the attorney, in consequence of such refusals, continued to hold the money during the pendency of such proceedings, which covered a period of more than four years, it appearing that these proceedings finally resulted adversely to the client, and it not appearing that they were founded on reasonable or even plausible grounds, or that the client was, in the first instance, warranted in declining to receive the money.

3. Nor, in such a case, is the client's right to sue the legal representative of the attorney for the money so collected relieved of the bar of the statute of limitations because shortly after making the collection, and more than six years before his death, the attorney, in writing, informed the client that he had collected the money, and would pay it over as soon as he had adjusted and settled certain contingent fees which he claimed were chargeable upon the same; and this is so whether such fees, if properly so chargeable, were ever, in point of fact, adjusted and settled or not.

4. Under the facts above recited the attorney was not holding the money as trustee for the client, and his liability for its payment was not founded upon a continuing trust.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Mrs. Vashti Schofield and others against Vasser M. Woolley, administrator of one Rutherford, deceased. A demurrer to the declaration was sustained, and plaintiffs bring error. Affirmed.

C. L. Bartlett and Dessau & Hodges, for plaintiffs in error. King & Anderson and Erwin, Cobb & Woolley, for defendant in error.

SIMMONS, C. J. On April 18, 1893, a suit of which the present suit is a renewal was brought against the administrator of Rutherford to recover a certain sum alleged to have been received by the intestate on March 7, 1883, from one Franklin, in settlement of a suit of the plaintiffs in which Franklin was defendant, and in which the intestate represented the plaintiffs as an attorney at law. The declaration was demurred to on several grounds, the main ground being that it was barred by the statute of limitations. The demurrer was sustained, and the plaintiffs excepted.

It appears from the declaration that the plaintiffs refused to ratify the settlement in pursuance of which the money sued for had been paid to Rutherford, and that a suit to set aside the settlement was instituted by them on February 11, 1889, which suit resulted, on March 1, 1891, in a verdict in favor of the defendants therein. On the day on which this verdict was rendered, Rutherford died. It further appears that on March 9, 1883, two days after the money was collected by Rutherford, "he promised in writing that he would pay over to the petitioners said money after he had paid certain contingent fees due and owing to certain local counsel whom he had employed to assist him on the trial of said cause, the amount of whose fees

had not been determined." It is alleged that this money was held in trust by Rutherford to pay himself a contingent fee, to pay contingent fees of assistant counsel, and to pay the balance to the plaintiffs; that this had not been done, and was a subsisting trust. There is no allegation of fraud. It was contended that under the facts alleged there was a continuing trust until the death of the intestate, and that the statute of limitations did not begin to run until after demand had been made upon the administrator. It is true, a subsisting, recognized, and acknowledged trust is not within the operation of the statute of limitations, but this rule applies only to those technical trusts which are cognizable alone in a court of equity (Code, § 3196; 2 Wood, Lim. [2d Ed.] § 200; *Douglas v. Corry* [Ohio Sup.] 21 N. E. 440, and cases cited); and the relation of an attorney to his client, where the attorney retains in his hands money collected for the client, does not constitute such a trust. In the case of *Lightning Rod Co. v. Cleghorn*, 50 Ga. 782, it was said by Bleckley, J.: "An attorney's possession of the money of his client is more like that of a mere agent or bailee. It would be deviating from the ordinary use of language to call the client's money trust property, and the sole duty of the attorney in respect to it is to pay it over. He has no right to control and manage it as a trustee in possession. In this regard his powers do not extend beyond those of an attorney in fact appointed to collect. The latter is not a technical trustee. *Bowen v. Johnson*, 12 Ga. 9. Prior to the Code, the rank of a claim against a deceased attorney at law for money collected in his lifetime was on a par with bonds or other obligations. *Smith v. Ellington*, 14 Ga. 379. We think it has not been advanced. If it was, all deposits and bailments (where conversion has followed) have undergone a similar advancement, for, in a general sense, they are all trusts." In 1 Wood, Lim. (2d Ed.) § 18, p. 54, it is said: "The liability of an attorney for money of his client which has come into his hands, in the absence of fraud, is simply that of an agent or factor, and creates a simple contract debt only. The rule is that, where an attorney collects money for his client, the statute begins to run from the time of its receipt, and that, too, without regard to notice or demand by the client." Upon the question whether notice or demand is required the authorities differ, but it is said that, "In the absence of proof, the law will presume notice and demand made in a reasonable time after the money is collected, and at that time the action will be deemed to have accrued." *Weeks*, Attys. § 263. In the present case it appears that the plaintiffs had notice of the collection within two days after the money was received by the defendant's intestate, but, instead of authorizing the payment of fees of counsel from this fund, as proposed or promised by the defendant's intestate, the plaintiffs refused to ratify the settlement, and brought

suit to have it set aside. It cannot be said, therefore, that there was any trust to apply the money for the purpose stated. And it is clear that a repudiation of his act in collecting the money will not stop the running of the statute, especially when the result of the proceeding to set aside the settlement was to sustain what had been done by the attorney, and when, so far as appears, there were not even plausible grounds for such a proceeding. The statute of limitations is a statute of repose, and it would seem that, if there is any case to which the statute should apply, it is a case like this, where parties for whom an attorney has collected money wait for six years, with full knowledge of all the facts, before taking any steps to have the action of the attorney declared not binding upon them, and for ten years, and until the attorney's lips are sealed in death, before bringing an action to recover the money collected. All actions upon contracts not in writing, whether express or implied, being barred after four years from the time the cause of action arose, when not otherwise provided, and all actions upon simple contracts in writing being barred after six years (Code, §§ 2917, 2918, 2923), and the contract of an attorney to pay over money collected for a client being no exception to the statute, it follows from what has been said that the present action was barred. Judgment affirmed.

ATKINSON, J., not presiding.

(58 Ga. 700)

WHIDDON et al. v. WILLIAMS  
LUMBER CO.

(Supreme Court of Georgia. June 13, 1896.)

DEEDS—RECORD—EVIDENCE—TRESPASS—TITLE AND  
POSSESSION OF PLAINTIFF—SUFFI-  
CIENCY OF EVIDENCE.

1. When the foundation for introducing secondary evidence of the contents of a registered deed has been properly laid, a certified copy of it from the records of a county in which it was duly recorded is admissible in evidence, though the land described in the deed was afterwards cut off into a newly-made county, and the deed in question was never recorded therein.

2. Though on the trial of an action by administrators for trespass to realty alleged to belong to their intestate the evidence introduced by the plaintiffs may be sufficient to show title in the intestate, yet where it appears that neither he nor they were in possession when the alleged trespass was committed, and the evidence for the defendant shows a paramount outstanding title in another, there can be no recovery; and this is true notwithstanding the failure of the defendant to show any connection between such outstanding title and the claim under which he entered.

3. It is essential to the maintenance of an action of trespass upon realty, brought to recover damages to the freehold, that the plaintiff, if not in possession when the injury was committed, should show himself to be the true owner of the land; and this he must do by proving title in himself, and in such case title is not shown by proof of former possession without more.

4. In view of the evidence as a whole, the court committed no error in directing a verdict for the defendant.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Trespass by Annie E. Whiddon, administratrix, and others, against the Williams Lumber Company. From a judgment for defendant, plaintiffs bring error. Affirmed.

De Lacy & Bishop, for plaintiffs in error. D. M. Roberts and Smith & Clements, for defendant in error.

SIMMONS, C. J. 1. The ruling announced in the first headnote does not require further discussion.

2. Under our Code, in order to recover damages for trespass upon land, the plaintiff must have possession, or else must have a good title to the land. Bare possession is sufficient to authorize the possessor to recover damages from any person who wrongfully interferes in any manner with his possession (Code, § 3015); and section 3016 declares: "The person having title to lands, if no one is in actual possession under the same title with him, may maintain an action for a trespass thereon; and if a tenant be in possession, and the trespass be such as injures the freehold, the owner, or a remainderman, or reversioner, may still maintain trespass." In order to bring himself within the statute, a plaintiff out of possession must show himself the true owner, and this he can only do by showing a good title. *Mining Co. v. Irby*, 40 Ga. 482. Such a title is not shown by prior possession alone. A plaintiff in ejectment, it is true, may recover the premises in dispute upon his prior possession alone, against one who has subsequently acquired possession by mere entry, and without any lawful right whatever (Code, § 3366); and in such a case the burden of showing a better title in himself is upon the defendant (*Wolfe v. Baxter*, 86 Ga. 705, 13 S. E. 18, and cases cited). This, however, is for the reason that ejectment is a remedy designed to redress wrongs amounting to a disseisin or ouster, and the person thus deprived of his possession has a right to recover possession from the person who has evicted him, unless the latter shows a better right to the premises. But where an action of trespass is brought for injury to the freehold the right of the plaintiff to recover depends upon his showing that he is the true owner of the freehold, and not merely that he had priority of possession to the defendant. Were it otherwise, a defendant, after having been required to pay damages to a person who had a prior possession, for injury to the freehold might afterwards be subjected to liability to the true owner for the same tort. And since the defendant in such an action cannot be held liable to any other than the true owner, it is a sufficient defense to the action if he shows that the plaintiff is not the true owner, whether he shows any title in himself or not. In the present case the action was brought by administrators to recover for

damages to the freehold by the cutting of timber therefrom. The intestate was not in possession, nor were the administrators, at the time of the acts complained of. The plaintiffs introduced in evidence a grant from the state to Peter J. Williams, covering the premises in dispute, a deed from Williams' executor and certain persons described in the deed as the heirs at law of Williams to William Pitt Eastman, and a chain of deeds from Eastman down to the plaintiffs. The plaintiffs also showed prior possession. The defendant introduced, with other evidence, a duly-certified copy of a deed from Peter J. Williams to Colby, Chase, and Crocker, including the land in dispute. The plaintiffs did not show any title in themselves from this latter source, nor did the defendant. This evidence showed a paramount outstanding title in others than the plaintiffs, and therefore, as we have shown, was sufficient to defeat the action, even though the defendant did not connect itself with it. The court, therefore, did not err in directing a verdict. Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.

(98 Ga. 640)

PATTERSON, Ordinary, v. TAYLOR et al. (Supreme Court of Georgia. July 18, 1896.)

BRIDGES—CONSTRUCTION—DISCRETION OF ORDINARY—MANDAMUS.

1. The recommendations of two successive grand juries that a bridge be built over a stream crossed by a public road at a place where no bridge previously existed do not render the building thereof a matter of such absolute duty on the part of the ordinary sitting for county purposes as to deprive him of the right to exercise a discretion in the premises, nor authorize a proceeding by mandamus to compel him to have such bridge built.

2. The court erred in making the mandamus absolute.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Petition by W. F. Taylor and others for mandamus to J. S. Patterson, ordinary. From a judgment making the mandamus absolute, respondent brings error. Reversed.

Parker & Thomas, for plaintiff in error. G. J. Holton & Son, for defendants in error.

SIMMONS, C. J. Certain citizens of Appling county petitioned the superior court for a mandamus against the ordinary of that county to compel him to build a bridge over a stream across a public road at a place where no bridge previously existed, the petition alleging that the building of the bridge had been recommended by two successive grand juries. The case was submitted, upon the law and the facts, to the presiding judge, who made the mandamus absolute, and to this judgment the ordinary excepted.

Mandamus will not lie to compel a public officer to do an act not clearly commanded by law. "It is only practicable by mandamus to compel performance of specific acts where the duty to discharge them is clear and well defined, and when no element of discretion is involved in the performance." Where the officer has a discretion in the matter, the court may, by this means, compel him to exercise his discretion, but cannot direct in what manner he shall exercise it. 14 Am. & Eng. Enc. Law, art. "Mandamus," 104; Merrill, Mand. § 106 et seq.

The ordinary has, when sitting for county purposes, original and exclusive jurisdiction over establishing bridges in conformity to law (Code, § 337); and there is no law which makes it imperative upon him to carry out the recommendations of a grand jury, or of successive grand juries, with regard to the establishment of new bridges. This is a matter within his discretion, and no recommendation of the grand jury would deprive him of the right to exercise his discretion in the premises, nor authorize a proceeding by mandamus to compel him to have such a bridge built. The court erred in making the mandamus absolute. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 282)

#### CITY COUNCIL OF AUGUSTA v. LOMBARD.

(Supreme Court of Georgia. Aug. 3, 1896.)

**MUNICIPAL WATERWORKS—NEGLIGENCE IN OPERATION—GOVERNMENTAL FUNCTIONS—EVIDENCE—ACTION FOR DAMAGES—PLEADING—AMENDMENT.**

1. When the question of the liability of a municipal corporation in an action for damages depended upon whether or not it had exercised reasonable care and diligence as to a particular matter connected with a business which the municipality was conducting for gain, and in which it was not exercising governmental functions, the fact that "in the opinion of the city officers" the proper diligence had been observed was not a good defense. Whether or not due diligence had been observed depended upon the facts as they existed, and not upon the views entertained of them by the municipal authorities. The rules for determining liability are the same as would be applicable to an action against a private corporation. See *City Council of Augusta v. Hudson*, 15 S. E. 678, 88 Ga. 599.

2. If, in such case, the maintenance, use, or discontinuance of certain water gates were matters under the control and direction of the municipal authorities, it would make no difference, as to damages resulting from the removal of the gates, by whom, or for what purpose, they were originally erected.

3. The numerous assignments of error in admitting or refusing to rule out evidence are not of sufficient weight or importance to require special notice.

4. An action for damages to specified articles of personality resulting from an alleged tort is amendable by averring damages to other articles of personality caused by the same tort, and at the same time. An amendment of this kind does not introduce a new and distinct cause of action, but is simply an enlargement of the cause of action originally set forth, and, when

made, it relates back to the date upon which the declaration was filed.

5. Under the law as laid down in this case at the October term, 1893 (20 S. E. 312, 93 Ga. 284), and in view of the evidence submitted, the verdict in the plaintiff's favor was warranted, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Action by R. O. Lombard, administrator, against the city council of Augusta to recover damages for negligence in the operation of water gates. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

Lombard sued the city council of Augusta, alleging: On July 31, 1887, and for a long time before, he was, and still is, lessee of property in Augusta, on the east side of Kollock street, and immediately on the south side of the third level of the Augusta Canal, on which property he was carrying on a foundry business, the machinery of the foundry being run by the water received from a headrace from the second level of the canal, for which water he pays defendant a large rental; that at the time of the building or cutting of the headrace strong and substantial water gates with solid brick abutments were constructed at the point where the headrace leaves the second level of the canal, and the main object in constructing the water gates was to regulate and control the volume of water passing through the headrace during the periods of very high water in the Savannah river, and consequent high water in the second level of the canal; that early in the spring of 1887 defendant had the water gates taken out, notwithstanding plaintiff's objections, who earnestly protested at the time, and notified defendant's officers and agents superintending the removing of the gates that the effect thereof would be to seriously damage him at times of high water; that in consequence of said removal, on Sunday, July 31, 1887, when the Savannah river reached its highest stage, large and unusual quantities of water flowed from the headrace in such volumes as to run over the banks or dams of the headrace, which were lower by one or two feet than the dam of the second level of the canal, by which sixty feet or more of the bank or dam next to his foundry yard and buildings was washed away, and large quantities of water precipitated upon his premises; that the loss thereby resulting to him was caused by the negligent, reckless, and unnecessary removal of the water gates, which had been constructed for the purpose of guarding against the very character of the injuries herein complained of, and, but for their removal, the damage would not have been done; and that defendant is the owner and has sole control and management of the canal and its branches. Plaintiff obtained a verdict, and, defendant's motion for a new trial being overruled, it brought the case to this court, by which the judgment of the court below was reversed. See 93 Ga. 284, 20 S. E. 312, where

will be found set out the pleas of defendant. The case being again tried, there was a verdict for plaintiff for \$3,500. Defendant's motion for a new trial was overruled, and it excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the verdict was excessive.

The amended motion was upon the grounds:

Error in admitting in evidence, over objection of defendant, the testimony of plaintiff that "Berry's mill could have been furnished with additional water without removing those gates by adding one or two more arches to the gates that were already there," and also his testimony as to the cost of putting in additional gates, "I am satisfied it would not have cost over six or seven hundred dollars to have put in two or more arches and gates,—I mean to take out the abutment on one side." The objection urged at the trial was that this evidence was irrelevant. Movant contends further that the evidence should not have been admitted, because it was merely the opinion of the witness, without giving any facts upon which it was based; because the enlargement of the raceway or the addition of the gates could not be considered, as the only matter to be considered was whether it was necessary or reasonably proper to remove such obstructions as were already there, in order to give additional water to the other manufacturing establishments on the same raceway; and because the testimony failed to show that putting in such additional gates or gate would enable the city to furnish adequate and continuous supply to its patrons along the canal. Further, error in allowing the following question and answer of plaintiff over defendant's objection: "Was not that dam opposite your foundry and dam raised after the freshet of 1887? A. Yes, sir." The objection urged at the trial was that it was irrelevant. Movant further contends that the evidence was inadmissible because it was in reference to work done after the alleged injury occurred.

Error in admitting the testimony of Jesse Thompson, over defendant's objection, in which he gave as his opinion that additional water could have been furnished by putting in another gate, or adding more space by widening the canal at that point, the same being based upon observation made by witness in 1891, four years after the alleged injury. It was not stated what objection was made at the trial. Movant contends that the evidence should not have been admitted, because it was the witness' opinion, based on no facts; because his testimony as a whole was irrelevant, and did not illustrate the issue tried; because it tended to mislead and deceive the jury to defendant's injury; because the testimony of Thompson as a whole shows that, in order to furnish additional water, the canal at that point would have had to be enlarged. The whole of the testimony of Thompson is set out in the motion.

Error in refusing to rule out, on motion of

defendant, all that witness J. F. Patterson said in connection with Mr. Phillips and the city and in connection with putting in those gates, the testimony being as follows: "The gates at the head of the raceway in question were put in about 1859 or 1860. We made the gates at Hight's foundry. We made them there in the latter part of 1859 or early part of 1860. My understanding is that these gates were erected under the supervision of the city engineer, Mr. Wm. Phillips. I was working at Mr. Hight's foundry at the time we were running by steam. I was one of the employes who helped to make the cast iron part of the gates. The engineer, Mr. Phillips, was around about there, and I took it for granted that he made the drawings and ordered the patterns. He (Phillips) was there, giving orders in regard to the gates." What the ground of the motion made at the trial was does not appear. Movant contends that the evidence was wholly irrelevant, and attempted to show by a mere surmise of the witness that the city, under the supervision of its engineer, put in the gates.

Error in allowing the following questions and answers to and by the same witness: "Then, when it got that far, its outlet would be through the Ga. R. R.? Would that have furnished an outlet so that it could not have come over Mr. Lombard's place? A. That was about the lowest point, but I have seen it back through and go in a torrent down to Miller's mill. That was previous to 1887. I have seen it go in a tremendous torrent down the canal to Miller's mill, and wash the bridge away across Cumming street. Q. Do that when Lombard's mill would be perfectly protected and preserved? A. Yes, sir." The objection urged at the trial was that it was leading. Movant further contends that it was illegal, and wholly irrelevant.

Error in admitting, over defendant's objection, the following testimony of William Pendleton: "I was there in 1865, and, in my opinion, it was a larger freshet than in 1887." What the objection urged at the trial was is not stated. Movant contends that it was merely the opinion of the witness, without stating any of the facts upon which it was based.

Error in admitting, over defendant's objection, the following testimony of William Pendleton: "I think those banks have been raised since the freshet of 1887." The objection urged at the trial was that it was irrelevant. Movant contends further that it was a mere opinion of the witness, and referred to matters subsequent to the injury complained of, and gave no facts upon which to base the opinion.

Error in admitting, over defendant's objection, the following testimony of the same witness: "There is not a considerable difference between the banks right southwest of Mr. Lombard's gate than they were at the other point. I was not there when the break occurred in 1887, that did the damage, and can-

not tell if the water that did the damage came through the headrace of the canal, or was the water that came from somewhere else. I was not there when the break occurred. I know that we have never feared any water that could come down Kollock street. I have stayed there until the water got to be a general freshet in the city, and the water on Kollock street, when it was the largest and most dangerous at our banks." The objection urged at the trial was, "That is the identical expression that the court ruled out in this very case." Movant contends that the evidence was irrelevant, and was the opinion of the witness, without giving facts upon which it was based, and shows on its face that it was an opinion of what occurred in his absence.

Error in admitting, over defendant's objection, the following testimony of the same witness: "Being absolutely familiar with the premises, working there, as I am, of course, the current comes through the raceway. I never saw the water coming down Kollock street from the shop. It goes through the other way. That raceway has been raised twice since 1887. I would say at least two feet." The objection urged at the trial was that it was "one of the questions ruled out by the supreme court." Movant contends further that the evidence was inadmissible because the opinion of the witness, without giving the facts upon which it was based, as to the water coming through the raceway, and not down Kollock street, his own testimony showing he was absent at the time.

Error in admitting, over objection, the following testimony of W. G. Moody: "Counsel for plaintiff: State, if you can, and give the reasons, and then your opinion, as to whether or not water could be supplied to the wheel of Mr. Berry's mill without the removal of those gates. Witness: I know it could. They might have put in larger gates, or more gates, by the removal of the wall. Say this book is the wall. There was a kind of arch, or circle, built around here [indicating], which extended out two or two and a half feet on each side. I think that should have been removed, and the bank made straight, and they could have put in more or larger gates." The objection urged at the trial was that the witness was obliged to give the facts before he could express any opinion. Movant contends further that the court should have required the witness to state the facts, and to pass upon those facts as a question of law,—as to whether they were sufficient on which to base an opinion; that movant had a right, before the opinion went to the jury, to have the court decide said question of law, and that the admission of the opinion was error, because it was not based upon sufficient facts, and shows that additional water could not have been furnished without changing the form of and enlarging the canal, and defendant was under no legal obligation to do this.

Error in admitting, over defendant's objection, the following question and answer of W. P. Cone: "Q. What were those gates used for in high water? A. I cannot say positively, of my own knowledge, what those gates were used for in times of high water. I never had seen them shut down in my life; but they were used to keep the water in the right direction, instead of letting it go into Lombard's raceway." The objection urged at the trial was: "I object. He certainly cannot go further than he has." Movant insists, further, that the admission of this evidence was error, because it was merely the opinion of the witness, without any facts upon which it was based, as to the use of the gates in high water, and also that it was irrelevant.

Error in admitting, over defendant's objection, the following questions and answers of A. H. McCarrel: "What would that cost [addition of more gates, and making the cross sections larger]? A. I do not know. Q. Would there have been any considerable expense attending the enlargement? A. I suppose one or two gates more could have been put in there for from between \$250 and \$400. Q. What would be the effect of a gate there let down in time of high water? A. The effect would be to stop the flow of water through there, if it fulfilled its functions." The objection urged at the trial was that the testimony was irrelevant, that it was opinion evidence, and that "of course, your honor understands our objections about any costs." Movant now contends that the admission of the testimony was error, because it tended to confuse and mislead the jury as to the issue involved, namely, whether it was necessary or reasonably proper to remove the obstructions in order to furnish an adequate supply of water, and not what it would cost to enlarge the canal, or put in additional gates.

Because the court erred in refusing to grant a nonsuit (at the close of plaintiff's evidence), which the defendant moved for on the ground that plaintiff had failed to show that it was not reasonably proper and necessary, in the language of the decision in this case, for the city to take out the gates and bulkhead to give Mr. Berry an additional supply of water, because the allegations and proof did not agree. They allege that the gates were put in there for the purpose of controlling high water, and the evidence totally fails to show any such purpose.

Error, in refusing to charge the following written request of defendant: "In making alterations and removing obstructions in the canal in order to furnish an adequate supply of water to its patrons, the city is only bound to the exercise of ordinary care and diligence, and may adopt such methods to carry out the purpose intended as to it may seem best to reach the result sought; and if the plan adopted by the city at the time of doing the work was (in the opinion of the city officers) reasonably proper as a means of accomplish-

ing the end in view, then that was all that could be required of the city, although, after the work was done, a different plan of accomplishing the work might be suggested by parties disconnected with the city as a better or more efficient plan. The city cannot be chargeable with negligence, as the law only required it to do that which was reasonably proper to accomplish the purpose of furnishing its patrons with an adequate supply of water." The error alleged being in omitting from said request the following words, inclosed in parentheses: "In the opinion of the city officers."

Error in refusing to charge the following written request: "The plaintiff can only recover upon proof of the allegations contained in his petition, and if you find from the evidence that the gates were not put in by the city, but by a private individual, and not for the purpose of regulating and controlling the volume of water passing through the head-race during periods of very high water in the Savannah river and consequent high water in the second level of the canal, then I charge you that he has failed to establish the allegations of his petition as to this branch of the case, and he cannot recover, although you may believe he met with the losses claimed in his bill of particulars. Movant contends that the request was a pertinent and legal charge, applicable to the facts in issue, and should have been given as requested."

Error, upon the call of the case for trial on May 13, 1895, in allowing plaintiff to amend his declaration by adding to the bill of particulars, thus increasing the amount of said bill, as follows: "One coal bin, \$250; one hr. wagon scales, and setting for same, worth \$120.00." Movant contends that the allowing of this amendment was error, because to the extent of \$370 it was a new and distinct cause of action; and, further, because the loss of said property occurred July 31, 1887, and, the amendment not being offered until May 13, 1895, the right to recover for said items was therefore barred by the statute of limitations.

M. P. Carroll and Wm. T. Davidson, for plaintiff in error. Black & Verdery and Boykin Wright, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 280)

**WAXELBAUM et al. v. BERRY et al.**

(Supreme Court of Georgia. Aug. 3, 1896.)

**ADMISSION OF EVIDENCE—HARMLESS ERROR**

1. Admitting in evidence a copy of a mortgage, even if the same was irrelevant, is not cause for a new trial, when the only objection to its admissibility was that the original had not been sufficiently accounted for, and it appears that this objection was not well taken.

2. Admitting in evidence hearsay testimony upon a material and controlling issue is cause for a new trial, when, upon the evidence as a whole, including the hearsay, the case was a

close one, and the verdict, but for the introduction of the illegal evidence, might have been different.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Action by J. M. Berry and others against S. Waxelbaum & Son and others. Judgment for plaintiffs. Defendants bring error. Reversed.

The following is the official report:

A petition was brought against Ellis & Outland, Waxelbaum & Son, and Mrs. Eliza Dukes, by 13 parties, creditors of Ellis & Outland, alleging that on March 29, 1893, Ellis executed to Waxelbaum & Son a deed to the storehouse and lot where the firm of Ellis & Outland did business, and on April 4, 1893, Outland made to Waxelbaum & Son a deed to 50 acres of land, each of which deeds expresses the consideration of \$4,907.35; that on December 2, 1893, and at various times prior thereto, Waxelbaum & Son received from Ellis & Outland notes, accounts, mortgages, etc., on various customers, as collateral security, amounting to \$5,000 or other large sum, and Waxelbaum & Son now hold said evidences of indebtedness, pretending that Ellis & Outland are due them large sums, which is denied by plaintiffs; that, on or about the date last named, Ellis & Outland made a pretended sale of their stock of merchandise to Waxelbaum & Son, on the pretended claim that they were still debtors to Waxelbaum & Son, and that said goods are probably worth \$5,000; that on November 29, 1893, Ellis & Outland executed and had recorded a mortgage for \$2,805.85, covering all their stock of goods; that no inventory of the stock was taken at the time of the sale to Waxelbaum & Son, whereby the amount on hand could be approximated with any degree of certainty, nor was there any delivery of the goods under said pretended sale, but Ellis & Outland are still (December 5, 1893) in possession of the storehouse and stock of goods, and conducting their usual business as merchants; that at the time of said sale they had money in the hands of factors in Savannah, and Waxelbaum & Son are claiming it; that defendants are combining and confederating to injure plaintiffs, and to defeat them in the collection of their claims; that Ellis & Outland are only indebted to Waxelbaum & Son, as claimed by them, about \$6,500, less the value of the storehouse and lands conveyed by said deeds, which were simply given as security to protect Waxelbaum & Son, who admit having received about \$5,000 in notes, accounts, etc., from Ellis & Outland, and pretend to hold title thereto under said sale and assignment; that they had, at the date of said sale, already received from Ellis & Outland \$4,907.35 in real estate, which, with the \$5,000 in notes, accounts, etc., is far more than sufficient to have paid the \$6,500 claimed by

them, and they took the bill of sale to the merchandise fraudulently and collusively, to aid Ellis & Outland to defraud and defeat plaintiffs and other creditors; that the mortgage to Mrs. Dukes (who is the mother-in-law of Ellis) is a part of the collusive scheme to defeat and defraud creditors; and plaintiffs charge that Ellis & Outland did not owe her the sum claimed therein, and that Waxelbaum & Son made the purchase of the stock of goods, and assumed payment of this mortgage, when they knew and were satisfied that it was fraudulent, and not a bona fide indebtedness of Ellis & Outland; and it would be a fraud on plaintiffs to allow Ellis & Outland to continue their business ostensibly for Waxelbaum & Son, but really for themselves, thereby allowing them to sell out and dispose of their goods in hand, and get the proceeds under cover of the pretended sale to Waxelbaum & Son. Plaintiffs pray that the sale be set aside as void; that the mortgage be canceled as void; that the deeds also be canceled, unless it appear that Ellis & Outland really owed said money, in which event the \$4,907.35 should be credited on the claim of Waxelbaum & Son; and that plaintiffs have judgment for the amounts of their claims against both Ellis & Outland and Waxelbaum & Son; general relief, etc.

Waxelbaum & Son demurred, for (1) no equity; (2) full and adequate remedy at law. The demurrer was overruled, and they excepted. Answers were made by all the defendants. In response to questions submitted by the court, the jury found: (1) The value of the property conveyed to Waxelbaum & Son by Ellis & Outland on December 2, 1893, is \$3,300. (2) On that date, Ellis & Outland owed Waxelbaum & Son \$6,778.51. (3) To the question, "How much did Waxelbaum & Son pay to Ellis & Outland for the stock of goods conveyed on Dec. 2nd, 1893, and how was it paid?" the jury answered: "\$500 credited on Ellis & Outland's account." (4) The mortgage to Mrs. Dukes was fraudulent, and Waxelbaum had reasonable grounds for suspecting same. (5) The purchase of the stock of goods was not a bona fide transaction, but was done to defeat the claims of creditors, and such intention was known to Waxelbaum & Son. (6) The transaction of December 2, 1893, was fraudulent, and Waxelbaum & Son, before their purchase, had grounds for suspecting the same. (7) Benefit was reserved to Ellis & Outland in the purchase of the stock of goods. Upon these findings, in connection with other and separate verdicts in favor of the plaintiffs for the amount of their claims against Ellis & Outland, judgment was entered that plaintiffs each recover said amount against Ellis & Outland, Waxelbaum & Son, and Mrs. Dukes. To this judgment defendants except, on the ground that judgment against Waxelbaum & Son should have been only for the pro

rata amount due each plaintiff, after allowing Waxelbaum & Son their pro rata part of their debt, equal with the other creditors, the jury having found that Ellis & Outland owed them \$6,778.51, and that the value of the stock was only \$3,300; and no judgment should be entered against Mrs. Dukes.

The defendants also moved for a new trial, which was refused, and they excepted. The motion alleges that each of the findings in answer to questions submitted was contrary to the evidence, and without evidence to support it; and that the court erred: In admitting in evidence, over objection that the original had not been sufficiently accounted for, a copy of a mortgage executed by Ellis & Outland to Waxelbaum & Son. The foundation for the admission of the copy was laid as follows: Plaintiffs served Waxelbaum & Son and Ellis & Outland with notice to produce the same, who replied to said notice that they had never had the possession, custody, or control of said original mortgage; that the same had never been delivered to them or accepted by them. Ellis was then called, and testified that the original mortgage made by Ellis & Outland to Waxelbaum & Son on November 29, 1893, had not been seen by him since December 2, 1893, when he had offered the same to E. A. Waxelbaum, the agent of Waxelbaum & Son, who refused to accept or receive the same; that he did not authorize the same placed of record, nor did he ever deliver it to the clerk of the superior court, but supposes that this was done by W. J. Ellis without authority from any one. Defendants contended that the clerk of the superior court was a competent witness to show the possession and disposition of the mortgage from the time of delivery, and by whom; and he was not called. This mortgage recites that Ellis & Outland are indebted to Waxelbaum & Son \$6,517.95, as is evidenced by ten notes for various sums, three dated March 21, 1893, six dated November 8, and one dated November 29, 1893, maturing at various dates from December 1, 1893, to March 1, 1894. It covers the stock of merchandise and fixtures in the storehouse of Ellis & Outland, as well as all other goods to be purchased, and recites that it is given as junior and subject to a mortgage of Mrs. Eliza Dukes for \$2,805.95. It bears date November 29, 1893, and an entry of record on December 5, 1893; and the copy introduced in evidence bears the following, signed by the clerk of the superior court: "I certify that the original mortgage of which the above and foregoing is a copy was not filed in my office for record until December 5, 1893, at 3 p. m." In admitting, over objection that it was irrelevant, the testimony of the sheriff that when he went to serve the petition on J. H. Ellis, on December 6, 1893, W. J. Ellis asked to be allowed to take some cartridges out, saying that there would be enough left for creditors,—about \$6,000 of stuff in the house; and that he remarked to witness, on the day he went to the store to get cartridges pending the tempo-

rary receivership, in the presence of J. H. Ellis, that the firm of Ellis & Outland had about \$6,000 in stock, and would be all right as soon as they could get rid of this embarrassment. (J. H. Ellis and W. R. Outland composed the firm. W. J. Ellis was in their employment, and is a brother of J. H. Ellis.)

In addition to the mortgage and the testimony before stated, the plaintiffs introduced in evidence: A draft, letter, and telegram dated December 2, 1893, from Ellis & Outland to Butler & Stevens; the draft being for \$254.40, in favor of J. M. Dixon & Co., and the letter directing Butler & Stevens to pay the same if Dixon & Co. would dismiss a garnishment served on Butler & Stevens in a suit against Ellis & Outland, and the telegram directing Butler & Stevens to sell all the cotton of Ellis & Outland, and remit the proceeds to Waxelbaum & Son. Dixon & Co. are parties plaintiff to this case. Also, a letter of the same date, from Ellis & Outland to Butler & Stevens (admitted to have been written by E. A. Waxelbaum), confirming the above telegram, and stating: "On November 29, we gave to S. Waxelbaum & Son a bill of sale for all cotton, and a draft for amounts with you. Please consider the same the property of S. Waxelbaum & Son." Also, a check drawn by Waxelbaum & Son on the Exchange Bank of Macon, January 23, 1894, in favor of Mrs. Dukes for \$1,250, by her indorsed to J. H. Ellis, by him indorsed to Waxelbaum & Son, and by them indorsed to I. Epstein & Bro. It was stamped "Paid" by said bank. Also, the tax returns of Mrs. Dukes from 1884 to 1894, the total amounts of which ranged from \$420 to \$1,518 (this last being the amount returned for 1893), and the bulk of returns being on real estate; the balance being on furniture, live stock, etc., and not including any return of money. Also, the testimony of E. A. Waxelbaum, as follows: "I was business manager for Waxelbaum & Son in 1893, and up to February, 1895. Was familiar with their dealings with Ellis & Outland, in whom they had the utmost confidence, and advanced them much more largely than their financial standing entitled them. In the spring of 1893, when they arranged for the advances, they secured the existing debt by deeds to the storehouse in Statesboro, and to 50 acres of land in Bulloch county, owned by Outland, and the agreement to deposit with Waxelbaum & Son, as further collateral security, all notes and obligations they should receive from their customers. The deeds taken were not sales of the realty, but the consideration expressed therein was the amount of Ellis & Outland's indebtedness at the time. This consideration was so stated by advice of Waxelbaum & Son's counsel. At the time of taking said deeds, Waxelbaum & Son made their bond for titles back to Ellis & Outland, conditioned to reconvey the realty upon the payment of said indebtedness. Thereafter Waxelbaum & Son made other advances of goods and money to Ellis & Outland, and, to enable them to pur-

chase goods from Dannenberg and Macon Hat Co., guarantied the payment of said purchases. Prior to December 2, 1893, they had paid the amount of \$877.26 to Dannenberg, which made the total indebtedness of Ellis & Outland to Waxelbaum & Son on that day \$6,778.51. They subsequently paid the Macon Hat Company their account of \$126.50, making the total indebtedness \$6,905.01. Not all the indebtedness of Ellis & Outland was due on December 2, 1893. Part of it had been liquidated by notes that became due thereafter. About \$1,300 was to fall due on December 1st and November 30th. I came to Statesboro to look after the collection thereof, and of such of it as was past due,—about \$2,200. I found a clerk in charge of the store, and Ellis & Outland gone, and could get no information about them. I also found, the day before, Mrs. Dukes' mortgage upon their stock had been recorded. I was very much worried at this, considering the relations that existed between Waxelbaum & Son and Ellis & Outland, and the many favors extended by the former to the latter. I thought Ellis & Outland had treated them badly. I never heard of their indebtedness to Mrs. Dukes, and did not know what to think of their preferring her. Having learned that Groover and Brannen were leading lawyers of Statesboro, I consulted them, and stated to them that on the return of Ellis & Outland, if I could not make satisfactory arrangements with them, I desired to employ them to take charge of Waxelbaum & Son's claim. If satisfactory arrangements were made, I would turn over to them for collection, anyhow, all the collateral notes Ellis & Outland had previously given and they could thereafter secure. Early on the morning of December 2d, I went to Ellis & Outland's store, and found them both there. They explained that they had been to Waynesboro, where Mrs. Dukes lived, to borrow some money from her to pay the amount of Waxelbaum & Son, and that they had succeeded in getting \$1,100 from her, which they paid to me, to be credited on Waxelbaum & Son's account. They explained their indebtedness, exhibiting their books, and I became convinced that her debt was valid. They offered me for Waxelbaum & Son a second mortgage on the stock of goods, which I rejected. This mortgage they said they had already drawn of the same date as Mrs. Dukes'. I have about 15 years' experience in estimating the value of a stock of goods. I can go carefully through a stock of goods, and, without taking an inventory, approximate their value. During the two days I had been in Statesboro, I had so investigated Ellis & Outland's stock, and thought its value about \$3,000 to \$3,300, and hoped to secure on their return a mortgage or some security from them on account of the obligations they were under to Waxelbaum & Son. When I became convinced of the validity of Mrs. Dukes' mortgage, I decided, as my house was extending its business by branch houses, and as it considered Statesboro a good point to es-

tablish a branch, it would be better to buy Ellis & Outland, and own the business, if it could be done reasonably; and I negotiated with them for this purpose. Finally, they agreed to sell their stock of goods for \$500, to be credited upon their indebtedness, and Waxelbaum & Son to assume the debt of Mrs. Dukes. This was the full market value of said stock. It was a bona fide purchase. There was no intent to hinder, delay, or defraud any creditor of Ellis & Outland to protect this house, so far as I could learn. There was no arrangement or understanding whatever by which any benefit was to be reserved to Ellis & Outland or either of them. After the purchase, considering Ellis to be an active and efficient man, and acquainted with the trade, I employed him to take charge of the sales department of the store, and management of the clerks, and keeping up the stock. Waxelbaum & Son were to send, and did thereafter send, Walden, who was brought up in their store in Macon, to have charge of the finances and books during the time negotiations were going on between me and Ellis. Groover came to see Ellis & Outland about the claim of J. M. Dixon, and suggested the giving of a draft to dissolve the garnishment. Regarding Groover as our attorney, I urged Ellis to comply with his suggestion, and it was done. Ellis & Outland claimed to have considerable cotton with their factors, and would have balances, and gave us orders for such balances on Butler & Stevens and Gordon & Co. I wrote the telegram and other letter of said date to Butler & Stevens, and Ellis signed them. We never succeeded in getting anything from Butler & Stevens. They claimed to have no balance. Gordon & Co. had a balance of \$——, which was paid us. In compliance with their agreement in the spring, Ellis & Outland turned over to us from time to time, as collateral security, the notes of their customers; and on December 2d they also delivered some of them, aggregating in their face about \$4,500 to \$5,000, but their customers were not indebted thereon that amount. These notes were taken from their customers for advances to be made, and in a good many instances they did not advance one-half what the notes called for. Before leaving, I went to Brannen and Groover, and notified them that I had made satisfactory arrangements with Ellis & Outland, and of my instructions to Ellis & Outland to deliver to Ellis [?] all collaterals we held, for collection. I did not talk to them during the two preceding days as a pretense of employment, just to keep them off of Ellis & Outland, but I was bona fide employing them, and thought I had done so. They did mention having a few small claims in their hands against Ellis & Outland, for collection. I did not know that they did not consider themselves employed until I heard of their filing this bill, after I returned to Macon. After the application for the receiver had been heard and dismissed, I may have said to Binswanger that I had

downed Groover and Brannen, but I have no distinct recollection of this conversation. Waxelbaum & Son have paid to Mrs. Dukes all of the mortgage debt except a small balance, but I have no personal knowledge of the detail of the payments. They were made by S. Waxelbaum. The \$2,805.95 and the mortgage to secure it, when Waxelbaum & Son had paid it down to \$800, was transferred to them, and they gave their note for this sum. I think about \$50 is still due on the note. The check of \$1,250, of January 23, 1894, was written by S. Waxelbaum (who is now very ill, not likely to recover), and I had no personal knowledge of why it was indorsed by Mrs. Dukes to Ellis, and then back to Waxelbaum & Son. Outland did not remain in the employ of Waxelbaum & Son after their purchase of the stock. The mortgage of November 29, 1893, from Ellis & Outland to Waxelbaum & Son, was never delivered to said firm or any of its agents, nor by them authorized to be put upon the records, nor in any way accepted or ratified by them. After purchasing the stock, they ran it until about February 1, 1895, when they sold to Simmons. They had added new stock, to between \$9,000 and \$10,000, and about \$11,000 was remitted to them. This included all collections from collaterals delivered by Ellis & Outland. During this year I made several efforts to sell the stock. I offered it at 70 cents on the dollar of invoice cost. The best offer made was 50 cents on the dollar; the storehouse and stock of goods for \$4,000; and out of this sum Waxelbaum & Son paid a mortgage of about \$700 for purchase money on the lot. This is usually the market price in bulk of an old stock. The invoice book of Ellis & Outland, in which was also kept the invoice of the stock after it passed to Waxelbaum & Son, was sent to Macon in January, 1895, to be checked up, and was destroyed in the fire that consumed the store of Waxelbaum & Son. The real estate taken as collateral I considered worth about \$2,500 at the time it was deeded to Waxelbaum & Son, subject to a \$700 mortgage. I am unable to explain the credit of \$1,100 of December 2d, except that Ellis paid it to me, and I was glad to get it. I did not consult Groover or Brannen as to the propriety of taking a bill of sale instead of a mortgage. I don't know but that the \$1,100 claimed by Ellis to have been got from Mrs. Dukes, added to what appeared to be due her on the books, made Ellis & Outland owe her \$3,900. I can't explain this. I can't explain how the check for \$1,250 was indorsed to Ellis, and by him back to Waxelbaum & Son."

J. H. Ellis testified: "Mrs. Dukes is my wife's mother. She owns three plantations and a house in Waynesboro, and has money besides. About three years ago she got \$2,000 from insurance she held on her brother's life. I borrowed from her several times money for Ellis & Outland, and used it in building the storehouse we occupied. This was known to Outland. Her account with us was entered

upon the books of Ellis & Outland. In November, 1893, I arranged with her to loan us about eleven hundred and odd dollars she then had, which I wanted to use in paying on my debts maturing with Waxelbaum & Son. She agreed to loan it to us, if we secured what was past due, as well as what was then about to be loaned. On completing this arrangement, I went to Brannen, and had him to draw up a note including both the past-due debt and the amount then agreed to be loaned, and mortgage to secure the same on our stock of goods. This mortgage was made and recorded on November 29, 1893, and Outland and I both went to Mrs. Dukes to get the money. We got the \$1,100 she promised, delivered her the note and mortgage, and returned. On December 2, 1893, E. A. Waxelbaum came, and I paid him \$1,100 of the money loaned us by Mrs. Dukes. I explained to him our indebtedness to her, and offered him the second mortgage on the stock. This he rejected, as of no value, and I left it in the store. I did not put it of record. Understood my brother had it done. He was not authorized so to do. After Waxelbaum rejected the mortgage, he offered to buy us out, and, after considerable negotiation, we agreed upon the sale. That was, Waxelbaum & Son were to assume and pay Mrs. Dukes' debt, and credit us with \$500. This was the full value of the stock of merchandise. There was no agreement, secret or spoken, or any understanding whatever, by which any benefit was reserved either to Outland or myself. In making the sale there was no intention on my part nor Outland's to hinder or delay our creditors, but our only intent was to prefer Waxelbaum & Son, who were our main creditors. The first loans made by Mrs. Dukes to us were out of rents collected from her plantations. After Waxelbaum & Son purchased our stock of merchandise, I remained with the house, and was salesman, and would make out bills of goods to be purchased, all of which were sent to Waxelbaum & Son to be approved. They then shipped or had them shipped to us. All moneys received and collected at this store were remitted to Waxelbaum & Son. We made some payments to Mrs. Dukes out of the store, by direction of Waxelbaum, and these were charged as remittances. Walden was the bookkeeper and manager of the finances. He alone had authority to draw checks. I did draw some, but they were rejected by the bank. On January 23, 1894, S. Waxelbaum came to Statesboro with Lamar, with whom he was on a trade for the stock. They having failed to trade, Waxelbaum went home with me. Mrs. Dukes was at my house. Waxelbaum there proposed to sell my wife a half interest in the profits of the stock carried on here. He suggested that he pay Mrs. Dukes that amount on her mortgage debt, and, if she would loan it or give it to my wife to be used in said purchase, it would benefit all parties. I saw my wife and Mrs. Dukes, and Mrs. Dukes agreed to loan my wife that sum

for said purchase, if Waxelbaum would pay that much on the mortgage debt. This being agreed to, Waxelbaum drew check for \$1,250 to be credited on the mortgage debt. Mrs. Dukes indorsed it to me, and I indorsed it to Waxelbaum, in payment of a half interest in the profits of the business for my wife; and the transaction was duly entered at the time on our books. I was to receive \$50 per month as a salary. About the 1st of February, 1895, Waxelbaum & Son sold out to Simmons the storehouse and stock for \$5,000; the house being valued at \$2,000, and the stock at \$3,000. Waxelbaum & Son took and accepted for my wife the uncollected collaterals then on hand, amounting to between \$1,700 and \$1,800. It was not generally known that my wife had an interest in the business which was conducted under the name of S. Waxelbaum & Son, but my recollection is that I informed Brannen, plaintiffs' counsel, of it at the time. Outland and I had not dissolved prior to December 2, 1893, though negotiations were going on between us for that purpose. He was present at the negotiations resulting in the sale to Waxelbaum & Son, and when I signed the bill of sale; and he ratified and agreed to it. Out of the sale of the storehouse, Waxelbaum & Son had to pay \$750 principal, besides interest, which were due on the purchase money of the lot. The 50 acres of land covered by their deed from Outland was sold for \$150. These were the full values of the real estate at the time."

Outland testified: "On November 29, 1893, J. H. Ellis proposed to buy my interest for \$500, and I agreed to accept it, and so did not consider I was a member of the firm on December 2, 1893. I had been in the firm about 18 months, and had put in it \$1,250. Mrs. Dukes loaned us the money to build the storehouse, and we were owing her for it on November 29, 1893. Ellis told me she had agreed to loan us about \$1,100 more if we would secure her by a mortgage. I agreed to it. The mortgage and note were drawn, and we went to Waynesboro to get it. I was not present when Mrs. Dukes gave Ellis the money, but, after Ellis got it, he showed it to me, and said Mrs. Dukes had loaned it; and we came home with it, and he turned it over to Waxelbaum, to be credited on their account. I know nothing about Ellis getting the money from Mrs. Dukes, except what he told me. He said he had got some money from her, but I did not see it."

W. J. Ellis testified: "My duties as clerk were principally outside the store, in the cotton yard. I did not have much familiarity with the goods in the store, and do not know their value. I do not remember making any remark about the value of the goods."

The attorney for Mrs. Dukes testified in corroboration of Waxelbaum as to the payments made by Waxelbaum & Son to her on her mortgage. There had been some negotiations for settlement, which he supposed, from statements of Waxelbaum's counsel, had been ef-

fect, and was not advised otherwise until too late for Mrs. Dukes to attend this trial, though he had telegraphed her to come.

Defendants introduced notes of Ellis & Outland to Waxelbaum & Son, corresponding with items set out in their answer; the bill of sale of December 2, 1893, expressing a consideration of \$500, and the assumption of the debt of Mrs. Dukes of \$2,805.95, secured by first mortgage on the stock; the note and mortgage of Mrs. Dukes, dated November 29, 1893, recorded on the same day, with credits leaving a balance of \$800 settled by note, and a transfer of the mortgage to Waxelbaum & Son; the cashbook and ledger of Waxelbaum & Son, kept in the store at Statesboro, showing entries made January 23, 1894, that Mrs. Ellis was credited with \$1,250 cash paid, and Waxelbaum & Son charged with \$1,250 paid by Mrs. Ellis; and the ledger of Ellis & Outland, containing the account of Mrs. Dukes.

M. H. Sandwich and Hardeman, Davis & Turner, for plaintiffs in error. D. R. Groover and J. A. Brannen, for defendants in error.

PER CURIAM. Judgment reversed.

(96 Ga. 766)

O'BRIEN v. BATTLE et al.

(Supreme Court of Georgia. Aug. 18, 1896.)

CONSTRUCTION OF WILL.—DEATH OF JOINT TRUSTEES  
—APPOINTMENT BY COURT.

Where a testator appointed his wife the sole executrix of his will, and, after therein conferring upon her certain powers in the capacity of trustee, further provided as follows: "If my executrix, who is hereby appointed trustee of the property willed in this item, shall die before the trusts herein provided for are completed, or she shall become unable to exercise the same, or unwilling to do so, then a new trustee may be appointed by my said executrix by an instrument in writing for that purpose in the nature of a will or deed, as she may select or prefer," and where, upon the death of the wife, the testator, by a codicil to the will, appointed two persons executors, "with all the powers, both as executors and as trustee, granted by the terms of said will to my said wife,"—*held*, that the testamentary scheme contemplated the continuous management of the trust property by two trustees, and not by one only; that upon the death of one of the trustees without a successor having been appointed the joint powers conferred upon both by name did not survive to the other; that the latter could not fill the vacancy by appointing a co-trustee to act with himself; that the power to do so devolved upon the judge of the superior court, and could be exercised by him upon a proper petition for that purpose presented by the cestui que trustant, and that it was his duty to appoint such co-trustee, notwithstanding the fact that the survivor objected to his so doing.

(Syllabus by the Court.)

Error from superior court, Warren county; Seaborn Reese, Judge.

Action by Minnie A. Battle and others against E. S. O'Brien and Maud B. Smith. Judgment for plaintiffs, and O'Brien brings error. *Affirmed*.

W. M. Howard, Jas. Whitehead, and H. McWhorter, for plaintiff in error.

Cited for plaintiff in error: *Gambell v. Trippe*, 75 Md. 252, 23 Atl. 461; *Bank v. Morse*, 43 N. J. Eq. 168, 18 Atl. 387; *Powles v. Jordan*, 62 Md. 503; *Scull v. Reeves*, 3 N. J. Eq. 84, 131; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Peter v. Beverly*, 10 Pet. 563; *Freem. Co. Ten.* § 48; *Parrott v. Edmondson*, 64 Ga. 332.

M. P. Reese and H. M. Holden, for defendant in error.

Cited for defendant in error: *Tift & B. Trusts*, pp. 366, 376, 385; *Perry, Trusts*, §§ 275, 277, 286; *White v. McKeon*, 92 Ga. 343, 17 S. E. 283; *Attorney General v. Barbour*, 121 Mass. 568; *Green v. Winter*, 31 N. J. Eq. 37; *Chase v. Davis*, 65 Me. 102; *Hospital v. Amory*, 12 Pick. 445; *Dixon v. Homer*, 12 Cush. 41.

SIMMONS, C. J. Mary L. Battle, Minnie A. Battle, E. L. Battle, and James H. Battle brought their petition against E. S. O'Brien, trustee, and Maud B. Smith, praying the appointment of Minnie A. Battle as co-trustee with E. S. O'Brien. At the hearing O'Brien demurred to the application. No evidence was introduced, but it seems that the allegations of fact in the petition were treated by counsel on both sides and the judge as true. The judge below overruled the demurrer and passed an order appointing Minnie A. Battle co-trustee, whereupon O'Brien excepted.

The petition alleged: Petitioners, with Maud B. Smith, are all of the children of Lawrence Battle, and they are now of full age. Lawrence Battle died in Warren county in 1878, leaving a last will, which was duly probated. By a codicil to this will, executed January 16, 1878, and which was proved and admitted to record, he appointed as his executors to carry out the will and as trustees under the same his brother, James J. Battle, and his brother-in-law, E. S. O'Brien, both of whom qualified, and took upon themselves the duties of executors and trustees under the will. Under the fifth item of the will there passed to the trustees 170 shares of stock in the Georgia Railroad & Banking Company. By the terms of the will the trustees are given a large discretion as to said trust property, being allowed to sell the same, and reinvest the proceeds, at any time they may deem prudent and wise. The income of dividends arising from the stock the trustees are required to collect and divide among the children of the testator in equal shares, both before and after they became of age; the corpus of the trust fund to be held intact by the trustees for the grandchildren of testator. The petition further alleged that it was the purpose and plan of the testator that there should be at all times two trustees to hold and look after the management of said trust fund, and in accordance with such purpose and plan he provided in the fifth item of the will that said trustees might appoint successors to themselves by a writing

for that purpose, either in the nature of a will or deed; and that in 1895 James J. Battle died without having exercised this power of appointment, so that now E. S. O'Brien is the sole trustee. Petitioners prayed for an order appointing Minnie A. Battle one of their trustees in the place of James J. Battle, alleging that she was in every way qualified to perform all the duties of such office. It appears from the copy of the will attached to the petition that the testator appointed his wife his sole executrix, and, after conferring upon her in the capacity of trustee certain powers of the nature above stated, further provided, in the fifth item, as follows: "If my executrix, who is hereby appointed trustee of the property willed in this item, shall die before the trusts herein provided for are completed, or shall become unable to exercise the same, or unwilling to do so, then a new trustee may be appointed by my said executrix by an instrument in writing for that purpose in the nature of a will or deed, as she may select or prefer." The codicil was as follows: "My wife, who was appointed executrix of said will, having died, I hereby appoint my brother, James J. Battle, and my friend, E. S. O'Brien, executors of said will, with all the powers, both as executors and as trustee, granted by the terms of said will to my said wife."

The grounds of demurrer were (1) that the facts alleged in the petition were not sufficient in law to authorize the appointment of a co-trustee; and (2) that there was no vacancy in the office of trustee, the entire trust having devolved by operation of law upon the surviving trustee upon the death of his co-trustee.

Where a will confers upon two trustees a power not coupled with an interest, and no words of survivorship are used in the instrument, the presumption of law is that the grantor contemplated a joint execution of the power, and the survivor cannot execute it; and, even where the power is coupled with an interest, the survivor cannot execute it if it appears to have been the intention of the testator that the power should not be exercised by one alone. In *1 Chance, Pow. §§ 645, 646*, it is said: "That a power vested in two or more cannot, on the decease of one or more of the donees, be executed by the survivors or survivor, is perfectly clear. The rule of law is that powers will not in themselves survive. Not, as is observed by Wilmut, lord commissioner, in *Mansell v. Mansell* [Wilm. Op. 36], that there is anything 'in an authority incompatible with its surviving' (or its being limited to be exercised by a surviving party), but if I say I will trust two, the law will not say I shall trust one; it is a joint confidence; but if it is limited to the survivor, it is saying I will trust two as long as they live, and afterwards one of them." \* \* \* Even as to trusts, which in general survive with and accompany the estate or interest to which they are annexed, a contrary intention

sometimes may be collected, and will prevail." In this instance the testator indicated the number which he deemed necessary for the proper administration and safety of the trust fund by appointing two persons as trustees, and at the same time making provision for substitution in the event of the death of one of them, as he did in expressly granting to them all the powers which he had before granted to his wife as trustee, one of which was the power of appointing a successor in the trust. It is apparent, therefore, that the testamentary scheme contemplated the continuous management of the trust property by two trustees, and not by one only. This power of appointment which was committed jointly to the trustees, and which they failed to exercise, could not, upon the death of one of them, be exercised by the other. "The power of appointing other trustees can be exercised only by those to whom it is expressly given. \* \* \* So, if the power be given to particular persons by name, without saying more, or adding words of survivorship, it must be exercised jointly, and upon the death of one of them the power will be gone." 1 Perry, Trusts, § 294. No trust, however, shall fail for the want of a trustee; and upon the death of the trustee in this instance without the appointment of a successor the power devolved upon the judge of the superior court upon a proper petition for that purpose by the cestuis que trustent. "The cestuis que trustent are entitled to have custody and administration of the trust fund confided to proper persons and to a proper number of persons. If the original number of trustees is reduced by death, the cestuis que trustent may call upon the court to appoint new trustees in place of those deceased." 1 Perry, Trusts, § 275. And see *White v. McKeon*, 92 Ga. 843, 17 S. E. 283. Under the facts of this case we think the discretion of the court was properly exercised. Judgment affirmed.

(119 N. C. 606)

## SHELDEN v. CITY OF ASHEVILLE.

(Supreme Court of North Carolina. Oct. 20, 1896.)

## MUNICIPAL CORPORATIONS — ACTION FOR NEGLIGENCE — INSTRUCTIONS — DEMAND.

1. In an action against a city to recover for a personal injury alleged to have been received by reason of the defective condition of a sidewalk, where there is no material conflict in the evidence as to the condition of the walk, it is proper to instruct as to what legal conclusions will follow if the testimony of the witnesses is believed.

2. Code, § 757, providing that no action shall be maintained against any city, county, or town on any debt or demand unless the claimant shall have made a demand on the proper municipal authorities, applies only to actions arising out of contracts.

Appeal from superior court, Buncombe county; Graham, Judge.

Action by Janet R. Shelden against the city of Asheville to recover for personal injuries

alleged to have been received by plaintiff by reason of a defective sidewalk. Judgment for plaintiff, and defendant appeals. Affirmed.

Davidson & Jones and J. C. Martin, for appellant. Moore & Moore, for appellee.

AVERY, J. The plaintiff testified that she had already passed over a portion of the plank sidewalk that was obviously bad, and over a portion of the street where it was entirely gone, when at a point directly in front of West's front door, where the sidewalk, "as far as she could see," was good, a strip gave way, and let her foot between the boards, so as to throw her down. In this fall she received the injury complained of. The court charged the jury that, if the sidewalk was in the condition testified to by the witnesses, and was allowed to remain so for any considerable length of time, which would raise a presumption of notice on the part of the city, or, if the authorities had actual notice of its state, the first issue (involving the question whether the injury was caused by the defendant's negligence) should be answered in the affirmative. This instruction was excepted to as a misdirection. The plaintiff had also testified that the plank which gave way and caused her fall was in the proper place, and apparently nailed down. The defendant contended that the testimony of one Henderson, a witness for the city, was in conflict with that of the plaintiff as to the condition of the sidewalk in front of West's house, and that the jury were, therefore, misdirected, in that it was their province to pass upon the conflicting evidence under proper instruction. It is conceded to be the general rule that the judge is not at liberty to single out a particular witness, and predicate his charge to the jury upon the theory that the testimony of that witness is to be taken as true, when it is in conflict with that of another witness. Did the witness Henderson contradict the plaintiff as to that particular question? After stating that in some places, not far from West's gate, the plank sidewalk was entirely gone, and in other places its condition was bad, Henderson testified in response to one question that the sidewalk "right in front of Mr. West's house" was "in pretty fair condition," and in answer to other questions that he "did not see any defective stringer or planks there," and that "the stringers were good, and the planks seemed good." The gravamen of the plaintiff's complaint was that the plank "seemed" safe, when in fact it was in such bad condition that it would not sustain her weight. The defendant seems, from the questions asked, to have embarked upon the examination of this witness, and to have conducted the defense in other respects upon a theory widely different from that adopted in the argument here, though the exceptions raise the question discussed. Henderson testified that much of

the sidewalk over which the plaintiff passed on the occasion when she sustained the injury complained of was in obviously unsafe condition, but, when his attention was directed to the precise locality where she fell, he admitted that the planks "seemed good" at that point. The statement that it was the best part of a plank sidewalk, some of which had been worn out and removed and other portions of which were obviously unsafe, was not a contradiction of the plaintiff's statement, which tended to show that, while apparently in good condition, the plank was left unfastened, and was, therefore, in fact unsafe, by reason of the neglect of the defendant's servants to secure it by nails driven into the end of it. If there was anything in the testimony of either of the witnesses from which the jury could have inferred that there was contributory negligence on the part of the plaintiff, the question was properly left to the jury under the rule of "the prudent man." She had a right to assume that the municipal authorities had done their duty, and it was not obvious in any aspect presented by the testimony of either witness that she could not safely proceed on that assumption in relying upon the soundness of the portion of the sidewalk that seemed secure. *Willis v. City of New Berne*, 118 N. C. 137, 24 S. E. 706; *Nathan v. Railway Co.*, 118 N. C. 1066, 24 S. E. 511; *Thompson v. City of Winston*, 118 N. C. 666, 24 S. E. 421; *Russell v. Town of Monroe*, 116 N. C. 720, 21 S. E. 550; *Tankard v. Railroad Co.*, 117 N. C. 561, 23 S. E. 46. She was not contradicted as to the statement that, though it appeared to one passing to be secure, the plank was not in fact fastened to the stringer. That statement went to the jury uncontradicted. Where, as in this case, but a single inference is deducible from the testimony, "it is the exclusive duty of the court to determine whether an injury has been caused by the negligence of one or the concurrent negligence of both of the parties." *Russell v. Railroad Co.*, 118 N. C. 1111, 24 S. E. 512; *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. 426; *Styles v. Railroad Co.*, 118 N. C. 1084, 24 S. E. 740; *Ellerbee v. Railroad Co.*, 118 N. C. 1024, 24 S. E. 808; *Lloyd v. Railroad Co.*, 118 N. C. 1010, 24 S. E. 805. It will appear from authorities cited above that it is only where more than one inference may be drawn from the testimony by reasonable minds that the jury are at liberty to apply, as a test, the question whether the injured party exercised such care as a prudent man, placed in the same situation, would have exercised. If, then, there was no material conflict in the testimony of the two witnesses as to the condition of the sidewalk at the place where the injury was sustained, it was not error for the court to tell the jury what legal conclusions would necessarily follow if they believed what the witnesses had said.

The question whether the provisions of section 757 of the Code apply to actions arising ex delicto was settled upon a full discussion

of the authorities by the well-considered opinion of Justice Furches in *Shields v. Town of Durham*, 118 N. C. 450, 24 S. E. 794, where it was held to apply only to actions arising out of contract. The other questions raised by the exceptions were either not strenuously insisted upon, or have not sufficient merit to make it incumbent on the court to discuss them. There was no error of which the defendant could justly complain. **Affirmed.**

(119 N. C. 81)

**BRANCH v. CHAPPELL et al.**

(Supreme Court of North Carolina. Oct. 20, 1896.)

**COUNTERCLAIM—ACTION ON CONTRACT—COUNTERCLAIM SOUNDING IN TORT.**

Under Code, § 244, providing that a defendant may plead as a counterclaim a cause of action arising out of the contract or transaction set forth as the foundation of plaintiff's claim, or connected with the subject of the action, the defendant in an action for work and labor in cutting timber may plead as a counterclaim damages sustained in consequence of a fire negligently set and permitted to escape by plaintiff, while so engaged at work for defendants, in disobedience of orders.

Appeal from superior court, Halifax county; Graham, Judge.

Action by George Branch against Edward Chappell and Walter Chappell, co-partners as Edward Chappell & Son, to recover for work and labor done in cutting timber for defendants. From a judgment for plaintiff, defendants appeal. **Reversed.**

MacRae & Day and E. T. Clark, for appellants.

CLARK, J. The plaintiff sued the defendants for work and labor done in cutting timber trees. The defendants offered, as a counterclaim, to show that the plaintiff, while so engaged at work for defendants, negligently permitted fire to escape, damaging the defendants, who were put also to much expense to put out the fire, to prevent greater damage. The sole question is whether the damage caused by the negligence of the plaintiff while engaged in work for defendants is a counterclaim in an action for compensation for such work. The spirit of the Code is to prevent multiplicity of actions, and by section 244, subsec. 1, a tort can be pleaded as a counterclaim to an action either in contract or tort, if "connected with the subject of the action." The subject of the action here is cutting timber for the defendants. Injury sustained from carelessness of the plaintiff while doing work for defendant is held to be "connected with the subject of the action," in an action by the workman for his wages. *Eaton v. Woolly*, 28 Wis. 628; *De Witt v. Cullings*, 32 Wis. 298; 1 Boone, Code Pl. § 90, note 1. Among instances somewhat similar, to an action by the mortgagee, after foreclosure sale, for deficiency, the mortgagor was allowed to plead a counterclaim for waste committed by the mortgagee while in possession. *Smith v.*

*Fife*, 2 Neb. 10; *Allen v. Shackleton*, 15 Ohio St. 145. To an action on a rent note, the tenant may set up a counterclaim for injury sustained by the landlord's interference with leased property (*Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847), or damages for false representations by the landlord that the farm was underdrained (*Norris v. Tharp*, 65 Ind. 47). Many similar cases are collected. Maxw. Code Pl. 544, and Bliss, Code Pl. (3d Ed.) § 374. In an action by a mechanic for wages, a counterclaim was allowed for material converted by him. *Wadley v. Davis*, 63 Barb. 500. And in *Bitting v. Thaxton*, 72 N. C. 541, in an action against an employe for converting the employer's property, a counterclaim was allowed the mechanic for his unpaid wages. In *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513, to an action to enforce a lien on a horse for the purchase money a counterclaim for breach of warranty was held good. It is not necessary to consider here whether the measure of damages is the cost of putting out the escaped fire, as the defendants seem to have intended to claim; for the judge rejected entirely, as not allowable, the defendants' offer to set up as a counterclaim that they had been damaged by the negligence of plaintiff while prosecuting the work for which he seeks to recover pay. It would seem that this was "connected with the subject-matter of the action," and that justice, and the terms of the Code, would permit the whole matter to be settled in one action. In rejecting evidence to sustain such counterclaim, there was error.

FAIRCLOTH, C. J., and FURCHES, J., dissent.

(119 N. C. 784)

**STATE v. MITCHELL.**

(Supreme Court of North Carolina. Oct. 20, 1896.)

**BASTARDY—INSTRUCTIONS—CONSTITUTIONAL LAW—RIGHT OF ACCUSED TO CONFRONT WITNESSES AND ACCUSER—WAIVER—CRIMINAL LAW—OBJECTIONS TO EVIDENCE.**

1. On appeal by defendant in bastardy proceedings from a judgment of a justice of the peace, it was not error to charge that the oath and examination of prosecutrix before the justice was, under the statute, *prima facie* evidence of defendant's guilt, and that the burden was on defendant to exonerate himself from the charge so made against him; the statute (Code, § 32) using the word "presumptive" to define evidence that must be received and treated as true "till rebutted by other testimony which may be introduced by the defendant."

2. Const. art. 1, § 11, provides that in all criminal prosecutions every man "has the right" to be informed of the accusation against him, and to confront the accusers and witnesses face to face. *Held*, that defendant in bastardy proceedings, if a criminal prosecution, can waive the right secured by such section.

3. In bastardy proceedings, on appeal from a justice court, where the oath and examination of prosecutrix before the justice is offered in evidence, in order to raise the question of defendant's constitutional rights to confront the accuser and witnesses, he must object on the

specific ground that he insists on the right to have prosecutrix introduced and to be confronted by her as his accuser, a general objection to the evidence being insufficient.

Clark, J., dissenting.<sup>1</sup>

Appeal from superior court, Wilson county; Boykin, Judge.

Proceeding in bastardy against Walter Mitchell. The defendant was arrested and brought before a justice of the peace upon the charge of bastardy. He entered the plea of not guilty, and, offering no evidence, upon the affidavit of complainant he was adjudged to be the father of the child, and judgment was entered against him accordingly, from which he appealed to the superior court, where a jury was impaneled, who returned a verdict of guilty. It was thereupon adjudged by the court that the judgment of the justice of the peace be affirmed, and the defendant appealed. Affirmed.

His honor charged the jury that the oath and examination of the prosecutrix taken before the justice of the peace were, under the statute, prima facie evidence of defendant's guilt, and that the burden was upon defendant to exonerate himself from the charge so made against him. To this charge the defendant excepted, and appealed from the judgment rendered.

The Attorney General and Perrin Busbee, for the State.

AVERY, J. The charge that the oath and examination of the mother of the bastard child was prima facie evidence of the defendant's guilt was not erroneous. *State v. Rogers*, 79 N. C. 609; Code, § 32. Prima facie evidence is that which is received or continues until the contrary is shown. *Kelly v. Jackson*, 6 Pet. 622. It is clear from the terms of the statute (Code, § 32) that the word "presumptive" is used there to define evidence that must be received and treated as true "till rebutted by other testimony which may be introduced by the defendant," and that it is therefore synonymous with "prima facie." We see no force in the suggestion that there was error in the use of one of the terms rather than the other.

Another ground of objection to the competency of the written examination of the mother is that its admission was a violation of Const. art. 1, § 11. That section provides that "in all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony." Conceding that, since the begetting of a bastard child has been made a criminal offense, the accused has the right to insist upon the production of his accusers, it is nevertheless a right that is waived by failure to assert it in apt time, like the guaranty contained in the same section that he shall not be compelled to give evidence against himself. The application of the principle to the

crimination of a party by his own testimony is so common in practice as to have become familiar learning. When asked the criminalizing question, it is the privilege of the witness to determine whether it is preferable to answer or to ask the protection of his constitutional right. Indeed, it is a general rule that a party may waive the benefit of a constitutional as well as a statutory provision. *Sedg. St. Const. Law*, p. 111. The right may be waived either by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *Id.*; *Lee v. Tillotson*, 24 Wend. 337; Const. art. 1, § 19; Code, § 398; *Reynolds v. U. S.*, 98 U. S. 145; *State v. Behrman*, 114 N. C. 797, 19 S. E. 220; *State v. Thomas*, 64 N. C. 76; *Driller Co. v. Worth*, 118 N. C. 746, 24 S. E. 517; *Id.*, 117 N. C. 520, 23 S. E. 427. It is settled law in North Carolina that the important privilege of being present in person, so as to confront one's accusers, on trial for a criminal offense, may, except in capital felonies, be waived by counsel. *State v. Jacobs*, 107 N. C. 779, 11 S. E. 962; *State v. Weaver*, 13 Ired. 203; *State v. Paylor*, 89 N. C. 539; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185. For like reason, one who is actually or constructively present at the trial of an indictment against him for offenses of the lower grade must be deemed to have waived, when he does not in express terms insist upon, the bodily presence of the prosecutrix on the witness stand. The legislature has made a defendant a competent witness on the trial of an indictment against himself. He may exercise this privilege or not, but, if he once elects to go upon the stand, he is deemed to have waived his right to refuse to answer questions intended to elicit self-criminating testimony from him, where such questions would have been competent on the examination of other witnesses. *State v. Thomas*, 98 N. C. 590, 4 S. E. 518; *State v. Allen*, 107 N. C. 805, 11 S. E. 1016. Where a statute gives a prisoner the privilege of taking depositions outside of the state, upon condition that the state shall have the like right, it has been held that he waives the benefit of the constitutional privilege by the exercise of the right to avail himself of such testimony. *Butler v. State*, 97 Ind. 878. He takes the new statutory privilege upon the condition annexed by its provisions to its acceptance,—that he shall thereby waive his constitutional right to face the witness. The legislature clearly has the general power to pass statutes giving artificial weight to any particular kind of testimony in specified classes of criminal actions. *State v. Burton*, 113 N. C. 664, 18 S. E. 657, and cases there cited. The statute (Code, § 32) must be enforced till it comes in conflict with the constitution. The broad exception to the admissibility of the oath and examination of the woman is sufficient to raise the question which we first discussed; but, if the defendant intended to throw himself upon his constitutional privileges, which he might, at his option, waive or demand, it

<sup>1</sup> For dissenting opinion, see 25 S. E. 1020.

was incumbent on him to object on the specific ground that he insisted upon the right to have the woman introduced and to be confronted by her as his accuser. Had the defendant pursued this course, it may be that the solicitor would have had the prosecutrix sworn, and tendered her for cross-examination. Such an offer unquestionably would have afforded him the opportunity contemplated by the constitution of meeting his antagonist face to face. *State v. Thomas*, 64 N. C. 76. This general assignment of error in admitting a document declared competent by statute no more raises the constitutional question than would an exception to criminal testimony given by a witness without objection, on the specific ground that it might subject him to punishment. The constitutional right, if it existed, was waived by the failure to object to the testimony, because the right guaranteed to him was not that he should be compelled to confront his accuser in a case like that before us, but that he might on demand have her compelled to meet him "face to face." No error.

(119 N. C. 184)

**FARMERS' STATE ALLIANCE v.  
MURRELL et al.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**VENUE—ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS—MOTION TO REMOVE CAUSE—TIME OF HEARING.**

1. Code, § 193, providing that all actions on official bonds, "or against" executors and administrators in their official capacity, shall be instituted in the county where the bond shall have been given, if the principal, or any of the sureties, is in the county, etc., applies to all actions against executors and administrators sued in their official capacity, whether on their official bond or for the purpose of holding them liable for any act of theirs as such personal representatives, or for any liability incurred by decedent in his lifetime. *Stanly v. Mason*, 69 N. C. 1, followed.

2. When an application for the removal of a cause to another county is made in writing before the time for answering expires, as provided by Code, § 195, it rests with the court and parties as to when the motion shall be heard.

Appeal from superior court, Wake county; McIver, Judge.

Action by the Farmers' State Alliance of North Carolina against William Murrell and others. A motion made by defendants to remove the cause to another county for trial was granted, and plaintiff appeals. Affirmed.

W. J. Peela, for appellant. J. B. Batchelor, for appellees.

**FURCHES, J.** This is a motion to remove the cause for trial from the county of Wake to the county of Onslow. The motion was allowed, and plaintiff appealed. There is no dispute but that the court has jurisdiction of the subject-matter of this action, and this motion only affects the venue. Two of the defendants are sued as administrators of Ell-

jah Murrell, who were appointed, qualified, and gave bond as such in the county of Onslow; and all the defendants reside in that county, and all join in the application to remove. *Clark v. Peebles*, 100 N. C. 348, 6 S. E. 798. The plaintiff being a domestic corporation, it has no residence, as provided under section 192 of the Code. *Cline v. Manufacturing Co.*, 118 N. C. 837, 21 S. E. 791. But if it had, and resided in Wake county, section 193 provides that "all actions upon official bonds, or against executors and administrators in their official capacity shall be instituted in the county where the bond shall have been given, if the principal or any of the sureties on the bond is in the county; if not then in the plaintiff's county." This section has been construed to apply to all actions against executors and administrators sued in their official capacity, whether on their official bond or for the purpose of holding them liable for any act of theirs as such personal representative, or for any liability their testator or intestate incurred in his lifetime. *Stanly v. Mason*, 69 N. C. 1; *Foy v. Morehead*, 69 N. C. 512; *Bidwell v. King*, 71 N. C. 287. It is true there is an intimation in *Clark v. Peebles*, 100 N. C. 348, 6 S. E. 798, that seems to doubt the correctness of the ruling in *Stanly v. Mason*, supra, as to debts due by the intestate or testator before his death. But it was not overruled, as it was not necessary to pass upon that point in that case; and, after considering the question in this case, we have concluded not to do so, as the statute seems to be plainly written in that way. *Wood v. Morgan*, 118 N. C. 749, 24 S. E. 522.

This would seem to dispose of the case, but for the fact that the action was returnable to April term, 1894, and this motion was not heard until April term, 1896; and section 195 of the Code provides that application must be made in writing before the time for answering expires, which was at April term, 1894. But it was found as a fact that this application was made by the defendants at the return term of the court. This finding of fact cures what seems to be a ground for reversing the ruling of the court in making the order of removal; for, after the motion was properly made, it was then a matter with the parties and the court as to when it should be heard. It may be the plaintiff did not ask a hearing until spring, 1896, and defendants should not be prejudiced on that account. The facts found we cannot review, and, upon the facts as found, we find no error in the ruling of the court. Affirmed.

(119 N. C. 123)

**ARNOLD v. PORTER.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**COURTS—JURISDICTION—CONTROVERSY WITHOUT ACTION.**

The court has no jurisdiction of a controversy without action, under Code, § 567, in the

absence of the affidavit required by such section, that the proceeding is in good faith to determine the rights of the parties.

Appeal from superior court, Wake county; Boykin, Judge.

Controversy without action between T. A. Arnold, as plaintiff, and John Porter, receiver of the Park Lumber Company, as defendant, under Code, § 567 et seq. From a judgment in favor of plaintiff, defendant appeals. Proceeding dismissed.

S. G. Ryan and Armistead Jones, for appellant. Shepherd & Busbee, for appellee.

**MONTGOMERY, J.** It was intended, it seems, to submit without action a case containing facts upon which the controversy depends, under section 567 of the Code. It appears that the affidavit required by the statute, to the effect that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties, was never made or filed. Such an affidavit is a prerequisite to the exercise of jurisdiction in the matter. *Jones v. Commissioners*, 88 N. C. 56; *Grant v. Newsom*, 81 N. C. 36. The proceeding must be dismissed. Dismissed.

(119 N. C. 783)

#### STATE v. DUKES.

(Supreme Court of North Carolina. Oct. 20, 1896.)

#### FORNICATION—ADMISSIBILITY OF EVIDENCE—SUFFICIENCY OF EVIDENCE.

1. On trial for fornication, where it appeared that defendant had been seen, two years before his indictment, taking very indecent liberties with the woman, and they had been seen frequently together after that up to a few months before the woman's child was born, an instruction that evidence of an act of illicit intercourse which occurred more than two years before indictment found was not competent as substantive testimony, but might be considered as corroborating evidence of subsequent association, was not error.

2. On trial for fornication, an instruction that the offense was of such nature that it was not necessary to show by direct proof the actual bedding and cohabiting together, but that it was sufficient to show, beyond a reasonable doubt, circumstances from which the jury might reasonably infer the guilt of the parties, was not error.

Appeal from superior court, Northampton county; Graham, Judge.

Cad Dukes and Louisa Gay were convicted of fornication and adultery, and the defendant Dukes appeals. Affirmed.

MacRae & Day and Mr. Calvert, for appellant. The Attorney General and Perrin Busbee, for the State.

**AVERY, J.** More than two years before the male defendant was indicted, he was seen, if the testimony was believed, taking a very indecent liberty with the female defendant, who, on remonstrance by the person who saw the act, said, in presence of Cad Dukes, "it was pretty much what they had done." In connection with this, there

was evidence tending to show that they lived a half mile apart, and that a witness had seen them frequently together, at his own house and elsewhere, up to 10 months ago. The witness who testified to the indecent liberty had not seen them together since last spring. It was in evidence that she gave birth to a child last spring. The defendants' counsel asked the court to instruct the jury that, upon the whole evidence, the defendants are not guilty. To the refusal of the court to comply with this request, the defendant Cad Dukes excepted and appealed.

The court told the jury, in substance, that this offense was of such a nature that it was not necessary to show by direct proof the actual bedding and cohabiting together, but that it was sufficient to show, beyond a reasonable doubt, circumstances from which the jury might reasonably infer the guilt of the parties. They were instructed further that evidence of an act of illegal intercourse which occurred more than two years before the finding of the indictment was not competent as substantive testimony, but might be considered, if believed, as corroborating evidence of subsequent association. There was no error in the instructions given. *State v. Guest*, 100 N. C. 410, 6 S. E. 253; *State v. Kemp*, 87 N. C. 538; *State v. Potteet*, 8 Ired. 23; *State v. Pippin*, 88 N. C. 646. The rules of evidence are founded upon reason and common sense. When parties who have been once seen in the attitude described by a witness continue to associate with each other for a year, in which time the visits of the male defendant often average twice a week, the law allows a juror to draw the same inference that every other reasonable man deduces from such circumstances. No error.

(119 N. C. 715)

#### MARKHAM v. RALEIGH & G. R. CO.

(Supreme Court of North Carolina. Oct. 27, 1896.)

#### RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for the death of plaintiff's intestate, it appeared that deceased was walking beside defendant's railroad, in a footpath at the end of the cross-ties, and that if he had remained in the path the train would not have struck him. There was evidence that deceased, before he died, said he heard a train coming, and ran to get out of the way, and fell, and his arm was caught by the front wheel. His son, who was with him at the time, testified that deceased could have seen the train, had he looked back. *Held*, that the evidence did not justify a verdict for plaintiff.

Appeal from superior court, Wake county; McIver, Judge.

Action by J. C. Markham, administrator of the estate of Perry, deceased, against the Raleigh & Gaston Railroad Company for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment of

compulsory nonsuit, plaintiff appeals. Affirmed.

A son of the intestate testified that he was with him, going towards home from Wake Forest. "We were walking on the path beside the railroad. I passed him, and went over past the crossing. Heard the train blow, and looked back, and saw him down by the side of the road, at the end of the cross-ties, twenty-five or thirty feet from the crossing. The engine blew after it passed me, twenty-five or thirty yards from the crossing. I heard no other blow or signal. I joined my father at Forestville. He was fifty years old, strong and healthy. He was a farmer. I worked with him. He made \$400 or \$500 per year. He had been drinking, but was not a drunken man. He had a pint of whisky, and four men drank out of it. There was something like a gill left." Cross-examination: "The road crossing was about 150 yards from the depot. I suppose the train was at the depot when we passed along the dirt road. I could have seen it if I had looked. That year my father was not farming. He was hiring himself out." Dr. J. B. Powers, a witness for the defendant: "I was at Wake Forest that day and was called to see intestate, and reached him in ten or thirteen minutes after the injury. He said he was running up the path, stumped his toe, and fell; that the engine did not touch him, but front wheel ran over his arm. He died from the injury. I smelt whisky, but did not see any." Cross-examination: "He was rational. He said he heard the train coming, and ran to get out of the way, and fell." Mrs. Perry, the wife of the intestate, testified that he was fifty years old; a farmer; had no mean habits, but drank his dram. He did not make a habit of drinking. James Hartsfield, a witness for plaintiff, testified: "I met intestate, and was twenty-five yards from him when he fell. I heard the train blow when it had passed the road crossing." Cross-examination: "I was not looking at him when the train passed. If he had stepped to one side the train would not have hit him. It would not hit him in the path. When I saw him fall the engine was opposite to him."

B. C. Beckwith, for appellant. L. R. Watts, MacRae & Day, and J. B. Batchelor, for appellee.

FAIRCLOTH, C. J. His honor properly held that the evidence in this case was insufficient to justify a jury in returning a verdict for the plaintiff. It appears that plaintiff's intestate was not on the roadbed, but walking along the path beside the railroad; that is, the footpath at the end of the cross-ties. The son said he could have seen the train if he had looked back. The deceased said he heard the train coming, and ran to get out of the way, and fell, and his arm was caught by the front wheel. It further appeared that if he had remained in the path

the train would not have struck him. *Young v. Railroad Co.*, 116 N. C. 932, 21 S. E. 177. An engineer seeing a person walking on the road track, without any reason to know or believe that such person is disabled in some way from seeing and hearing, and understanding the situation, may reasonably assume that such person is sane, and, as a prudent man, will either remain on the side path, where he is safe, or will leave the roadbed proper, when the train is approaching. If the deceased fell in the wrong direction, from running or otherwise, near by the train, when it was too late for the engineer to stop, it was his misfortune, and not the fault of the engineer. *Matthews v. Railroad Co.*, 117 N. C. 640, 23 S. E. 177.

Affirmed.

(119 N. C. 710)

ALLEN v. WILMINGTON & W. B. CO.

(Supreme Court of North Carolina. Oct. 20, 1896.)

CARRIERS—EJECTION OF PASSENGER—PUNITIVE DAMAGES—APPEAL.

1. A person who enters a railroad train which does not stop at the station to which he purchased a ticket, and who refuses to pay fare to any other station, is not entitled to recover punitive damages for being ejected, where it is done without insolence, and no unnecessary force is used.

2. Where an action has been tried on the theory that it was one to recover for a tort, it must be reviewed on appeal on the same theory, though the complaint may state a cause of action for a breach of contract.

Appeal from superior court, Halifax county; Robinson, Judge.

Action by W. B. Allen against the Wilmington & Weldon Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

David Bell and Mullen & Daniel, for appellant. MacRae & Day, for appellee.

FURCHES, J. In reviewing this case upon the record, and the manner in which it was presented and tried in the court below, the judgment must be affirmed. The complaint was evidently intended to be an action of tort, and it was so tried. The plaintiff bought a through ticket at Goldsboro, from that place to Enfield, on defendant's road. After he bought the ticket, a friend of his, thinking the train did not go through to Enfield that night, made inquiry of the defendant's ticket agent at Goldsboro as to whether that train (called the "Shoo Fly") went through to Enfield that night, and was told it did. After plaintiff boarded this train, he was told by the conductor, upon presenting his ticket, that this train did not go to Enfield, but stopped at Rocky Mount, but was informed by the conductor that another train passed Rocky Mount, and for plaintiff to take that train; that it did not stop at Enfield, but for plaintiff to take that train, and, as he had a ticket for Enfield, the conductor would have to stop

and let him off. Under these circumstances and this advice, plaintiff boarded this train as it passed Rocky Mount. Upon presenting his ticket to the conductor, soon after leaving Rocky Mount, he was told that the train did not stop at Enfield; and the conductor refused to take his ticket unless the plaintiff would pay the additional fare to the next station, where his train would stop. This the plaintiff refused to do, and the conductor stopped the train, and asked the plaintiff to get off. This he said he would not do, unless he was put off, and told the conductor to take hold of him, which he did, and plaintiff got off. It is alleged in the complaint that plaintiff was rudely, insolently, and with force and violence ejected from defendant's train. But plaintiff's own evidence, as well as that of the other witnesses, shows that this was not the case.

Upon this state of facts, plaintiff insisted that he was entitled to punitive damages for this wrongful, violent, and forcible ejection. On the trial, the plaintiff tendered three issues which he asked the court to submit to the jury. The first was: "Did the defendant company, through its conductor, wrongfully eject the plaintiff from its cars on the 17th of December, 1893?" The second issue was in the same language as the first, except it added the words "rudely, wantonly, forcibly, and wickedly" eject the plaintiff from its cars on the 17th of December, 1893. And the third: "What damage has the plaintiff sustained by such ejection?" The court did not submit the first and second issues in the precise language in which they were tendered, leaving out of the first issue "through its conductor," rejecting the second issue, and giving the third in the language in which it was tendered by the plaintiff. We see no error in this ruling. The first issue is, in substance, the same as it was in the language employed by plaintiff, only improved by rejecting the surplus words "through its conductor." The second issue was substantially the same as the first, except it added additional adverbs as to the force used to eject the plaintiff from defendant's cars. We fail to see that refusing to submit this issue prejudiced the plaintiff. If it had been submitted, it would have devolved upon the plaintiff to show from the evidence that it was true; and, upon an examination of the evidence (the whole of which is sent up as upon a nonsuit), we fail to find any evidence to sustain the allegations of force described in this issue. The plaintiff's own evidence does not do so. The third issue was submitted to the jury in the same language as tendered by the plaintiff.

The plaintiff tendered three prayers for instructions, all asking the court to charge that plaintiff was entitled to recover punitive damages for the wrongful ejection of plaintiff from defendant's cars after leaving Rocky Mount, on the night of the 17th December, 1893. The court declined to give these instructions, and we see no error in this, as there was no force

used by defendant in making this ejection, and as plaintiff was wrongfully on this train. If he had been rightfully on the train, having paid his fare, or being ready to pay his fare, to the next station, where the train stopped, any ejection would have been wrongful,—a tort,—and plaintiff would have been entitled to recover. The opinion of the conductor on the "Shoo Fly" train that plaintiff could take the fast train, and, as he had a ticket to Enfield, the conductor would be bound to stop the train, and let him off, was misleading to the plaintiff. But the conductor on the "Shoo Fly" train had no right to instruct the conductor on the fast train, and he was not bound by it. In fact, he had no right to do so if the advice of the conductor on the "Shoo Fly" was in conflict with his instructions from the company. 1 Wood, Ry. Law, § 164; Mechem, Ag. § 273 et seq. As plaintiff was wrongfully on this fast train, without paying or offering to pay his fare from Enfield to the next station where the train was scheduled to stop, and in fact refused to pay it, it was not only the right, but the duty, of the conductor to put the plaintiff off. But he must do this without using unnecessary force, and without insolence. Railroad Co. v. Nuzum, 19 Am. Rep. 703; 2 Field, Briefs, 59, 60; Railroad Co. v. Stockdale (Md.) 34 Atl. 880.

This seems to dispose of the case as presented by the record and arguments. But it was suggested in conference that the plaintiff probably had a cause of action for breach of contract for failing to carry him through to Enfield that night, the ticket not allowing him to stop over; and that, although the complaint appears to have been drawn in tort. Whether there are not sufficient averments in the complaint to constitute a cause of action on contract, under Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566, and that line of cases, we are not prepared to say. But in these cases of defective statement of cause of action the actions were tried upon the true ground of complaint, and upon appeal this court held that, where sufficient appeared in the complaint to make out the case tried, this court would sustain the judgment. But that is not the case here. The complaint is not only defective in stating a cause of action on contract, but the case was tried as a tort, and it was so argued before us. The plaintiff's brief commences with the following paragraphs: "This was an action brought by the plaintiff to recover damages from defendant for being wrongfully ejected from its cars on the night of the 17th December, 1893." "The only thing to consider in this appeal is, did the plaintiff make out a case from his standpoint?" And, as we find no error in the court's trying this case as a tort, for ejecting the plaintiff from defendant's cars (the plaintiff insisting that tort was the action he brought and tried, and insisting that this is the only thing to be considered in this appeal), we do not think it would be fair to the parties nor to the court that we should look

out to see if it might not have been tried on a different theory, with different results. While we would not feel ourselves bound by an erroneous admission of a proposition of law, we must have respect to the manner in which parties present and try their cases. Judgment affirmed.

(119 N. C. 95)

WILKINS et al. v. JONES et al.

(Supreme Court of North Carolina. Oct. 20, 1896.)

**MORTGAGES—DESCRIPTION—PAROL TESTIMONY TO EXPLAIN.**

A description of land, in a mortgage, as "thirty acres of land situated in Stony Creek township, adjoining the lands of" other persons named, is not so vague and uncertain but that it may be aided by parol testimony.

Appeal from superior court, Nash county; Boykin, Judge.

Action by Henry Wilkins and others against James Carter Jones and others to recover possession of 30 acres of land which defendants claimed by purchase under a mortgage executed by the ancestor of plaintiffs, covering land described as "thirty acres of land situated in Stony Creek township, adjoining the lands of the late James Woodruff, James Carter Jones, and Richard Barnes." The court excluded testimony offered by defendants to identify the land described as that in suit. Judgment for plaintiffs, and defendants appeal. Reversed.

B. H. Bunn and Jacob Battle, for appellants. B. B. Massenburg, for appellees.

AVERY, J. There was error in the ruling of the court that the description was too vague and uncertain to be explained by parol testimony. *Perry v. Scott*, 109 N. C. 374, 14 S. E. 294. New trial.

(119 N. C. 804)

STATE v. GLENN.

(Supreme Court of North Carolina. Oct. 20, 1896.)

**AFFRAY—SUFFICIENCY OF EVIDENCE.**

On trial of G., indicted with A. for an affray and mutually assaulting each other with a deadly weapon, the evidence was that defendant, after walking up and down the street, swearing he could whip any man, struck A. in the face with his fist, the blow being heard across the street; that A. struck defendant with a pair of iron pliers; that defendant then put his hand in his pocket, as if to draw a knife, and A. caught him by the arms, and prevented him getting his hand out, etc. *Held*, that the evidence supported a verdict of guilty.

Appeal from superior court, Vance county; Boykin, Judge.

E. G. Glenn and Fred Amis were indicted for an affray and mutually assaulting each other with a deadly weapon, and Amis pleaded guilty. Glenn was convicted, and appeals. Affirmed.

Case: The defendant Amis pleaded guilty, and, upon the trial of defendant Glenn, L. W. Barnes (witness for the state) testified that

defendant Glenn was on the street in the town of Henderson, walking up and down, cursing and swearing that he was six feet, and could whip any man; that the defendant Amis was a few steps away, near a post; that defendant Glenn walked up to defendant Amis, and struck him with his fist in the face, and knocked his head against the nearby post, the lick sounding loud enough to be plainly heard across the street by witness; that defendant Amis struck Glenn with a pair of iron pliers; that defendant Glenn then put his hand in his pocket, as if to draw a knife, and defendant Amis caught him by the arms, and prevented him from getting his hand out; that defendant Glenn got away, and jumped on a box, and said he was an officer, and commanded the peace. Other witnesses for the state testified to the same. Defendant Glenn testified in his own behalf, admitted he struck the defendant Amis, but said he was not mad with Amis at the time, and that Amis struck him with the pair of iron pliers. There was no evidence that Glenn had any weapon.

T. M. Pittman, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. Glenn and Amis were indicted for an affray and mutually assaulting and beating each other with a deadly weapon. Amis pleaded guilty, and Glenn was convicted. He appealed, on the ground that no deadly weapon was used, and that the verdict was contrary to the evidence. We have found no authority to support his position. *State v. Allen*, 4 Hawks, 356; *State v. Stanly*, 4 Jones (N. C.) 290; *State v. Ridley*, 114 N. C. 827, 19 S. E. 149. We are not informed whether the weapons used were deadly weapons or not, but we do observe that the application of the pair of iron pliers, whatever they may be, had an immediate and salutary effect by transforming a six-foot clubber into an officer, who at once began to discharge his duties by commanding the peace. We assume that the duties and privileges of a peace officer were considered and explained by the court, but the jury did not feel it to be their duty to excuse this peace officer for clubbing a citizen in the face with his fist, without any provocation; and, if we were permitted to consider the question, we think we could approve the verdict. We have no doubt that his honor, in pronouncing judgment, gave the defendant full credit for his good intentions in trying to preserve the peace. Affirmed.

(119 N. C. 50)

STATE ex rel. BLOUNT et al. v. SIMMONS et al.

(Supreme Court of North Carolina. Oct. 20, 1896.)

**ACTION BY STATE—LIABILITY OF STATE FOR COSTS—WHAT CONSTITUTES CLAIM AGAINST STATE.**

1. Under Code, § 536, providing that, in all civil actions brought in the name of the state by an officer duly authorized, the state shall be

liable for costs to the same extent as private parties, it is proper to enter judgment against the state for costs, on failure of an action by the state, under Acts 1893, c. 287, § 4, to vacate an oyster-bed entry.

2. Costs of an unsuccessful action by the state, under Acts 1893, c. 287, § 4, to vacate an oyster-bed entry, for which the state is made liable by Code, § 536, do not constitute a claim against the state, within the meaning of Const. art. 4, § 9, providing that the supreme court shall have original jurisdiction to hear claims against the state.

Appeal from superior court, Pamlico county; Robinson, Judge.

Action by the state of North Carolina, on the relation of J. H. Blount and others, against W. S. Simmons and the commissioners of Pamlico county, to vacate an oyster-bed entry. From a judgment against it for costs, the state appeals. Affirmed.

The Attorney General, for appellants. Simmons & Ward, for appellees.

FAIRCLOTH, C. J. This action was authorized by Acts 1893, c. 287, § 4. It has been held that the defendant is not liable for the costs consequent upon the failure of the action. *State v. Simmons*, 118 N. C. 9, 23 S. E. 923. His honor below entered judgment against the state for the costs of the action, and the state has appealed. Is the state liable for the costs of its own action unsuccessfully prosecuted? It is urged that no citizen can maintain an action against the state, and that is true. *Battle v. Thompson*, 65 N. C. 406. But this is not an action against the state. It is an action by the state. And the state has declared, by its own legislation, that in such cases it shall be liable for costs to the same extent as private parties. Code, § 536. The attorney general insists that the state cannot be sued in any case, by reason of its sovereign character, and because the constitution (article 4, § 9) provides a remedy.<sup>1</sup> That article is a relaxation of the rule that the state cannot be sued, and enables the citizen to obtain the opinion of the supreme court as a recommendation to the legislature, and no more. The application to the court cannot result in a judgment for the claim of the citizen. The costs in this case are not strictly a claim against the state, as contemplated by article 4, § 9, but only an incident of an action by the state, for which its agent has assumed that it will be liable to the same extent as private parties. We find nothing in the constitution depriving the legislature of power to enact Code, § 536, and we do not think it will impair the sovereign character of the state to meet its just liabilities, whether in the form of costs or otherwise. How the judgment will be satisfied is a question not now before us. Affirmed.

<sup>1</sup> This section provides: "The supreme court shall have original jurisdiction to hear claims against the state; but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."

(119 N. C. 718)

**WILLIS v. ATLANTIC & D. RY. CO.**  
(Supreme Court of North Carolina. Oct. 27, 1896.)

**CERTIORARI—MISTAKE IN SERVING CASE ON APPEAL.**

It was agreed that, in lieu of the time prescribed by the Code, appellant should be allowed 20 days to serve the case on appeal, and appellee the same time to serve a counter case. In reply to an inquiry of appellant's counsel, "To whom shall I send the case?" appellee's counsel said, "Send to J.," and the former, understanding by this that the Code requirement of service by an officer was waived, as well as the time limit, sent the case to J. by express 6 days before the 20 days expired, writing him a letter at the same time, notifying him of the fact; and appellee's counsel made no attempt to correct the mistake till too late. *Held*, that certiorari would issue to bring up the record.

Action by A. D. Willis against the Atlantic & Danville Railway Company. Plaintiff had judgment, and defendant appealed, but through mistake of counsel failed to make proper service of the case on appeal, and now petitions for a writ of certiorari to bring up the record. Petition granted.

Battle & Mordecai and W. A. Fentress, for appellant. J. A. Long and J. W. Graham, for appellee.

CLARK, J. This is not the case of a verbal agreement of counsel, which, if denied, the court will not consider. Rule 39, 22 S. E. ix.; *Sondley v. City of Asheville*, 112 N. C. 694, 17 S. E. 534; *Graham v. Edwards*, 114 N. C. 229, 19 S. E. 150. But here both sides agree substantially as to what passed. It was agreed that in lieu of the time prescribed by the Code the appellant should be allowed 20 days to serve the case on appeal, and the appellee 20 days to serve a counter case. In reply to an inquiry of the appellant's counsel, "To whom shall I send the case?" one of appellee's counsel said, "Send to J." By this arrangement the appellant's counsel understood, and not unreasonably, that the Code requirement as to service was waived, as well as the time limit, and sent the case on appeal, and the judge's notes to J., by express, 6 days before the agreed 20 days expired, and also wrote him a letter by the same mail, notifying him of the fact. The appellee's counsel insists that he did not intend to waive service by an officer, but he must have perceived, from the appellant's counsel sending the case by express and the purport of his letter, that the latter had so understood him, and, if he had promptly notified the appellant's counsel of his mistake, there would have been ample time to have corrected the error by causing service to be made by an officer. But he did not give such notification till another letter had been written him, and the 20-days time had expired. From the undenied facts, there was a reasonable misapprehension on the part of the appellant's counsel, and the writ of certiorari should issue. *Parker v. Railroad Co.*, 84 N.

C. 118; *Graves v. Hines*, 106 N. C. 323, 11 S. E. 862; *Walton v. Pearson*, 83 N. C. 309. The appellee will have until five days after the certificate of this opinion is filed in the office of the clerk of the superior court of Caswell county to serve his counter case or exceptions to the appellant's case. If the parties cannot agree upon a case, it will then be settled by the judge who tried the case, in the manner provided by the Code. Petition granted.

(119 N. C. 127)

### BARNES v. CRAWFORD.

(Supreme Court of North Carolina. Oct. 27, 1896.)

#### APPEAL—PRINTING RECORD—DISMISSAL.

One of the essential parts of the record required by rule to be printed being the "case on appeal," failure to print articles of evidence which counsel in making up their statement of the case, instead of copying in full, referred to as Exhibits "A," "B," etc., necessitates dismissal of appeal.

Action by W. S. Barnes against W. T. Crawford. Judgment for defendant. Plaintiff appeals. Motion to dismiss appeal for failure to print necessary parts of record. Dismissed.

W. J. Peele and R. O. Burton, for appellant.  
F. H. Busbee, for appellee.

CLARK, J. The requirement that at least the essential parts of the record (which are designated in the rule) shall be printed, is not an uncalled-for rule, but a necessity. It is impossible for each of the five judges to examine the record, as should be done, unless it is printed, without great delay in the decision of causes. Should there be only one record, and that in manuscript, or so defectively printed that the manuscript must be referred to in order to see that the essential parts are printed, the delay caused thereby would result in large arrearages on our docket, much to the detriment of suitors. This court has become the ultimate tribunal for the litigation in the courts of a state containing nearly 2,000,000 of people, a state whose population, wealth, and volume of litigation are steadily increasing. The court has again and again called the attention of the bar to the absolute necessity of an inflexible adherence to this rule. It is in the interests of suitors themselves that they may have a prompt examination of their appeals, and by each and every member of the court. The requirements as to what shall be printed have from time to time been somewhat extended, but from the very beginning, now many years back, it has been always required, without ever an exception in any case, that the entire "case on appeal" shall be printed. The judge is presumed to put in the case on appeal all that is essential to present the errors alleged to have occurred on the trial below, and nothing that is nonessential. As counsel frequently differ as to the case, the judge is made the final arbiter when there is disagreement. In this case counsel did not disagree,

and themselves "settled the case." In making up the statement of the case, when they reached long articles, or pieces of evidence, etc., which were excepted to, instead of copying them out in full, referred to them as Exhibits "A," "B," etc., and thereby directed the clerk to send them up as parts of the case on appeal, who did so. This is not unusual or improper, and such exhibits are integral parts of the case on appeal, and counsel below held them to be essential parts, or they would not have included them. In printing this case on appeal, the appellant substituted himself for the agreement of counsel, omitted the exhibits as immaterial, and failed to print them. The appellee insisted on the materiality of the unprinted parts. The appellant might, with equal propriety, go through the case, and omit as immaterial any other parts thereof which are required to be printed. The result would be, if this was allowed here, that, to save a little cost to appellant, there would be a wrangle in every case whether the material parts of the case on appeal had been printed, taking up the time of the court on this collateral matter, which should be applied to hearing the argument on the merits. To prevent such unseemly proceedings, the rule has always required the whole of the "case on appeal" printed. Indeed, at the last term (118 N. C. 912, 24 S. E. 670), we required that when the pleadings were printed the exhibits referred to in them should be printed, being integral parts thereof. If a party is too poor, he can always appeal in forma pauperis, in which case we cause the clerk of this court to make the five copies of the "case on appeal" on the typewriter; but we cannot tax him with this labor when the party is not an appellant as a pauper. The repeated and reiterated notices given by this court that the requirement as to printing was necessary, and would be adhered to, leave the appellant no excuse for his default. Such parts of the transcript on appeal as are required to be printed must be printed in full, and we cannot open a Pandora's box by setting a precedent in this case of permitting the appellant to select such parts of the "case on appeal" to be printed as he thinks necessary, which has led, of course, to the appellee's controverting the selection, and the calling on this court to umpire the controversy. The rule is plain. The whole "case on appeal" was settled by counsel below as essential, and as such our rules require it to be printed. Our rules designate the parts of the record to be printed. We cannot accept printing parts of such parts, at the option of the appellant, as a compliance, and will not set a precedent of that kind. Most courts of last resort require, we believe, the entire transcript of the record on appeal to be printed. We trust that appellants and our brethren of the bar will recognize the necessity of this rule, and our determination to adhere to it. Appeal dismissed.

AVERY, J., being related to one of the parties, and MONTGOMERY, J., having been of counsel, did not sit on the hearing of this case.

(119 N. C. 109)

**ROSS v. ROSS et al.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**RECEIVER—APPOINTMENT.**

In an action to recover specific articles and money, the jury found that no specific articles were detained by defendant, but that she had \$300 of a specified fund, which she should deliver to plaintiff. The verdict was made a part of the judgment, which directed that plaintiff recover of defendant \$300, with interest, "according to verdict." On supplemental proceedings, it was found that defendant still held such specific fund, partly in money, and partly in choses in action and securities in which she had invested it. *Held*, that it was error to appoint a receiver to take possession of the fund till plaintiff should institute an action to recover it, but the judgment already rendered should be enforced by ordering defendant to pay over the specific money and the notes taken for the money invested.

Appeal from superior court, Vance county; Boykin, Judge.

Action by William E. Ross against Amanda Ross and others to recover specific articles and money, constituting a fund conveyed to plaintiff by defendant Amanda Ross, in which there was a judgment for plaintiff. On supplemental proceedings it was found that defendant still held the fund, partly in money and partly in choses in action and securities in which she had invested. The court, of its own motion, appointed a receiver to take possession of the specific fund till plaintiff could institute an action to recover it, and defendants appeal. Reversed.

T. M. Pittman, for appellants. T. T. Hicks and A. C. Zollicoffer, for appellee.

**CLARK, J.** The plaintiff sued for the recovery of specific articles and money, constituting a fund which had been conveyed to the plaintiff by the defendant. The jury found upon issues submitted to them that no specific articles were detained by the defendant, but that she had \$300 of the money of the specific fund, which she should have delivered to the plaintiff. The verdict was made a part of the judgment, which decreed that the plaintiff should recover of the defendant \$300, with interest, "according to the verdict." Upon supplemental proceedings it was found as a fact that the defendant still held (partly in money, and partly in the choses in action and securities in which she had invested the balance thereof) this specific fund. The clerk thereupon properly forbade the transfer or conveyance of the choses in action and money (Code, § 488, subd. 6), and directed the same to be paid over to the plaintiff (Id. § 493), and, upon noncompliance, issued a notice to show cause why the defendant should not be attached for contempt (Id. § 500).

The defendant was not entitled to her personal property exemption in a fund already adjudged to be the property of the plaintiff.

Upon appeal the judge approved the findings of fact by the clerk, but reversed his judgment, and, on his own motion, appointed a receiver to take possession of the fund till the plaintiff should institute an action to recover the specific fund. This was error. The appointment of a receiver, and another action, were alike unnecessary, for this action itself had been brought for the recovery of the specific fund. The jury had found it belonged to the plaintiff, and the judgment had directed the \$300 to be paid over to the plaintiff, "according to the verdict." When the supplemental proceedings disclosed that part of the fund was still in defendant's hands, and that the remainder had been since loaned out, and invested in choses in action, it only remained to enforce the execution of the judgment by ordering the defendant to pay over the specific money and the notes taken for the other part of the money to the plaintiff, and to compel the enforcement of the order, if not obeyed, by attachment for contempt. *Wilson v. Chichester*, 107 N. C. 386, 12 S. E. 139. Had the judgment not been so clearly drawn in accordance with the verdict, the remedy would have been by motion, in the cause on notice to the defendant, to amend and correct the judgment in accordance with the verdict, and not by a new and independent action for the same cause of action. And, in any view, it was error to restrain defendant, and hold the fund till the plaintiff could bring an independent action against her to recover the specific property. Granting a restraining order in one action, till another action can be brought between the same parties, was an incident of the old procedure when law and equity were divided, but is foreign to the present simpler system, in which, when the court possesses jurisdiction of the parties and subject-matter, it will proceed to administer all rights of those parties pertaining to that subject-matter. Under Code, § 497, when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it; but such action is brought by the receiver as the agent of the court, and is an entirely different matter from restraining a conveyance till the plaintiff may bring an independent action against the same defendant. Whatever rights the plaintiff has as against the defendant are determined by the judgment which is the foundation of the supplemental proceedings, which are merely to assist in the execution of the judgment by appropriate investigation and orders. The judgment of the court below is reversed, and the case is remanded, that judgment may be entered affirming the action of the clerk in accordance with this opinion. Reversed.

(119 N. C. 118)

**HOLMAN v. WHITAKER.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**CHattel Mortgage — DESCRIPTION OF PROPERTY — SUFFICIENCY — PAROL EVIDENCE TO EXPLAIN.**

1. Where a chattel mortgage described the property as a "one-horse wagon," and the mortgagor had four one-horse wagons, the description was insufficient.

2. Where the ambiguity in the description in a chattel mortgage was patent, parol testimony to explain the description was inadmissible.

Appeal from superior court, Wake county; McIver, Judge.

Action of claim and delivery by W. C. Holman against James Whitaker. From a judgment for plaintiff, defendant appeals. Reversed.

Action was commenced in a magistrate's court to recover possession of a two-horse phaeton, with driver's seat in front, and a single-horse wagon, the personal property mentioned in a certain chattel mortgage made by defendant to plaintiff to secure a note of \$100. The mortgage was put in evidence, and it was also in evidence that the sheriff went to seize the above-named property, but found at defendant's house more than one single-horse wagon. The defendant pointed out to him which wagon was the one mentioned in the mortgage, and the sheriff took that wagon; but, the plaintiff having refused to receive this wagon, the sheriff returned it, and seized another wagon. Upon the trial the plaintiff was asked to state which one of the wagons he thought he had a mortgage on, and to this question the defendant objected. Objection overruled, and defendant excepted on the ground that the description in the mortgage was such a patent ambiguity that it could not be explained by parol evidence, as the defendant had several wagons at the time of making the mortgage, and that they were not separated, except as hereinafter stated, and that there was no mutual understanding between the plaintiff and defendant as to which wagon was meant. All testified that at the time the mortgage was made the defendant was working for the plaintiff, using as needed a two-horse and a one-horse wagon. Defendant said that he had four one-horse wagons at that time, and that the one last seized by the sheriff was the one he was using in hauling while working for the plaintiff. Issues: "Is plaintiff the owner and entitled to the possession of the carriage and wagon described in the complaint? Ans. Yes. How much is the defendant indebted to the plaintiff? Ans. \$91.50." Plaintiff stated that the wagon the defendant was using was the only single-horse wagon he knew the defendant had at the time, and that he did not know the defendant had more than one single-horse wagon,—the one he was using,—and he thought it was understood by the defendant and himself that that was the wagon mortgaged. There was no express statement about it. It was in evidence that

defendant had worked out a contract to build a house and barn for plaintiff. Defendant said that it was agreed when he finished this job that the mortgage was to be canceled. Plaintiff said that, if defendant could finish this job without assistance, the mortgage debt was to be credited on his account, but that defendant did not do so, as plaintiff had advanced money to buy lumber, which left the defendant in his debt \$129. The court charged the jury that the burden was on plaintiff to satisfy them that the wagon seized by the sheriff was the one named in the mortgage, and that, unless so satisfied, they should answer the first issue, "No." Parol testimony was competent to point out the property, but the jury must be satisfied as to its identity, and, unless they were so satisfied, they should find in favor of the defendant, and answer this issue, "No."

J. B. Batchelor and E. A. Johnson, for appellant.

**FAIRCLOTH, C. J.** This is an action to recover possession of personal property claimed under a mortgage. The description was, a "one-horse wagon," the defendant having at the time of making the mortgage four one-horse wagons. This case is governed by *Blakely v. Patrick*, 67 N. C. 40. There the language was, "ten new buggies," the mortgagor having more than 10 new buggies in the same lot, and the plaintiff could not recover. Here a "one-horse wagon" was the description, the mortgagor having four one-horse wagons, and the plaintiff cannot recover. Suppose one wagon in the meantime had been stolen. Whose wagon was lost? The doctrine was so well discussed in *Waldo v. Belcher*, 11 Ired. 609, that we need not repeat it. The ambiguity is patent, and parol testimony to explain it is inadmissible. If one of the wagons had been set apart, and in some way distinguished, at the time of making the mortgage, or if the mortgagor had owned only one wagon, then such evidence could be heard for the purpose of identification. *Spivey v. Grant*, 98 N. C. 214, 2 S. E. 45; *Lupton v. Lupton*, 117 N. C. 30, 23 S. E. 184. We notice that there is no judgment for possession of the wagon in the record, unless the words in the judgment, "that the sale was in all respects regular," can be so construed. We, however, give the plaintiff the benefit of a judgment for possession, according to the finding on the first issue. There is no controversy about the phaeton. There is error. Error.

(119 N. C. 159)

**FOUSHEE v. CHRISTIAN, Court Clerk.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**ELECTIONS—NUMBER OF BALLOT BOXES.**

The election law of 1895 (Acts 1895, c. 159) § 18, provides for two ballots,—one on which solicitors and all higher officers are to be voted for; and on the other, the members of the gen-

eral assembly and county officers, besides a constable in each township. Section 19 requires the clerk or board of electors to provide ballot boxes for each class to be voted in at every precinct. Section 23 specifies how the abstracts of the election returns are to be made, and provides (subsection 2) for a return on one sheet of the clerk of the superior court, county treasurer, register, surveyor, sheriff, coroner, constable, "and such other county and township officers as shall be provided by law." *Held*, that there cannot be a separate ballot box at each precinct for the votes for justices of the peace.

Petition by H. A. Foushee for a rule on W. J. Christian, clerk of the superior court of Durham county, under Acts 1895, c. 159, § 7, to provide a separate ballot box at each precinct for the election of justices of the peace. Heard before a single justice of the supreme court. From an order denying the rule, petitioner appeals. *Affirmed*.

Shepherd & Busbee and J. S. Manning, for appellant. John W. Graham, for appellee.

CLARK, J. The election law of 1895 (chapter 159, § 18) provides for only two ballots, upon one of which the state officers, presidential electors, members of congress, judges, and solicitors are to be voted for, and on the other the members of the general assembly and county officers, besides a constable in each township; and section 19 requires the clerk or board of electors to provide ballot boxes for each class, i. e. two ballot boxes to be voted in at every precinct besides the two duplicate boxes for the preservation of the ballots. Section 23 of said act specifies how the abstracts of the election returns are to be made; subsection 2 thereof providing for a return on one sheet of clerk of superior court, county treasurer (if any), register, surveyor, sheriff, coroner, constable, "and such other county and township officers as shall be provided by law." The justices of the peace, though not specifically named in this act, come within this description, and are to be voted for on the ticket above, which contains the names of the candidates for general assembly and county and township officers. The justices of the peace are certainly embraced in "such other county or township officers provided by law." Acts 1895, c. 157, § 4, provides for the election of the number of justices therein specified, in and for each township. Each township elects its own justices of the peace. Consequently, while the names of the candidates for that position must be placed on the ticket which contains the names of the candidates for general assembly and county and township officers, the names of candidates for justices only appear on such ticket for their respective townships, as in the case with constables, who in like manner are voted for only in their own townships, and in the same manner as, on the other ballot, candidates for congress and solicitor are voted for only in their respective districts. In refusing an order for an additional ballot box, there was no error.

(119 N. C. 115)

## CLARK v. EDWARDS et al.

(Supreme Court of North Carolina. Oct. 27, 1896.)

## MECHANIC'S LIEN—SUBCONTRACTORS.

Under Code, § 1801, giving a subcontractor, giving notice of his claim, a right to a lien "not exceeding the amount due the original contractor at the time of notice given"; and section 1802, conferring on the subcontractor right to enforce such lien if the owner fails "to retain" the amount thereof "out of the amount due the said contractor,"—the subcontractor has no right to a lien where neither at the time he gives notice nor afterwards is anything due the contractor. That the subcontractor is working on the building is not notice to the owner not to pay to the contractor.

Appeal from superior court, Wake county; McIver, Judge.

Action by M. S. Clark against C. B. Edwards and others. Judgment for defendants. Plaintiff appeals. *Affirmed*.

J. C. L. Harris, for appellant. W. N. Jones, for appellees.

CLARK, J. It is true, under section 1789 of the Code, that, where a mechanic's or laborer's lien or lien for material is filed as required, it dates back and takes priority of all liens attaching, and against all purchases for value (though without notice) made subsequent to the beginning of the work or furnishing the first material. *Burr v. Maultsby*, 99 N. C. 263, 6 S. E. 108; *Lookout Lumber Co. v. Mansion Hotel & B. Ry. Co.*, 109 N. C. 658, 14 S. E. 35. But such lien is only good for the amount due the contractor, laborer, or material man, and the subcontractor can be put in no better condition. As defendant's counsel said forcibly and pertinently on the argument, the subcontractor can only sue into the contract. Accordingly, Code, § 1801, affords the subcontractor giving notice of his claim a right to a lien "not exceeding the amount due the original contractor at the time of notice given"; and section 1802 confers on the subcontractor the right to enforce such lien if the owner fails "to retain" the amount thereof "out of the amount due the said contractor." In this case the plaintiff, who was subcontractor, did not give the owner of the property notice of his claim till after the contractor who was paid up to that date had failed in business and abandoned the work. Neither at that time nor at any time thereafter was anything due the contractor, the owner completing the building himself. There was therefore no sum due the contractor out of which the owner should have "retained" the plaintiff's claim. The plain language and intent of the statute controvert the plaintiff's contention, which, if correct, would prevent owners from paying anything to contractors till 12 months after the completion of their work. The mere fact that laborers and subcontractors are working on the building is not notice to the owner not to pay out to the contractor till it is ascertained how much is due by the contractor to each and every subcon-

tractor, laborer, material man, etc. The statute requires that the subcontractor must give notice, and, till he does this, he does not have a lien, and the owner is justified in making payment to the contractor. No error.

(119 N. C. 120)

**STATE ex rel. GOODWIN v. CARALEIGH PHOSPHATE & FERTILIZER WORKS.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**STATUTORY PENALTIES — ACTIONS TO RECOVER — PARTIES — CONSTITUTIONAL LAW — TAX ON FERTILIZERS.**

1. A person suing for a penalty is the proper party plaintiff, unless the statute creating the penalty provides otherwise.

2. Code 1883, §§ 2190, 2191, 2193, which provide that private parties may recover penalties of any manufacturer of fertilizers selling the same without having brand tags attached, are not in conflict with Const. art. 9, § 5, which provides that the net proceeds of all penalties and forfeitures shall go to the school fund. *Sutton v. Phillips*, 21 S. E. 968, 116 N. C. 502, followed.

3. The tax of 25 cents a ton imposed upon fertilizers by Code 1883, § 2190 (as amended, Laws 1891, c. 9), to defray the expense of inspection, is not in itself so unreasonable or excessive as to show a purpose to evade the inhibition of the federal constitution (article 1, § 8, cl. 3) against the taxation of imports by the states. *Patapasco Guano Co. v. Board of Agriculture of North Carolina*, 52 Fed. 690, followed.

Appeal from superior court, Wake county; McIver, Judge.

Action by the state, on the relation of W. H. J. Goodwin, against the Caraleigh Phosphate & Fertilizer Works, for the statutory penalty for defendant's failure to affix brand tags to certain bags of fertilizers sold to relator.

Plaintiff complains: (1) That defendant is a corporation, etc., and is doing business in this state, to wit, in the manufacture and sale of fertilizers. (2) That defendant, having manufactured the Eclipse brand of fertilizer, which, according to law, said defendant is required to tag each sack of said fertilizer as provided in sections 2190, 2191, 2193, Code 1883, sold to W. H. J. Goodwin, in Wake county, and delivered to him, 20 sacks of said Eclipse brand of fertilizer during the months of April and May, 1895, without affixing the tag as required by the aforesaid sections of the Code to each of said twenty sacks of fertilizer. Wherefore plaintiff demands judgment against the defendant for \$200 and costs.

Defendant demurs: (1) Because there is a defect of parties, in that the department of agriculture should be made a party. (2) Because there is a defect of parties, in that the state of North Carolina should be made a party. (3) Because the act of the general

assembly under which the plaintiff brings this action is unconstitutional and void, in that it is in violation of the constitution of North Carolina (article 9, § 5), providing for the appropriation of fines and penalties to the common-school fund. (4) Because the act of the general assembly under which plaintiff brings this action is unconstitutional and void, in that it is in violation of the constitution of the United States (article 1, § 8, cl. 3).

Judgment: It is ordered that the demurrer be overruled, and the defendant shall answer over. It is further ordered that plaintiff recover his costs.

Defendant appealed. Affirmed.

J. C. L. Harris, for appellee.

FURCHES, J. As it appears, this is an appeal from the judgment of the court below upon complaint and demurrer. The demurrer admits the facts stated in the complaint, and assigns four grounds upon which it is contended the plaintiff should not recover. The first assignment cannot be sustained, as the party suing is the proper plaintiff, unless the statute creating the penalty provides otherwise. *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971. The second assignment cannot be sustained, as the party claiming the penalty is the proper plaintiff, and not the state. *Middleton v. Railroad Co.*, 95 N. C. 167. The third assignment cannot be sustained, as this question has been decided and has been expressly held to be constitutional in *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968, and a number of other cases there cited. As to the fourth assignment, we are somewhat at a loss to see its relevancy to this case. And we regret that the case was not argued for the defendant in this court. As we understand the facts from the pleadings, the defendant is a domestic corporation, and the plaintiff is a resident of Wake county; and it is not plain to us how it is that a question of interstate commerce is involved, as we understand from plaintiff's attorney it was contended in the court below. But, if there is such a question involved, it cannot be sustained by defendant. This statute<sup>1</sup> and this very question have been discussed in a well-considered opinion by Judge Seymour of the United States district court, and held to be constitutional. And while we do not consider ourselves bound by this opinion as authority, still we believe it to be founded on sound reasoning and authority, and a correct exposition of the law. *Patapasco Guano Co. v. Board of Agriculture of North Carolina*, 52 Fed. 690. We find no error, and the judgment is affirmed.

<sup>1</sup> Laws 1891, c. 9, § 1, amending Code 1883, § 2190, and imposing a tax of 25 cents a ton on fertilizers, to defray the expenses of inspection.

(119 N. C. 874)

**STATE v. YANDLE.**

(Supreme Court of North Carolina. Oct. 27, 1896.)

**CONVICTS—EMPLOYMENT ON HIGHWAY.**

1. Under Code, § 3448, authorizing the boards of commissioners of the several counties to provide for employing on the highways or public works persons committed to jail on conviction of any crime or misdemeanor, etc., a person imprisoned for assault and battery may, without any order of the judge, but as an incident to the punishment, be set to work on the highway by the county commissioners. *Myers v. Stafford*, 19 S. E. 764, 114 N. C. 234, followed.

2. That provision of Code, § 3448, which forbids the hiring out of convicts, except under order of the court embodied in the sentence, applies only to farming out convicts to individuals or corporations, and not to labor employed on public works under the supervision and control of public agents. *State v. Sneed*, 94 N. C. 806, followed.

Appeal from superior court, Union county; Starbuck, Judge.

Petition by R. Z. Yandle for a writ of habeas corpus. From a judgment remanding petitioner to custody, he appeals. Affirmed.

At August term, 1896, of Union superior court, defendant was tried and convicted of an assault and battery with a deadly weapon, and sentenced to imprisonment for 90 days in the county jail. After the adjournment of court the county commissioners put the defendant in the custody of James Howie, and began to work him upon the public roads, without any order of court authorizing them to do so, and on the 14th of September the defendant swore out a writ of habeas corpus, alleging that he was sentenced by the judge to imprisonment for three months in the county jail, and was committed to the jail, upon conviction and sentence for the assault and battery above stated; that he was, without any order of the judge, placed under the control of said Howie, captain of the chain gang, and worked upon the public roads; that he is advised and believes that the same is without authority of law, etc. In response to the writ, and as a return thereto, the respondent says that the board of commissioners, as he is advised and believes in pursuance of law, have made provision for the employment on the public highways of all persons imprisoned in the county jail, and who fail to pay the costs adjudged or to give security therefor, and said commissioners have appointed the respondent superintendent of work on the public roads; that defendant was convicted, and sentenced by the judge to imprisonment for three months, and that he failed to pay the costs or give security therefor, and was delivered by the board of commissioners to the respondent, as superintendent aforesaid, with instructions to work him on the public roads; that defendant is not detained by virtue of any writ or other written authority, except the judgment and sentence of the court in which he was convicted, and, being in jail under said sen-

tence, he was placed in the custody of respondent, and put to work on the public roads, by order of the commissioners, and is now retained under the authority of said order, and under no other authority. The respondent offered the certificate of J. M. Bivens, register of deeds, as follows: "It is ordered by the board of commissioners that chapter 194, Acts 1895 (for the improvement of public roads in N. C.), be adopted and accepted by the county of Union, and, with all its provisions, is hereby declared to be of full force and authority in said county. The board finds as a fact that the revenue of the county for ordinary purposes, and within the limitations prescribed by the constitution, is insufficient to meet the necessary expenses of improving the public roads, and that, to meet said expenses, it is necessary to levy a special tax on the polls and property of the county not exempt from taxation. It is therefore ordered that a special tax be levied at the regular meeting of the board on the first Monday in June, 1896, not to exceed 15 cents on \$100 worth of property and 45 cents on each poll, for the purpose of improving the public roads, and that the amount of tax on each poll and upon each \$100 worth of property be fixed at the regular meeting on 1st Monday in June, 1896, and that in fixing the same the equation prescribed between the poll and property by the county commissioners shall be observed, and that the special levy aforesaid be placed in a separate column of the tax books, under the heading of 'Special Road Tax.'" This certificate was admitted without objection.

"The cause coming on to be heard, and upon consideration of the certificate, and the return thereto by James Howie, and the evidence offered, the court finds that the facts set forth in the return are true, and that the commissioners failed to enter on the minutes a record of their proceedings in regard to the working of convicts on the public roads, except as appears in the certificate of J. M. Bivens, clerk of the board, introduced in evidence. And, the court being of opinion that the detention complained of by the petitioner is legal, it is ordered that the petitioner, Yandle, be remanded into the custody of the said James Howie. [Signed] H. R. Starbuck, Judge."

The defendant's exceptions: "Defendant excepts to the findings of fact and conclusions of law by his honor, and assigns as grounds therefor: (1) That he erred in finding the answer of Howie to be true, there being no proof in support of the facts therein set forth. (2) That his honor erred in finding the evidence adduced that the commissioners of Union county had made provision according to law for working prisoners in jail. (3) That his honor erred in holding, as a matter of law, that petitioner, Yandle, was in the rightful custody of Howie, and in remanding him to the custody of Howie,

to be worked on the public roads. (4) That his honor erred in failing to hold that the commissioners had no right to work petitioner on the public roads, and that he is in the unlawful custody of the respondent, Howle. (5) For such other and further errors as are apparent upon the face of the record."

Shepherd & Busbee, for appellant. The Attorney General and Jerome & Williams, for the State.

**EVERY, J.** The boards of commissioners of the several counties have power to provide for employing on the public streets, public highways, or public works persons committed to jail by any magistrate or judge of a superior or criminal court having jurisdiction to try the accused, upon conviction of any crime or misdemeanor, or upon their failure to enter into bond to keep the peace or for good behavior, or to pay, or properly secure the payment of, costs or fines. That the authority to make the order complained of was granted by section 3448 of the Code, and was not withdrawn by any subsequent act, is settled in the well-considered opinion of Justice MacRae in *Myers v. Stafford*, 114 N. C. 234, 237, 19 S. E. 764. There is no force in the contention of the defendant that the order of the commissioners was in the nature of a sentence subsequently imposed, and was void because they had no judicial authority, and because, if they had been competent to try and sentence originally, a sentence had been already pronounced, and no additional sentence could be imposed after the term when it was entered. The principle upon which the defendant relies is a familiar and fundamental doctrine, which was not disputed by the prosecution. The working of the defendant on the public highway was not in pursuance of a judgment pronounced by the commissioners. It was an incident to the sentence proper imposed by the court, which the law had declared, before conviction and before the offense was committed, should follow. The order of the commissioners was therefore no more an additional judgment than is an order of the superintendent of the state prison that a prisoner confined in a cell at the penitentiary shall be taken to one of the farms now cultivated under his direction. The commissioners were for this purpose only the ministerial agents provided by law for the purpose of managing economically the business of the counties, and protecting the people, as far as possible, against unnecessary cost in the punishment of criminals. A person who commits an assault and battery knows, or is presumed by law to know, the probable legal as well as the natural consequences of his own act. Knowing the law (as we must assume), he knows that the court has the power to imprison upon conviction, and that, as an incident, the commissioners of the county may, for the protection of the county, order him to be taken out and work-

ed upon the public roads. The principle governing this case is in no sense analogous to that upon which the decision hinged in *Ex parte Lange*, 18 Wall. 163, 175. The order to work the defendant upon the public roads was in no proper sense a second sentence, imposed after a part of the punishment provided for by an original judgment had been inflicted, but was an incident to the punishment, in contemplation of which he committed the offense. It has been expressly held, also, that the provision of section 3448 of the Code, which forbids the hiring out of convicts, except under order of the court embodied in the sentence, applied only to farming out convicts to individuals or corporations, and did "not extend to labor employed upon public works, and under the supervision and control of public agents." *State v. Sneed*, 94 N. C. 806. The answer of the respondent was sufficient to show that the prisoner was detained by lawful authority, and we are of opinion, therefore, that there was no error in the order remanding him to the custody of James Howle. No error.

(47 S. C. 488)

#### NORRIS v. CLINKSCALES et al.

(Supreme Court of South Carolina. Oct. 26, 1896.)

**APPEAL—REVIEW—WITNESS—TRANSACTIONS WITH DECEASED—DISCRETION—SECONDARY EVIDENCE OF LOST INSTRUMENTS—CLAIM AND DELIVERY—VERDICT—DAMAGES—NECESSITY OF PROOF—CONSTITUTION—CONSTRUCTION—INSTRUCTIONS.**

1. Where evidence is excluded on an entirely different ground from that of the objection interposed by counsel, the appellate court on review must consider, not the grounds of objection submitted by counsel, but only the reasons expressed by the court.

2. Under Code Civ. Proc. § 400, providing that certain persons shall not be examined in regard to any transaction or communication between such witness and a person at the time of the examination deceased, "as a witness against a party then prosecuting or defending the action as executor," \* \* \* where such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him," to disqualify a witness the examination must not only be in regard to a transaction with deceased, and his testimony or the event of the trial affect the present or previous interest of the witness, but the action or proceeding must be one against or by one of the designated classes of persons.

3. The exercise by the trial court of its discretion in the exclusion of secondary evidence to prove the contents of an instrument claimed to have been lost or destroyed is reviewable on appeal.

4. On the issue as to the admissibility of secondary evidence to prove the contents of lost instruments, there was evidence that the instrument, which had been intrusted to G., one of defendant's counsel, was sent by him to M., another of defendant's counsel; that ineffectual search had been made by G. and defendant in the offices of both G. and M., who was dead. Held, that it was error to exclude the secondary evidence for failure to examine G., who was at the time of the trial in attendance at the legislature, as to the existence of the instrument.

5. In claim and delivery against co-defendants not jointly liable, a verdict for plaintiff for certain property, valued at a certain sum, with damages for detention, is too indefinite, as it should in such case be against each defendant separately for the specific property, or its value, wrongfully in his possession.

6. To entitle plaintiff to damages in claim and delivery, he must give proof thereof. Mere proof of a wrongful detention is insufficient.

7. In the construction of an amendment to a section of the constitution, the section amended should be considered.

8. Under Const. 1895, art. 5, § 26, providing that "judges shall not charge juries in respect to matters of fact, but shall declare the law," which deprived judges of the former constitutional authority "to state the testimony," the judge in his charge can only state disputed facts hypothetically, without reference to the testimony, or intimation of his opinion of its effect.

Appeal from common pleas circuit court of Abbeville county; Earle, Judge.

Action by Jane Estelle Clinkscales, as executrix, against A. J. Clinkscales and another. On the death of plaintiff, E. B. Norris, as executor, was substituted in her stead. There was a judgment for plaintiff, and defendants appeal. Reversed.

F. B. Gary and Parker & McGowan, for appellants. Graydon & Graydon, for respondent.

**BENET, Special Judge.** This action for claim and delivery was brought by Jane Estelle Clinkscales to recover from the defendants certain personal property covered by a mortgage of which she was the assignee. After the commencement of the suit the plaintiff died, and her father and executor, E. B. Norris, was substituted as plaintiff. The cause was heard at Abbeville at the January term, 1896, before his honor, Judge Earle, and a jury, and resulted in a verdict for the plaintiff. The defendants appeal to this court from the rulings and charge of the circuit judge, and from the verdict of the jury, upon various grounds, which are set forth in the case in the form of ten exceptions. The conclusions arrived at by this court render it unnecessary to pass upon more than five of the exceptions, and these we will take up and consider in order.

The appellants' second exception alleges error "because the circuit judge erred in excluding the testimony of T. L. Clinkscales, Jr., under section 400 of the Code, when (1) that section of the Code had no application at all; and, (2) even if it had been applicable, the door was opened by Mrs. Estelle Clinkscales in her testimony, and the witness had the right, under the said section, to give his version of the transaction in reply to her." On the threshold of the main question involved in this exception the respondent's counsel make the objection that the testimony was excluded, not under section 400, but because it was contrary to the assignment the witness T. L. Clinkscales had made on the mortgage. In support of this view, the case does certainly show that the testimony was objected to by respondent's

counsel "on the ground that this testimony is contrary to the assignment that the witness had made." This objection was overruled and the testimony admitted. But when court opened next morning the trial judge stated that he had some doubts as to the ruling of the previous day, and he decided to reverse it and "rule the testimony out, except so much of it as negated the payment of the money as these plaintiffs show." It is manifest, however, that, although the motion to exclude was not grounded on section 400, the exclusion itself was placed upon no other ground. The circuit judge said: "The court rules that the testimony of T. L. Clinkscales must be expunged from the record, so far as it refers to any transaction between him [the witness] and J. P. Clinkscales. He is permitted to testify that Mrs. Estelle Clinkscales paid him no money for his assignment, inasmuch as she testified that she paid him \$700 for it, but the court will not allow him to testify as to any transactions between him [T. L.] and J. P. Clinkscales." When it is borne in mind that the inhibition of section 400 refers particularly to testimony as to "any transactions" between the witness and a person deceased, and that J. P. Clinkscales was a person deceased, and that the testimony expunged was that part of T. L. Clinkscales' testimony which recounted "transactions" between him and the deceased person, and that the circuit judge in excluding it made use of the term "transaction" five times,—a word made technical by the Code, in section 400, and used by the judge in its technical sense,—there can be no doubt that the learned judge based his exclusion of the testimony upon section 400. If any further light were needed, it would be found in the charge to the jury, where the judge, again referring to the expunged testimony, said: "You can consider nothing as to any transactions between this defendant, T. L. Clinkscales, and J. P. Clinkscales. The law is that in a case like this no conversation or transaction like this witness here, between the witness and a deceased person, can be given in evidence." While, therefore, it is true that plaintiff's counsel moved that the testimony be excluded "on the ground that this testimony is contrary to the assignment that the witness made," it is also true that in excluding it the presiding judge did so upon an entirely different ground, namely, upon section 400 of the Code. Consequently, in deciding the question whether or not the exclusion of the testimony was error of law, we must consider, not the grounds submitted by the counsel, but the reasons expressed by the judge.

It may seem strange that after having been on our statute book for nearly 30 years, and after having been construed and elucidated by this court in innumerable appeals, section 400 of the Code should still appear to be hard to understand, and difficult to apply as a rule of evidence. And yet it is not strange when one regards the abnormal length of its periods, and the intricate involutions of its phraseology.

We can readily believe that no other rule of evidence gives as much trouble in the trial of causes as does the proviso of section 400. The first part of it reads as follows: "That [1] no party to the action or proceeding; nor [2] any person who was a legal or equitable interest which may be affected by the event of the action or proceeding; nor [3] any person who, previous to such examination, has had such an interest, however the same may have been transferred to, or come to, the party to the action or proceeding; nor [4] any assignor of anything in controversy in the action, shall be examined [a] in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as [b] a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when [c] such examination, or any judgment or determination in any such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him." For the purpose of simplifying this very complex provision of the Code, we have inserted the figures 1, 2, 3, and 4, and the letters a, b, and c. A careful analysis of this proviso of section 400 shows that its purpose as a rule of evidence is to exclude the testimony of a witness who may belong to any one or more, or to all, of the classes indicated by the figures 1, 2, 3, and 4, but only when his testimony belongs to all three of the kinds described in the divisions a, b, and c. It describes four classes of persons, and three characteristics of testimony. The four classes of persons are these: (1) A party to the action or proceeding; (2) a person having an interest which may be affected by the event of the trial; (3) a person who has had such an interest, but which has been in any manner transferred to, or has in any manner come to, a party to the action or proceeding; (4) an assignor of a thing in controversy in the action. The three characteristics of the testimony are these: (a) In regard to any transaction or communication between the witness and a person deceased, insane, or lunatic; (b) against a party prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic; (c) when the present or previous interest of the witness may in any manner be affected by the testimony or by the event of the trial. It will be thus seen that, to justify the exclusion of testimony under this proviso of section 400, it should be shown to the satisfaction of the trial judge—First, that the witness belongs to one or more, or to all, of the four classes of persons whose testimony may under certain circumstances be excluded; and, secondly, that his testimony partakes of, not

merely one or two of the disqualifying characteristics classified under a, b, and c, but that it possesses all three of those characteristics. To illustrate: A witness may belong to all four of the classes of persons described under 1, 2, 3, and 4, and his testimony may fall under the divisions a and b, but if it does not also fall under division c then it would be error to exclude it.

Applying these tests to the case before us, we find that the witness T. L. Clinkscales, whose testimony was excluded by his honor, Judge Earle, belongs to three, if not all four, of the classes of persons indicated in section 400. He is a party to the action,—a defendant (class 1). He may be said to be interested in the event of the trial (class 2). He was the mortgagee of the mortgage which was transferred to the plaintiff's testator, and by virtue of which this action was brought (class 3). And he was the assignor of the said mortgage (class 4). We also find that the witness' testimony which was excluded, or rather which was first admitted and afterwards expunged, was in regard to transactions with a deceased person, and therefore possessed a first disqualifying characteristic (division a). It is plain, too, that the interest of the witness would be affected by his examination, or by the judgment rendered in the cause. His testimony therefore possessed the third disqualifying characteristic (division c). But the record does not show that his testimony was "against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic." The testimony is against Jane Estelle Clinkscales, the original plaintiff in the cause, now dead, who prosecuted this action, not as any legal representative of the "deceased person," her husband, J. P. Clinkscales, but solely in her own right as assignee of the note and mortgage for value, and as the lawful owner and holder of the same. The fact that since her death the action has been prosecuted by her executor, E. B. Norris, does not change the status of the case in so far as this appeal is concerned. The testimony therefore does not possess the second disqualifying characteristic set forth in division b. Section 400 is a statute of exclusion, intended to restrict section 399, which provides that "no person offered as witness shall be excluded by reason of his interest in the event of the action." It must, as such, be strictly construed. Nothing may be included under its provisions but what is clearly and unmistakably expressed in its terms. Having found, therefore, that while the witness T. L. Clinkscales may belong to all four of the classes of persons who may, under the conditions set forth in section 400, be forbidden to give testimony possessing the three characteristics described therein, and that his testimony, while it possessed two of the three disqualifying characteristics, yet did not pos-

cess all three, we are bound to hold that the testimony should not have been excluded, and that in excluding it the circuit judge committed error of law.

The third exception charges error in the circuit judge "in refusing to allow secondary evidence as to the contents of the receipt signed by Estelle Clinkscales, in which she elected to take under the will of her husband, J. P. Clinkscales, and to give up all claim to the property covered by the mortgage in question, when there was sufficient proof going to show that said receipt had been lost or destroyed by fire." Judicial discretion, in some of its aspects, being a mixed question of law and fact, it is proper to set forth the facts disclosed by the record upon which this exception is based. One of the defendants, A. J. Clinkscales, testified that he turned over to Jane Estelle Clinkscales the things that were left to her in the will, and took her receipt for the things, as executor. Upon objection of plaintiff's counsel the court ruled that the witness could not go into the contents of the receipt without showing that it was lost and could not be produced. The witness thereupon testified that the receipt was written at Mr. Norris', in Estelle's presence, and that she signed it; that he did not have the receipt; that he left it with Mr. Frank B. Gary, one of the counsel for defendants; that he had not seen the receipt since; that they employed Mr. Murray, of Anderson, to assist in the case, and that the papers were sent to him; that Mr. Gary and he (the witness) searched for the paper in Mr. Gary's office, and it could not be found; that he was at Anderson a while after that, and Mr. Murray and his clerk and he searched for it in his office, and it could not be found; that this search was made after the fire in Mr. Murray's office; that he had never seen the paper since, and did not know where it was. Upon this showing it was sought to introduce secondary evidence of the contents of the paper, and Judge Earle ruled that: "The person who had the paper in his possession should have been examined as to the lost paper. Unless it be shown by competent evidence that the paper is lost and cannot be found, then the contents of that paper cannot be gone into. We can introduce secondary evidence only when it is shown that the primary evidence cannot be produced. It may be possible that Mr. Gary found that receipt after he and this witness made the search." And the secondary evidence was not admitted. The case shows that Mr. Gary (one of the defendants' attorneys, and the first employed) was not at the trial, but was absent, in attendance upon the state legislature, of which he was a member, and that the circuit judge had refused the defendants' motion for a continuance based upon his absence. This exception raises two questions: First, is the exer-

cise of judicial discretion in regard to the admission or exclusion of secondary evidence appealable matter, to be reviewed by this court? And, second, if appealable and reviewable, did the circuit judge in the case at bar commit error of law in excluding the secondary evidence offered?

Arguing on the first question, counsel for the respondent contend that the admission or exclusion of secondary evidence is a matter solely in the discretion of the judge, and not appealable, and as authority they cite *Congdon v. Morgan*, 14 S. O. 588. We do not think that case will bear such a construction. Delivering the opinion of the court, Mr. Chief Justice McIver referred to *Floyd v. Mintsey*, 5 Rich. Law, 372, and to *Berry v. Jourdan*, 11 Rich. Law, 75, to show that no uniform rule could be established as to the exact amount of evidence necessary to prove the loss of the instrument before secondary evidence of its contents could be admitted. And he added: "Neither shall we undertake on this occasion to lay down an absolute rule upon the subject, for, as it is said in 1 Greenl. Ev. § 558, 'it should be recollected that the object of the proof is merely to establish a reasonable presumption as to the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge.' Hence, where the case, as presented to us, does not show that the judge has violated any of the established rules of evidence in the conduct and determination of this preliminary inquiry, we cannot say that there was any error on his part in admitting the secondary evidence. In this case we are unable to perceive any such violation of the rules of evidence. \* \* \* [After summarizing the facts]. We do not see that there was any error on the part of the circuit judge in holding that the proof of loss was sufficient to let in secondary evidence." And further on he adds, "The preliminary evidence offered here was certainly much stronger than that which was held to be sufficient in *Edwards v. Edwards*, 11 Rich. Law, 537." This is a plain recognition of the fact that, while the preliminary inquiry as to the proof of loss of the instrument is addressed to the discretion of the judge, the exercise of that discretion will be, in a proper case, reviewed by this court. This court has always and very properly been averse to disturbing the exercise of this discretion in the courts below; having always felt assured that the judges presiding there would seldom, if ever, overstep the limits of their power and act capriciously and arbitrarily. In *Oliver v. Sale*, 17 S. O. 587, it was held, "What proof of loss of a written contract is sufficient to permit secondary evidence of its contents is to a large extent a question of fact to be decided by the judge, and his discretion will not be disturbed except in very rare cases." McGowan, J. In *Caulfield v.*

Charleston Co., 19 S. C. 601, it was held that "whether there has been sufficient proof of the loss of original evidence to justify the admission of secondary evidence must to a great extent be left to the discretion of the circuit judge." McGowan, J. And in the recent case of *Hobbs v. Beard*, 43 S. C. 370, 21 S. E. 309, it was held that "the loss of a paper is always a preliminary question addressed to the discretion of the presiding judge, and his ruling is not ordinarily the subject of review by this court." Gary, J. These views accord with the opinions of the courts both of England and of our sister states, and they arise out of the very nature of the case. The term "discretion" implies the absence of a hard and fast rule. The establishment of a clearly-defined rule would be the end of discretion. And yet "discretion" should not be a word for arbitrary will or unstable caprice. Nor should judicial discretion be, as Lord Coke pronounced it, "a crooked cord," but rather, as Lord Mansfield defined it, the "exercising the best of their judgment upon the occasion that calls for it," adding that "if this discretion be willfully abused \* \* \* it ought to be under the control of this court." *Rex v. Young*, 1 Burrows, 560. The courts and text writers all concur that by "judicial discretion" is meant sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds,—grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercises his judicial discretion he will decide and act according to the rules of equity, and so as to advance the ends of justice. There are two different kinds of discretion that may be exercised by the presiding judge, one of which is appealable, the other not. In the exercise of his exclusive right to decide a matter of fact, or to control the orderly conduct of trials, the discretion of the circuit judge will not be reviewed by this court. For example, in granting or refusing a new trial on the evidence, or in granting or refusing additional time for argument of counsel, or in deciding whether an admission or confession was made freely and voluntarily, so as to determine its admissibility as evidence, or in permitting a witness to be recalled, or in granting or refusing a motion for a continuance, or the like. In such matters no error of law can be committed, and no appeal can be taken. But to the appealable class, in this state, belong all instances of the exercise of discretion which may disclose the commission of error of law. And, without going into detail, it is enough for the purposes of this case to say that, in deciding the preliminary question whether or not there has been sufficient proof of the loss of the written instrument to justify the admission of secondary evidence of its contents, it is possible that a circuit judge may commit error of law in the violation or mis-

application of the rules of evidence, and therefore his exercise of discretion may be appealed from; and the appeal will lie, not because of any so-called "abuse of discretion,"—a phrase unhappily framed, because implying a bad motive or wrong purpose,—but because his ruling may appear to have been made on grounds and for reasons clearly untenable. This principle is recognized in *Trumbo v. Finley*, 18 S. C. 315, where Mr. Justice McGowan says that the exercise of a judge's discretion, "as a rule, will not be disturbed unless it deprives a party of substantial right, which he can show he is entitled to under the law."

In excluding the secondary evidence offered in this case the circuit judge assigned his reasons for his ruling as follows: "The person who had the paper in his possession should have been examined as to the lost paper. Unless it be shown by competent evidence that that paper is lost and cannot be found, then the contents of that paper cannot be gone into. We can introduce secondary evidence only when it is shown that the primary evidence cannot be produced. It may be possible that Mr. Gary found that receipt after he and the witness made the search." In excluding the secondary evidence upon the foregoing grounds, did the circuit judge commit error of law? The facts in evidence showed that the existence of the paper—the receipt—had been admitted by the other side in the testimony of Jane Estelle Clinkscales, the original plaintiff, taken *de bene esse*; that it had been placed by A. J. Clinkscales, a defendant, in the hands of Mr. F. B. Gary, one of the defendants' counsel; that afterwards Mr. Murray, of Anderson, had been employed to aid as counsel for the defendants; that the papers had been sent to him; that Mr. Gary and the witness had made search for the paper in Mr. Gary's office, and it could not be found; that he (the witness) was in Anderson afterwards, and he and Mr. Murray and his clerk had searched for it in Mr. Murray's office, and it could not be found; that he had not seen the paper since he left it with Mr. Gary; that the search in Mr. Murray's office was made after a fire in that office. Under the circumstances, we think the circuit judge committed error of law in excluding the secondary evidence. In the language of Mr. Greenleaf (1 Greenl. Ev. § 558), "It should be recollected that the object of the proof is merely to establish a reasonable presumption as to the loss of the instrument. Loss, like all other evidential facts, can only be inferentially proved. \* \* \* It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof shows such diligence as is usual with good business men under the circumstances." 1 Whart. Ev. § 142. "The proper limit is where a reasonable person would be satisfied that they had bona fide endeavored to produce the document itself." 2 Best, Ev. 181, quoting from Baron Alderson. Again, it is laid down in Greenleaf that "if the instrument is lost the party is required to give some evidence that such paper once existed, \* \* \*

and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found." Section 558. Such, generally speaking, is the measure of preliminary proof exacted of the party who seeks to introduce secondary evidence of the contents of a lost paper. As was well summed up by Mr. Justice Whitner in *Berry v. Jourdan*, 11 Rich. Law, 76, "the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." As we understand the ruling of the circuit judge in the case before us, he exacted a larger measure of proof, and applied a stricter rule of evidence. He held that: "The person who had the paper in his possession should have been examined as to the lost paper. \* \* \* It may be possible that Mr. Gary found that receipt after he and this witness made the search." We do not think that the rules of evidence sustain Judge Earle in holding, as a *sine qua non*, that "the person who had that paper in his possession should have been examined." It is true that in *Floyd v. Mintsey*, 5 Rich. Law, 373, the court held that: "Whenever the writing in question is traced to a particular individual, who is alive, he should be called to give some account of the instrument, and if he is dead inquiry should be made of such persons as must be presumed to have it in their possession. The preliminary inquiry may prevent the setting up of a fictitious deed, as it may result in the discovery that no deed was ever executed. \* \* \* The evidence, of the loss or destruction of the deed cannot be satisfactory when the persons who must be presumed to have possession of it have not been examined." And 1 Phil. Ev. (2d Ed.) p. 456, § 258, is cited as authority. But in *Floyd's Case* there was no evidence from the grantee, who had 20 years ago gone to Alabama and died, nor had any examination been had of his legal representatives, who were presumed to have the original deed. While in the case at bar there was no presumption that Mr. Gary had the lost paper, A. J. Clinkscales had testified that he and Mr. Gary had searched Mr. Gary's office for the paper, "and it could not be found"; that the paper had been sent to Mr. Murray, of Anderson; and that Mr. Murray and his clerk and the witness had searched for the paper in Mr. Murray's office after the fire, "and it could not be found." While it is true that the paper had been traced into Mr. Gary's possession, it is equally true that, by the testimony of the same witness, it had been traced out of his possession, and up to the office of Mr. Murray, in Anderson. In connection with the fact that Mr. Gary was not examined in person, it is important to remember that his associate counsel had moved for a continuance on the ground of Mr. Gary's unavoidable absence, he being a member of the state legislature then in session, and this motion the circuit judge, in his discretion, had refused. No presumption with reference to the possession of the receipt could properly arise from the mere

absence of Mr. Gary upon official duty, and the fact that his associate counsel, Mr. Parker and Mr. McGowan, offered in his absence secondary evidence of the lost receipt would not encourage the presumption that Mr. Gary may have "found that receipt after he and this witness made the search." In the absence of the presumption that Mr. Gary was in possession of the receipt, we do not think that this is a case for the application of the test or rule laid down in *Floyd v. Mintsey*, supra; and we are constrained to hold that the circuit judge was in error when he ruled that Mr. Gary should have been examined as to the lost paper, and in excluding the secondary evidence offered because of the fact that Mr. Gary, "the person who had had the paper in his possession," had not been examined. Under his honor's ruling, it seems that no other secondary evidence was offered, although more of it was in court, as is shown by an affidavit of Mr. Gary submitted on a motion for a new trial. After stating "that deponent is informed and believes that said original receipt was destroyed when the office of said Murray & Watkins was burned," he adds "that the commission of Mr. Watkins, surviving partner of said firm of Murray & Watkins, is here in court as proof upon this point, and not opened, as deponent is informed and believes, because it was held that testimony could go no further than possession of deponent." But, without this additional testimony, we think it proper to add that, measured by the quantum of proof adjudged to be sufficient in numerous cases in our Reports, as well as elsewhere, the case before us came fully up to the standard established by the courts. See the cases of *Edwards v. Edwards*, 11 Rich. Law, 541; *Berry v. Jourdan*, Id. 76; *Oliver v. Sale*, 17 S. C. 588; *Drake v. Ramey*, 3 Rich. Law, 37. Our opinion, however, is not based upon the quantum of proof, for that is the circuit judge's peculiar province, but on the ruling that "the person who had the paper in his possession should have been examined as to the lost paper," when this rule can only apply where the presumption is that he is in possession of the lost paper. And here that presumption was removed by the same testimony that created it.

The fifth exception charges that the "circuit judge erred in not granting a new trial on the ground that the verdict was insufficient, irregular, and improper, in that it did not specify in whose possession each article was, and the value of each; there being two defendants, and not bound jointly." The following is a copy of the verdict: "We find for the plaintiff the following described property, which we value at \$410.00 (four hundred and ten dollars), to wit: One six horse power Tozer engine; one sixty-saw Pratt cotton gin and condenser; one bay horse, 'Dixie'; one hand-power cotton press; one 3 $\frac{3}{4}$  wagon; one saw and sawmill,—all described in the complaint; or, in case a delivery thereof cannot be had, then for the value thereof, four hundred and ten dollars, and two hundred and fifty-one dollars, the plaintiff's damages for the detention of the same." This was an action in claim and delivery

brought against two defendants. But there was no allegation and no proof that if liable they were jointly liable. There was no privity of interest upon which to base a joint responsibility. They were co-defendants, because it was alleged that they were in possession of the property claimed. The testimony showed—indeed, it seemed to have been admitted—that the defendant T. L. Clinkscales never had in his possession any of the property in dispute except the horse "Dixie." The verdict is general in its form, and is against both the defendants. The foregoing statement clearly shows that the verdict cannot be carried into effect. It is too vague and indefinite. It cannot be held that T. L. Clinkscales, for example, should be made to respond for more of the property claimed than was proved to have gone into his possession. If, as was admitted, he had been in possession of only the horse "Dixie," he could not be made liable for more than the delivery of the horse, or the payment of its value as found, and damages for its unlawful detention, if any were proved. It would be grossly unjust to hold him responsible for all the property or its value, and for all the damages found by the jury, and yet that is the effect of the verdict. A verdict should conform to the proof. In this case a verdict, if against the two defendants, should be twofold,—against T. L. Clinkscales for the delivery of the specific property proved to have been wrongfully in his possession, or for its value, as assessed, if delivery cannot be had, and for such damages as may be proved; and similarly, but separately, against A. J. Clinkscales. We think the appellants' fifth exception is well taken, and hold that the circuit judge erred when he refused the motion for a new trial based upon the form of the verdict.

The ninth exception is as follows: "Because the circuit judge misled the jury and erred when he charged generally that in claim and delivery cases it is not necessary to prove damages. In answer to a statement from Mr. McGowan that there was no proof as to damages, the judge said: 'In the case of *Levi v. Legg* there was not a particle of proof as to damages, but I carried the case up to the supreme court, and that court held that it was not necessary to prove damages. If the property was wrongfully withheld, it was not necessary to prove damages.'" A perusal of the case referred to in the charge of the circuit judge (*Levi v. Legg*, 23 S. C. 282) shows that he misapprehended the decision of this court in that case. The point decided was one of pleading, not one of proof. The court, by Mr. Justice McIver, held that it was not error in the circuit judge to charge the jury that in a claim and delivery case damages followed as a corollary, and it was sufficient that damages be claimed in the demand for judgment. In that case there was no allegation of damages, but only a claim for them in the demand for relief; and this court held that in such cases damages need not be specially alleged, and that it is sufficient that they be claimed in the demand for relief. But it was not held that "it was not necessary to

prove damages," as his honor, Judge Earle, instructed the jury. It is elementary that a jury must "a true verdict give according to the evidence"; that a verdict or a part of a verdict unsupported by some evidence cannot stand, and should be set aside forthwith; and that in finding damages, as in finding any other verdict, the jury must be governed by the evidence on that point. The verdict must accord with the proof. If there be no proof of damages, there can be no true verdict for damages. In the case before us the circuit judge was clearly in error when he charged the jury that it was not necessary to prove damages if the property was wrongfully withheld. While it may not be necessary, in a suit for claim and delivery, to allege damages, but only to claim them in the demand for relief, it is indispensable to prove damages; otherwise a verdict for them cannot stand.

The sixth and eighth exceptions of the appellants will be considered together, the same ground being covered by both, namely, a charge that the circuit judge committed error of law by charging the jury on the facts, and expressing his own opinion on the same. The sixth exception reads as follows: "Because the circuit judge erred when he charged the jury as follows on the question of estoppel, viz.: 'So far as T. L. Clinkscales is concerned, he assigned this mortgage to Mrs. Estelle Clinkscales for value, as he says, and he is now in possession of this property, or a part of it; and, even if there was no proof as to what was due, T. L. Clinkscales would be estopped, for you observe T. L. Clinkscales put Mrs. Clinkscales in a position which she would not have occupied except for the position he put her in, if this is so. And what I have said as to the T. L. Clinkscales mortgage also applies to the Fleetwood Clinkscales mortgage, so far as the plaintiff is concerned.'" The eighth exception reads as follows: "Because the circuit judge charged directly on the facts, and expressed his opinion on the same, when he charged the jury in reference to the 'receipt' and an 'election' thereunder as follows, viz.: 'Did he undertake, for instance, to give her corn which had already been consumed? She can't be said to elect between that corn and this property, because the corn was not there to take.'"

It is contended for the appellants that in charging the jury in the manner above set forth the circuit judge violated the provisions of article 4, § 26, of the constitution of this state. The case at bar was tried at the January term, 1896. The new constitution went into effect "from and after the thirty-first day of December, in the year eighteen hundred and ninety five." The constitutional questions raised here therefore must be considered in the light of the new constitution. Section 26, art. 5, reads thus: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." If this were res integra, the task of interpretation and construction would be comparatively easy. But this court must take judicial notice of the fact that section 26, as it now

stands, differs very materially from section 28 as it appeared in the old constitution. A clause having been struck from the federal constitution by amendment, Chief Justice Marshall held that it might still be referred to, because "it aids in the construction of those clauses with which it was originally associated." *Fletcher v. Peck*, 6 Cranch, 139. We may not, therefore, ignore section 28 of the old constitution. Indeed, a candid construction of the new section demands a careful comparison with the old. The differences between the two are made manifest by placing them side by side:

Constitution of 1868.

Article 4, § 26: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."

Constitution of 1895.

Article 5, § 26: "Judges shall not charge juries in respect to matters of fact, but shall declare the law."

The first clause of the old section remains unchanged,—*"Judges shall not charge juries in respect to matters of fact."* The second clause has been changed in two important particulars: First. The permission to "state the testimony" has been omitted. Second. The permission to "declare the law" has been changed into a mandate. Instead of the former permissive clause, "Judges \* \* \* may \* \* \* declare the law," we find the now imperative provision, "Judges \* \* \* shall declare the law." In this case we are more especially concerned with the first of these two important changes, namely, the leaving out of the new section the permission to state the testimony. And, in construing the section as it now appears in the constitution, we must endeavor to ascertain and give effect to the true meaning of the section, and to the real object and intention of the framers of the new constitution in making this material change. Light and aid in this investigation will best be found by examining the long line of the decisions of this court in which provisions of the old section have been construed with great care, and from every possible point of view. Article 4, § 26, has received interpretation and construction by this court in some 60 cases, beginning with *Redding v. Railroad Co.*, 5 S. C. 69, and ending with *Brock v. O'Dell*, 44 S. C. 29, 21 S. E. 976. Until the adoption of the constitution of 1868, under the common law and the practice of the courts of this state, our circuit judges had the power to charge juries upon the evidence as well as upon the law. After the case was closed on both sides, the judge summed it up to jury. In this "summing up,"—the old name applied to a judge's charge, and the name still used in the English courts,—it was customary to state to the jury the issues involved, to explain the law applicable to the case, and to recapitulate the testimony so as to refresh the minds of the jurors, and enable them to apply the law to the testimony, and to pass intelligently upon it. It was competent for the judge to give the jury his opinion upon the facts as well as upon the law, provided he did not actually take the decision of the case from the jury, but left it to them to find a ver-

dict according to their own opinions. This was the practice for many years throughout all the states, and it still obtains in the federal courts. But this power to comment on the testimony has at various times, and in varying degrees, been abridged in the respective states by constitutional or statutory limitations. No effort has been made, however, so far as we are aware, by congressional legislation, to deprive the judges of the federal courts of this power, which the states, piecemeal, have taken from the judges of the state courts. There is no doubt that this power has been greatly abused. Not unfrequently judges evinced partisanship in their charges, and molded verdicts to their will; and as frequently juries shirked responsibility, and really adopted the opinion of the judge, finding their verdict as he directed. It was to put a stop to this, and to secure the constitutional right of trial by a jury and not by a judge, that the various limitations on this common-law power were imposed by constitutions or by statutes.

It is instructive to note the views expressed by the courts of last resort in this state while the common-law power was exercised. In *State v. Casados*, 1 Nott & McC. 98, Mr. Justice Cheves held that: "It is the right, and often the duty of the presiding judge, in the examination of questions of complicated facts, to give the aid of his discrimination, experience, and judgment to the jury. If he finally and distinctly submits the question of fact to the jury as a matter within their peculiar province, and on which they have a right to determine for themselves, there can be no cause for this court to interfere. There may be extreme cases, which I hope will never exist, where a judge, becoming insensible to the duties of his high station, may forget that impartiality which he is sworn to practice,—a quality which graces while it strengthens the authority of the bench. If, forgetting the duty of impartiality, a judge becomes a partisan, this court must interfere." It had been held in a previous case (*State v. Bennet*, 2 Tread. Const. 692, by Mr. Justice Nott, that: "Although it is the province of the jury to judge of the facts, and of the judge to determine the law, yet the judge is not precluded from giving his opinion on the facts. It is his duty to aid the jury in forming an opinion of the evidence as well as the law, which are frequently so blended that it is difficult to take a distinct and unconnected view of each separately. The whole case was finally and fairly left to the jury." In *Devlin v. Killcrease*, 2 McM. 428, the court cites with approval the *Bennet* and *Casados* Cases, as laying down "the practice in all common-law courts." It refers to "the frequency of such grounds of appeal," and Mr. Justice Richardson quotes from Lord Brougham, as "high authority," the following, "commending the judicial character and conduct of Lord Ellenborough," namely: "Lord Ellenborough was not one of those judges who, in directing the jury, merely read over their notes, and let them guess at the opinion

they have formed, leaving them without any help or recommendation in forming their own judgments. Upon each case that came before him he had an opinion, and, while he left the decision to the jury, he intimated how he thought himself. This manner of performing the office of judge is now generally followed, and most commonly approved. \* \* \* "And I may add," says Mr. Justice Richardson, "such is the well-settled practice in South Carolina." In the case of *Kirkwood v. Gordon*, 7 Rich. Law, 474, the will of Gordon had been attacked on the ground of lunacy, want of capacity, and undue influence. Judge O'Neill had said to the jury that "there was no evidence of insanity, lunacy, or want of capacity sufficient to destroy the will. Still," he adds in his report, "this was my mere opinion and advice. They were left at liberty, if they chose so to do, to find against the will. So, too, I told them there was no evidence of undue influence. \* \* \* If I seemed to argue the case for the will, it perhaps arose more from the preponderance of the facts on that side. It is, however, true that I did say to the jury, as I closed my charge, that the objections to the will seemed to me to be more shadowy than any which had ever been presented to me. The jury found for the will." One of the grounds of appeal charged that "the presiding judge, instead of submitting the case to the jury on the testimony, argued it to them with as much feeling, force, and earnestness as did the counsel for the executor." Mr. Justice Glover, speaking for the court of appeals, said: "This court has acted on the maxim, 'Ad questionem legis, respondent iudices; ad questionem facti, respondent juratores.' To preserve the latter branch of this maxim, it will hardly be contended that a judge shall simply recapitulate the evidence and play the part of a mere automaton, and not direct the attention of the jury to the relevancy and sufficiency of the evidence. \* \* \* His experience should light their path and lead them to a correct conclusion, not controlled by his opinion, but by the evidence. \* \* \* He must instruct the jury on the facts, not control their verdict; enlighten their understanding, not inflame their passions; and, above all, the discharge of judicial duties demands impartiality. \* \* \* This tribunal cannot say, in the language of counsel, that the presiding judge molded the verdict." The pithy style of this decision recalls to mind, and tempts us to quote, the quaint advice given by Lord Bacon to Mr. Justice Hilton in regard of summing up cases to a jury: "You should be a light to open their eyes, but not a guide to lead them by the noses." In *State v. Smith*, 12 Rich. Law, 439, one of the last cases on appeal under the old system, the learned Associate Justice Job Johnston, delivering the opinion of the court of appeals, stoutly maintained this "right of the judge to advise the jury on the facts," saying: "This right has been too often sustained to remain the subject of the least doubt. It is entirely reasonable and proper, and its exercise is not unfre-

quently called for by duty and expediency. \* \* \* It is not difficult to discover that such a procedure may be disagreeable and tend to the disappointment of interested parties; but to the cause of justice, of which both judge and jury are the sworn ministers, it can, when judiciously exercised, scarcely fail to be satisfactory."

These cases sufficiently indicate the nature of the right and the extent of the power exercised by the judges of this state in charging juries under the old common-law practice, which right was abridged and power limited by the constitution of 1868, and still further abridged and limited by the constitution of 1895. It is proper to ascertain the extent of that abridgment and limitation, first by the constitution of 1868, and afterwards by that of 1895. Following the example of other states, and indeed adopting the very words of some of the other state constitutions, our constitution of 1868 provided (article 4, § 26) that "judges shall not charge in respect to matters of fact, but may state the testimony and declare the law." This provision superseded the common law in this regard. It took away from the circuit judge the right he formerly had—in the language of the cases just cited—"to advise the jury on the facts," or "to instruct the jury on the facts," or to "direct the attention of the jury to the relevancy and sufficiency of the evidence," or to "intimate how he thought himself," or "to aid the jury in forming an opinion on the evidence" by "giving his opinion on the facts," or, "in the examination of questions of complicated facts, to give the jury the aid of his discrimination, experience, and judgment." Very soon appeals came up from the courts below charging violations of this constitutional provision, and they continued to come until section 26 had been interpreted and construed nearly 60 times by this court. Its object, meaning, and scope have repeatedly been declared in clear and unequivocal terms. For example, in the first case in order of time (*Redding v. Railroad Co.*, 5 S. C. 69) Mr. Justice Willard said: "Considering together the parts of this section, it is quite clear that its sole intention was to prevent judges from forcing upon the juries their own convictions as it regards matters of fact. The juries are the judges of such matters, and cannot properly look to the court for a controlling view of the proper conclusions of fact; nor can the court, on the other hand, employ its influence over the minds of jurors to force upon them its conclusions in such cases." This view was approved by Mr. Chief Justice Moses in *State v. Green*, 5 S. C. 66, 87. Mr. Justice McIVER, in *State v. White*, 15 S. C. 392, held that "the real object of this clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expression of opinion by the judge, whose position would very naturally add great weight to any opinion he might express upon any question of fact arising in a case." And on page 393: "The object of the constitutional provision is to preserve the jury from

being in any way influenced by the judge's opinion as to the facts." It was concisely stated by Mr. Justice McGowan in *Wood v. Railroad Co.*, 19 S. C. 581, that this provision of the constitution "was intended to exclude the influence of the judge in molding verdicts." Mr. Chief Justice Simpson said in *State v. Howell*, 28 S. C. 255, 5 S. E. 620: "We have construed this section to mean that while trial judges may state the testimony, and so arrange it as to enable the jury to apply it to the legal points involved, yet that they cannot convey to the jury, either expressly or impliedly, their opinions as to the force of said testimony upon any question of fact at issue between the parties; in other words, that the jury must be left perfectly free in reaching a conclusion upon the testimony introduced, untrammelled by any intimation from the judge as to whether a certain fact at issue has been proved or not." And Mr. Justice Pope, speaking for this court, in *Moore v. Railroad Co.*, 38 S. C. 31, 16 S. E. 791, clearly announced the same view thus: "What is meant by 'the judge charging upon the facts'? It seems to us, it may be said to occur when, in the progress of a trial, the circuit judge conveys by word his opinion upon the sufficiency or insufficiency of certain testimony in determining, by the jury, some fact at issue between the parties litigant. It must be by charge,—that is, oral or written statements of the judge to the jury; it must be an opinion on some matter of fact; it must be such an expression of opinion on a matter of fact that thereby the jury are made to know what is his estimate of the truth or falsity of some matter in testimony; and, lastly, such an expression by the judge must relate to some matter of fact at issue between the parties." Similar views are expressed in *Benedict v. Rose*, 16 S. C. 630; *Woody v. Dean*, 24 S. C. 504-506; *State v. Addy*, 28 S. C. 13-15, 4 S. E. 816, 817; *State v. Norton*, 28 S. C. 577-579, 6 S. E. 822-824; *State v. Jacob*, 30 S. C. 138, 139, 8 S. E. 702, 703; *Richards v. Munro*, 30 S. C. 290, 291, 9 S. E. 110; *State v. James*, 31 S. C. 235-237, 9 S. E. 851, 852; *State v. Williams*, 31 S. C. 238, 9 S. E. 853; *State v. Wyse*, 32 S. C. 54, 55, 10 S. E. 615; *Fertilizer Co. v. Pagett*, 39 S. C. 76, 77, 17 S. E. 563, 566; *State v. Ezzard*, 40 S. C. 322, 18 S. E. 1025. In the light of these and other cases, no doubt is left about the purpose and scope of section 26, and no further definition is needed of the meaning of the first clause of this section, "Judges shall not charge juries in respect to matters of fact." A judge violates this provision when he expresses in his charge his own opinion upon the force and effect of the testimony, or of any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part. Examples of what has been held to be charging on the facts will be found in: *State v. Green*, 5 S. C. 65; *State v. White*, 15 S. C. 391, 392; *Benedict v. Rose*, 16 S. C. 630; *Howard v. Wofford*, Id. 153; *Sharp v. Kinsman*, 18 S. C. 114; *State v. Jenkins*, 21 S. C. 285; *Levi v. Legg*, 23 S. C. 285; *State v.*

*Smalls*, 24 S. C. 591; *State v. Addy*, 28 S. C. 4, 4 S. E. 814; *State v. Norton*, 28 S. C. 578-580, 6 S. E. 823, 824; *White v. Railroad Co.*, 30 S. C. 228, 9 S. E. 96; *State v. Caddon*, 30 S. C. 609, 8 S. E. 536; *State v. Williams*, 31 S. C. 238, 9 S. E. 853; *State v. Wyse*, 32 S. C. 54, 55, 10 S. E. 615; *Jackson v. Jackson*, 32 S. C. 591, 592, 11 S. E. 204, 205; *State v. Brown*, 33 S. C. 160, 11 S. E. 641; *Brock v. O'Dell*, 44 S. C. 29, 21 S. E. 976. Instances of charges which were held not to be charges on the facts will be found in *State v. Atterberry*, 19 S. C. 597; *Acker v. Anderson Co.*, 20 S. C. 499; *State v. Robinson*, 27 S. C. 619, 4 S. E. 570; *Carroll v. Express Co.*, 37 S. C. 455, 16 S. E. 128; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021.

With reference to the second part of section 26, "but may state the testimony and declare the law," this court has several times confessed that "there is no more difficult duty imposed upon this court than that of fixing, under this provision, the exact line which bounds the province of the trial judge in respect to matters of fact. \* \* \* The judge undoubtedly has the right to state the testimony, and in its proper order, and it is easy to see how a conscientious officer \* \* \* may unconsciously transcend the very shadowy outlines of his constitutional domain." *State v. Addy*, 28 S. C. 13, 4 S. E. 814. See, also, *State v. Summers*, 19 S. C. 94. Since this permission to "state the testimony" has been taken away, and no longer is found in section 26 of the constitution, it is of the utmost importance that we should ascertain what this court has held to be the true and full meaning of the expression "may state the testimony," because by the elision of that clause circuit judges have been deprived of whatever power it conferred. In *Redding v. Railroad Co.*, 5 S. C. 69, it was thus defined: "'Stating the evidence' means more than repeating it. It includes the idea of placing it in its logical relation to the propositions which it is adduced to support or contradict, as well as to the principles and rules of law by which its bearing and force ought to be controlled." *Willard, J.* It was held, somewhat more at length, in *State v. Green*, 5 S. C. 66, "that a judge, in his charge to the jury, is not to be confined to a mere narration of the evidence. While he is not at liberty to give his conclusion on any particular portion of the testimony, nor the result of his judgment as to the whole, he is not restrained from comparing the various parts of it, that the jury may have before them, in as concise a form as possible, the issues upon which they are to pass, so that they may be the better enabled to apply the law to the facts presented in the cause. The judge is not permitted to say, where the testimony makes an issue of fact, in what manner the jury is to value it; but he may review the whole testimony, and, while not allowed to give his own conclusion, may collect and group together the various phases in which the evidence may be regarded, that the jury may view it in the various relations which it bears to the law as pro-

nounced by the courts." Moses, C. J. The quotation from Mr. Chief Justice Moses put, perhaps, a too liberal construction upon "stating the testimony," approaching somewhat too closely the "summing up" of the common law. This seems to be intimated by Mr. Justice McIver in *State v. White*, 15 S. C. 392. In that case the present chief justice thus interpreted the clause: "While, therefore, the judge is not expected to confine himself to a mere statement or repetition of the testimony as it was delivered, but may place it before the jury in the order in which it relates to the propositions which it is adduced to support or contradict, by pointing out the questions of fact which arise, and calling the attention of the jury to the evidence applicable to such questions, yet he should carefully avoid expressing any opinion which he may have formed from the facts, leaving it for the jury to draw their own conclusions, unbiased by any impressions which the testimony may have made upon the mind of the judge." Mr. Justice McGowan expresses the same opinion in *Benedict v. Rose*, 16 S. C. 630. After saying, "It has been properly held that 'stating the testimony' means more than repeating it," he adds, "But, while it means more than merely repeating the testimony, the other part of the provision negatives the right to invade the proper province of the jury, by expressly declaring that 'Judges shall not charge juries in respect to matters of fact.'" Mr. Chief Justice Simpson, delivering the opinion of the court in *Woody v. Dean*, 24 S. C. 505, said very forcibly: "What is meant by the constitutional inhibition upon a judge in charging on the facts, as we understand it, is that as to any disputed matter of fact in issue between the parties, while he may state the evidence, read it over to the jury, or state it orally, yet he is not permitted to give his opinion as to its force and effect, or make remarks intended or tending to influence the jury as to their finding. He may state the case alternatively, as, if they find thus and so from the testimony, which he has recounted to them, the law will be one way; if not, it will be otherwise. The point is that the judge shall not take the testimony from the jury, either directly or impliedly, as to its effect." To the same effect is the language of the present chief justice in *State v. James*, 31 S. C. 235, 9 S. E. 844, 851: "What, then, is the extent of the permission to state the testimony? Is it confined to a mere repetition of the testimony as it fell from the lips of the witnesses, or does it extend to an arrangement of the testimony in the order in which it applies to the several questions of fact arising in the case, and, as thus arranged, laid before the jury by the judge?" After referring to several decided cases, Mr. Justice McIver continues: "The latter construction has been held the correct one; but it has been uniformly held, that in thus laying the testimony before the jury in its proper order, the judge must be careful to avoid expressing or even intimating any opinion as to the facts, and that if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our constitution the jury are the exclusive judges of the facts; and the

true meaning and real object of the section of the constitution above quoted is that they must be left to form their own judgment, unbiased by any expressions or even intimations of opinion from the judge." See, also, for similar doctrine, *State v. Jones*, 21 S. C. 596; *State v. Davis*, 27 S. C. 612, 4 S. E. 567; *State v. Addy*, 28 S. C. 13, 14, 15, 4 S. E. 816, 817; *State v. Howell*, 28 S. C. 250, 5 S. E. 617; *State v. Howard*, 32 S. C. 95-97, 10 S. E. 832, 833; *Foggette v. Gaffney*, 33 S. C. 311, 12 S. E. 260; *Moore v. Railroad Co.*, 38 S. C. 30-33, 16 S. E. 791, 792. These authorities clearly show that under the constitutional provision to "state the testimony" a judge had the right to repeat the testimony to the jury, in his charge, either by reading it in its proper or logical order, or by grouping it with reference to the several issues of fact arising and propositions of law involved, and to call the jury's attention to the evidence applicable to the questions of law or fact. This right has been taken away from the circuit judges by the change made in section 26 in the constitution of 1895; the permission to "state the testimony" having been left out, and, we must hold, intentionally left out. It was manifestly the intention of the framers of the constitution of 1895 to deprive judges of the right to "state the testimony" in charging juries, and to take from them all the power which that phrase has been held to imply. Section 26, as it now stands, thus further abridges the right and limits the power of judges in charging juries which they formerly exercised under the common law, and which, as we have seen, had already been abridged and limited by the same section in the constitution of 1868.

Having thus ascertained what has been taken from the judges in this regard, it remains to determine what had been left to them,—to define, if possible, the limits of their diminished constitutional domain. It stands to reason that nothing has been taken from them, with regard to the testimony, except the right "to state the testimony" in their charges. Thus, it would still be competent for the judge to tell the jury in his charge, in a proper case, that there was no evidence bearing on a certain issue, if there was none. This court has held that such a ruling is strictly a matter of law, and not in conflict with the constitutional section in question. See *Redding v. Railroad Co.*, 5 S. C. 70; *Williams v. Connor*, 14 S. C. 621; *Lynn v. Thomson*, 17 S. C. 137; *State v. Summers*, 19 S. C. 94; *State v. Nance*, 25 S. C. 172, 173; *State v. Norton*, 28 S. C. 579, 6 S. E. 820. On the other hand, it would still be error to charge that there was no proof, if there was evidence at all on the point. *Fripp v. Williams*, 14 S. C. 510; *Carrier v. Hague*, 9 S. C. 457. It would seem, also, that a judge would not be violating the constitutional inhibition if he in his charge repeated the testimony as to undisputed facts or admitted facts, or stated their legal effect, or pointed out the different conclusions which might be drawn from them, or the inquiries

they would naturally give rise to. In *Woody v. Dean*, 24 S. C. 505, it was laid down that the constitutional inhibition upon a judge in charging on the facts related only to "any disputed matter of fact in issue between the parties." Quoting this in *Greene v. Duncan*, 37 S. C. 253, 15 S. E. 959, Mr. Justice Pope says: "Here is a judicial construction of this provision of the constitution, and by its express terms such inhibition extends only to any disputed matter of fact in issue between the parties." Held no error in the judge charging testimony to which there was no opposing testimony. So in *Moore v. Railroad Co.*, 38 S. C. 31, 16 S. E. 792, this court said by Mr. Justice Pope: "These acts of the plaintiff were admitted by him in his testimony. Every other witness testified to them. Where was there any issue between these parties as to those matters of fact? There was none. This being so, where did the circuit judge err in referring to them as unlawful? The facts being admitted, the judge had the right to state the legal effect of such admitted facts. They were unlawful, and hence no error was committed by the judge in this particular." It was held also in *Lynn v. Thomson*, 17 S. C. 137 (Mr. Chief Justice Simpson), that where there is no dispute as to the immediate fact testified to, and the question is as to the effect of such fact, it would not be an invasion of the province of the jury for the judge "to point out to them the different conclusions which may be drawn, and the circumstances which might incline them to believe the one or the other, reserving his own opinions." In *State v. Glover*, 27 S. C. 607, 4 S. E. 566 (Mr. Justice McIver), it was held to be no error in the judge to embody in his charge repetitions of the uncontradicted testimony of the witnesses, and "point out the inquiries which such testimony would naturally give rise to." See, also, *Ebaugh v. Mullinax*, 34 S. C. 373, 13 S. E. 613; *State v. Jackson*, 36 S. C. 491, 15 S. E. 559; *State v. Murrell*, 33 S. C. 98, 11 S. E. 682; *State v. Ezzard*, 40 S. C. 322, 18 S. E. 1025. It would seem, also, that there is no violation of the constitutional inhibition when a judge in his charge makes general remarks which have no special application to the case, or which are not pertinent to any issue involved, or inadvertent, irrelevant remarks, or statements used in illustration of some principle of law. *Sullivan v. Blythe*, 14 S. C. 622; *State v. Sims*, 16 S. C. 495; *State v. Corbin*, Id. 545; *Moore v. Railroad Co.*, 38 S. C. 31, 16 S. E. 781; *Fitzsimons v. Guanahani Co.*, 16 S. C. 197; *Rembert v. Railroad Co.*, 31 S. C. 312, 9 S. E. 968. It has also been decided by this court in several cases that a judge does not violate the provisions of section 26 when he makes incidental remarks or observations during the progress of a trial, not in his charge to the jury, but, for example, when making a ruling, or when hearing argument, or during the examination of the witnesses. In *State v. Turner*, 36 S. C. 544, 15 S. E. 605, referring to a remark made not in charging the jury, but in

making a ruling during the progress of the trial, Mr. Justice McGowan said: "It seems to us that it would be a great stretch of construction to hold that such an incidental remark, made during the progress of the case, amounted to a violation of the provision of the constitution which prohibits judges from charging juries as to matters of fact." To the same effect is *Ober v. Blalock*, 40 S. C. 37, 18 S. E. 266, in which the remarks objected to were made "in hearing argument and making rulings as to the admissibility of evidence." See, also, *State v. Crawford*, 39 S. C. 350, 17 S. E. 799, quoting with approval from *State v. Turner*, supra; also *State v. Atkinson*, 33 S. C. 108, 11 S. E. 693, and *Moore v. Railroad Co.*, 38 S. C. 31, 16 S. E. 791, which last case holds that the violation "must be by charge." It has also been well settled by the decisions of this court that article 4, § 26, was not violated when a judge in his charge to the jury based his declaration of the law upon a hypothetical statement of facts. By so doing he was neither charging in respect to matters of fact, nor commenting on the testimony, nor stating the testimony. In *Carroll v. Express Co.*, 37 S. C. 455, 16 S. E. 129 (Mr. Justice Pope), the court said: "The circuit judge refused to make this charge [a request to charge] because he would thereby express his opinion on the facts of the case. If such were the case the judge was right, but the appellant insists that such is not the case,—that the request to charge was predicated upon hypothetical findings of fact by the jury; and if this were so the judge would have been in error, for it is very often the case that this is the only mode by which a party litigant can obtain a declaration of what the law is, in a particular case, from the presiding judge." The request to charge on page 453, 37 S. C., and page 129, 16 S. E., was framed thus: "If the jury are satisfied from the evidence adduced that the plaintiffs, by their agent, Horton, induced the defendants' agent, Colyer," to do so (several matters being thus hypothetically stated), "then Horton must be held to have assumed all risk," etc., and in short to have made Colyer his agent; the purpose of the request manifestly being to obtain from the judge an instruction for the jury on the law of agency. The court held (page 457, 37 S. C., and page 130, 16 S. E.) that the request "was intended to bring out a declaration of this principle of law by him, and such refusal by the circuit judge was error." Without such a hypothetical basis, since he may not now state the testimony, it is difficult to see how a judge could make plain to the most intelligent jury the law of agency, of negligence, laches, estoppel, or the like subjects, in which necessarily law and fact are so intimately blended. See, also, Mr. Chief Justice McIver's opinion in *State v. Milling*, 35 S. C. 28, 14 S. E. 287, and Mr. Justice Pope's in *Greene v. Duncan*, 37 S. C. 254, 15 S. E. 956, and in *Brock v. O'Dell*, 44 S. C. 29, 21 S. E. 979, where it was held, "If the plaintiffs had desired a charge from the trial judge upon a

hypothetical state of facts, they should have so framed their request." A similar charge was sustained in *Bank v. Zorn*, 14 S. C. 453. And in *Woody v. Dean*, 24 S. C. 505, Mr. Chief Justice Simpson said, "He may state the case alternatively, as, if they find thus and so from the testimony, \* \* \* the law will be one way; if not, it will be otherwise." From these authorities we conclude, therefore, that it would be no violation of section 28, in its new form, to submit to the jury in the charge a hypothetical statement of facts, on which to base the law,—in many cases a necessary basis of the law which the judge announces.

We must not overlook the important fact that, in addition to the taking away the right to "state the testimony," the new section 26 has changed the permission, "may \* \* \* declare the law," into the mandate, "shall declare the law." Since the constitution now requires the trial judge to declare the law, the question arises, what law shall he declare? In a homicide case, for example, shall he give the jury a complete discourse on the law of murder, manslaughter, homicide, *se defendendo*, homicide *per infortunium*, etc.; or, in a case of trespass to try title, shall he endeavor to aid the jury by an exhaustive survey of the whole realm of the law of real estate? To ask the question is to answer it. Such a charge would leave the law of the particular case in *nubibus*. Clearly the judge can be required to declare only so much of the law as is applicable to the case on trial, and what that law shall be can be shown by the testimony alone. As was well said by Mr. Justice McGowan in *Benedict v. Rose*, 16 S. C. 630: "The judge is required to announce the law, but that cannot be done properly until the facts are established. He cannot be expected in every case to announce all the law, but only so much of it as is applicable to the case made by the facts. It is therefore absolutely necessary for him, in discharging his part of the duty, not only to understand, but to make reference, to the facts which must constitute the basis of the law he announces. Accordingly the constitution declares that he has the right to state the testimony and declare the law." That right has been taken away by the amendment to section 26, as we have seen; but it is as "absolutely necessary" as ever that the judge should have something to constitute the basis of the law he declares,—more necessary, if possible, now that he must declare the law. He can no longer bottom his law upon direct references to the testimony, but he may bottom it upon a supposed state of facts. Mr. Chief Justice Simpson was equally strong in delivering the opinion of this court in *Woody v. Dean*, 24 S. C. 504: "While a judge has no right under the constitution to charge on the facts to the extent of giving his opinion to the jury, he must necessarily say something about the testimony, or else his charge would be barren of fruit, and in many cases a useless ceremony." He may not now say anything directly about the testimony, may not state what is in evidence, but

he may prevent his charge from being a useless ceremony by founding it upon a hypothetical statement of fact. This view is not inconsistent with that expressed in *State v. James*, 31 S. C. 235, 9 S. E. 851, in which the present chief justice spoke for the court and said: "The first inquiry which naturally arises is, what is the meaning and extent of the prohibition,—judges shall not charge juries in respect to matters of fact? If that language stood alone, then the inference would be that a judge in charging a jury should not say anything about the facts; for the broad terms used, 'in respect to matters of fact,' would certainly warrant, if they did not require, the inference that a judge was not at liberty even to speak of the facts,—not at liberty to speak in reference to or 'in respect to' them. But, as that was not the intention, additional words are found in the clause which expressly permit the judge to state the testimony. So that the practical inquiry is, what is the extent of this permission? following, as it does, and qualifying, the previous absolute prohibition, which, without such qualification, would forbid any allusion to the testimony."

The condition thus argumentatively supposed now exists. The prohibition, "Judges shall not charge juries in respect to matters of fact," now stands alone in section 26, unqualified by the permission to "state the testimony," which permission has been stricken out by amendment. And any direct reference to the testimony in charging a jury, any expression as to what is in evidence, any remark that would amount to a stating of the testimony, in whole or in part, is absolutely prohibited. At the same time, we cannot presume that it was the intention of the framers of the new constitution (many of whom were members of the bar and learned in the law, and familiar with the decisions of this court) to require trial judges in their charges to declare the law, and yet forbid them to base that law upon any foundation, by which alone they can make it apply to a given case. The constitutional mandate is, they "shall declare the law." To require that they shall do so, and to forbid them to establish the law they must declare upon any foundation, is to require the impossible. We have shown by the highest authority that such a foundation is absolutely necessary. Formerly it was furnished either by a statement of actual facts in evidence, or by a statement of hypothetical facts; now it must be found solely in the latter,—a supposed state of facts. We therefore conclude and hold that as it would be impossible to declare the legal principles involved without some state of facts, actual or hypothetical, it was the intention of the framers of the new constitution, in amending section 26, art. 4, that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony either in whole or in part. We are clearly of the

opinion that under section 26, as it now reads, a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the legal result. In so doing, if he be careful not to repeat any of the testimony, nor to intimate directly or indirectly what is in evidence, he will be chargeable neither with stating the testimony, nor with charging in respect to matters of fact. The length to which our discussion of this question has grown will be excused, we trust, in consideration of the great importance of the subject, and the obvious necessity of determining as clearly and satisfactorily as possible the full effect of the change in section 26, art. 4.

We recur now to the charge of the judge in the case at bar, excepted to by the appellants as in violation of section 26. It appears that he said to the jury: "So far as T. L. Clinkscales is concerned, he assigned this mortgage to Mrs. Estelle Clinkscales for value, as he says, and he is now in possession of this property, or a part of it; and, even if there was no proof as to what was due, T. L. Clinkscales would be estopped, for you observe T. L. Clinkscales put Mrs. Estelle Clinkscales in a position she would not have occupied but for the position he put her in, if this is so. \* \* \* Did he undertake, for instance, to give her corn which had already been consumed? She can't be said to elect between that corn and this property, because the corn was not there to take." These remarks of the judge were not uttered while he was making a ruling during the progress of the trial, nor were they mere incidental remarks or observations let fall during the progress of the case, but they were made in his charge to the jury. Nor did they relate to undisputed or admitted facts, but to facts in issue between the parties, and to be determined by the jury. Nor was the judge submitting hypothetical findings of fact as a foundation for the law of the case, but his references to the testimony were direct, positive, and categorical. It is true that one of the statements was followed by the phrase, "if this is so," but the judge had already stated what the testimony was, and had given his opinion of its effect; and we must think that the qualifying phrase came too late to cure the mischief and do away with the effect of the positive expression. *State v. White*, 15 S. C. 393; *State v. Smalls*, 24 S. C. 591, 592. The portions of the charge under consideration amount to a "stating of the testimony" in part, and we have seen that the right "to state the testimony" has been taken from the trial judge. They also embody an expression of the judge's opinion concerning the effect of the testimony referred to, and such we hold to be an instance of charging "in respect to matters of fact,"—a violation, therefore, of the strict prohibition of the constitution. The sixth and eighth exceptions of the appellants are therefore sustained. It is the judgment of

this court that the judgment of the circuit court be reversed, and a new trial granted.

BENET, Special Judge, sitting in place of GARY, J., disqualified.

(119 N. C. 841)

# STATE v. TURNER et al.

(Supreme Court of North Carolina. Nov. 10, 1896.)

JUDGE—APPOINTMENT—DE FACTO JUDGE—CONSPIRACY — EVIDENCE — ACTS AND DECLARATIONS OF CO-CONSPIRATOR—INDICTMENT—PROOF OF INCORPORATION IN FOREIGN STATE.

1. Const. art. 4, § 11, provides that the judges of the superior court shall preside in the courts of the different districts successively, but that no judge shall hold the courts in the same district oftener than once in four years. Code, § 913, authorizes the governor to appoint any judge to hold special terms of the superior court, and, by consent of the governor, the judges may exchange the courts of a particular county or counties. *Held*, that the inhibition of the constitution applies neither to the holding, by any judge of the superior court, of one or more regular terms of said court, by exchange with some other judge, and with the sanction of the governor, nor to the holding of special terms under the order contemplated in said provision of the Code.

2. A judge of the superior court, who presides in another district by appointment of the governor, is a de facto judge of the court so held, and all his acts in that capacity are valid, though his appointment be unauthorized.

3. Where the unlawful act, in furtherance of a conspiracy to defraud, is done in the state where the indictment is found, the conspirators who participated only in the design may be tried without joining in the indictment the perpetrator of the overt act.

4. Where, in a prosecution of several defendants for conspiring to defraud, evidence of a common design is shown, testimony tending to prove the unlawful acts of persons not indicted, in furtherance of such design, is competent.

5. In a prosecution for conspiracy to defraud insurance companies, a witness for the state testified that he was the agent of defendants to fraudulently obtain insurance on the lives of deceased or aged persons, and find purchasers for the policies, who would keep the premiums paid; that one B., who was not on trial, "was also the agent of the defendants; that they all said he was"; and that witness saw B. offer to sell a policy on the life of one M. *Held*, that the declarations of B. made after the entry of defendants into the conspiracy, and up to the time when the overt act was committed, were admissible against defendants.

6. Where an indictment alleges the ownership of property by a corporation, it is sufficient to show that the corporation carried on business under the corporate name set out in the indictment, without producing the certificate of incorporation, or a copy thereof, in the private acts published by authority of the state.

7. A copy of the charter of a foreign corporation, certified by the secretary of the state where it was incorporated, under his official signature and the state seal, is admissible in North Carolina to prove the fact of incorporation. *Barcello v. Hapgood*, 24 S. E. 124, 118 N. C. 712, followed.

Appeal from superior court, Jones county; Graham, Judge.

Stephen Turner and others were indicted for conspiracy to defraud. A nol. pro. was entered as to two of the defendants. The others were convicted, and appeal. Affirmed.

The certificate of incorporation of the Massachusetts Benefit Association, one of the prosecutors, was signed by the secretary of the commonwealth of Massachusetts in his official capacity, and sealed with the seal of the commonwealth.

Clark & Gulon, for appellants. The Attorney General, for the State.

AVERY, J. The inhibition contained in the constitution (article 4, § 11)<sup>1</sup> applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the governor, nor to the holding of special terms under the order contemplated in section 913 of the Code.<sup>2</sup> *State v. Lewis*, 107 N. C. 967, 976, 12 S. E. 457, and 13 S. E. 247; *State v. Monroe*, 80 N. C. 878; *State v. Speaks*, 95 N. C. 689. The intent of the framers of the constitution was to change the then existing system, under which all of the courts of a district were generally held by a resident judge, so that the regular sittings of a whole district or circuit by any given judge would not occur oftener than once in four years. In case of holding specified terms by exchange or special terms by assignment, it is left to the chief executive to give or withhold his assent, and it must be assumed that he will exercise his discretionary power of selecting and assigning those who shall hold special terms with an eye to the best interest of persons directly interested; but, if there were any grounds for doubting the authority of the governor to issue a commission to the judge who presided, and to thereby constitute him a de jure officer in the discharge of that duty, the fact that the governor appointed him, and the public submitted to his authority, constituted him de facto judge of the court which he held, and rendered all of his acts in that capacity as binding and valid as if he had acted de jure. *State v. Lewis*, supra. Were it otherwise, the public would be subjected to the hazard of having all of the adjudications of a court presided over by an incumbent judge acting by virtue of a commission declared invalid, in all cases where, after a course of litigation, the lawful right to his office is declared to be in a contestant. An illustration could be found in our own judicial annals in a case where Judge Wilson was commissioned as

judge of the superior court, but was ultimately, and after holding a number of courts, ejected from the office, under the decision of this court in *Cloud v. Wilson*, 72 N. C. 155.

David Parker, a witness for the state, "gave a full and detailed account of his connection with the defendants for a number of years previous, and of their place and methods of together cheating and defrauding the insurance companies." He explained "that he was the agent of the defendants to work up their business for them, and that, when a policy had been fraudulently obtained upon the life of deceased or aged persons, he (Parker) was to procure a purchaser for it, who would take it, and keep the premiums paid up on it." Parker then testified "that William (Bill) Fisher was also the agent of the defendants; that they all said he was." Among other things, Parker was allowed to testify as follows: "I saw Bill Fisher offer to sell a policy in the Massachusetts Life Association on the life of Melissa Guthrie." The defendants excepted to the admission of that testimony after objection to its competency. The defendants were charged in the indictment with combining and conspiring to cheat the Massachusetts Benefit Life Association and others of divers large sums of money. William Fisher was not a defendant, and the defendants contend that his declarations were erroneously admitted as evidence against them. The same rules of evidence that govern the trial of other criminal offenses apply when the indictment is for conspiracy. But there is a marked distinction growing out of the manner of their application. Ordinarily, it is incumbent on the prosecution to prove participation in an act, but on trials for conspiracy the state must show participation in a design, and the facts in issue are (1) whether there was an agreement for an alleged purpose; (2) whether a defendant charged participated in the design; and (3) whether the common purpose was carried into execution. Here the testimony tended to prove an agreement between the defendants to constitute Fisher (who is not indicted) their agent to do the same unlawful and fraudulent acts that the witness Parker had been doing in furtherance of a common purpose to cheat certain insurance companies, and to show that the agreement which they "all said" they had made with Fisher culminated in similar covinous acts. All who aid, abet, counsel, or procure others to commit misdemeanors are principals. 1 *Rosc. Cr. Ev.* \*189. Conspiracy is, under the law of North Carolina, a misdemeanor. *State v. Jackson*, 82 N. C. 565. When once evidence of a common design is shown, and two or more of the conspirators are indicted and on trial, testimony tending to prove the unlawful acts of a person not on trial, or not indicted, in furtherance of such purpose, is clearly competent. Those who aid, abet, counsel, or encourage, as well as those who execute, their designs, are conspirators; and certainly, where the unlawful act is done within the limits of the state in

<sup>1</sup> Const. art. 4, § 11, provides that the judges of the superior courts "shall preside in the courts of the different districts successively; but no judge shall hold the courts in the same district oftener than once in four years, but in case of protracted illness of the judge assigned to preside, or any other unavoidable accident to him, by reason of which he shall be unable to preside, the governor may require any judge to hold one or more specified terms in said district, in lieu of the judge assigned to hold the courts of said district."

<sup>2</sup> Code, § 913, authorizes the governor to "appoint any judge to hold special terms of the superior court in any county, and, by consent of the governor, the judges may exchange the courts of a particular county or counties; but no judge shall be assigned to hold the courts of any district oftener than once in four years," etc.

whose courts the indictment is found, as in our case, the conspirators who only participated in the design may be tried and punished without joining in the indictment the perpetrator of the overt act shown. There was evidence reasonably sufficient, if believed, to warrant the inference of a conspiracy, and it was properly left to the jury to pass upon its sufficiency. *State v. Matthews*, 80 N. C. 424; *State v. Patterson*, 78 N. C. 470. Meantime it was the province of the court, upon hearing it, to decide that it rendered competent not only proof of the acts done in pursuance of the common design by a co-conspirator, even though not on trial (*State v. George*, 7 Ired. 323), but his declarations made after the entry of the defendants into the combination, and up to the time when the offense was committed. *State v. Anderson*, 92 N. C. 732. When the common design has been proved, the act of any one of the conspirators in furtherance of it may be shown by any competent evidence. *State v. George*, supra. It is competent to show a criminal act by confession of a party as well as by means of direct proof by the testimony of others. While the declarations of Fisher as to the participation of the defendants, either in the purpose to commit the offense or the act of selling the policies, if made after the sale, would have been clearly inadmissible (*State v. Dean*, 13 Ired. 63), the state was not precluded, after laying the foundation by showing the declarations of the defendants that he was their agent for that purpose, from proving his naked confession of the act of selling certain policies, as, according to the testimony of Parker, he had agreed to do, for the benefit of the defendants, and had subsequently attempted, in his presence, to do.

It has been held that for the purpose of proving the ownership of property by a corporation, when charged in an indictment, it is not necessary to produce the certificate of incorporation, or a copy of it in the private acts published by the authority of the state, but that it is sufficient to show that the corporation carried on business under the corporate name set forth in the indictment. *State v. Grant*, 104 N. C. 908, 10 S. E. 554; *State v. Western N. C. R. R.*, 95 N. C. 602. But, if it were conceded that the testimony of the witness Rippey that the companies mentioned held themselves out as insurance companies was insufficient, we hold that the certificates of incorporation were clearly competent, under the rule laid down in *Barcello v. Haggood*, 118 N. C. 712, 730, 24 S. E. 124. For the reasons given, the judgment of the court below is affirmed.

(119 N. C. 849)

STATE v. NOE et al.

(Supreme Court of North Carolina. Nov. 10, 1896.)

PROOF OF HANDWRITING—STANDARD OF COMPARISON.

A bond given by defendant for his appearance to answer a criminal charge, and constituting a part of the record, is admissible on his

trial for the purpose of comparison by an expert with a signature whose genuineness is questioned; the presumption being that the signature to the bond is genuine.

Appeal from superior court, Jones county; Graham, Judge.

Levi T. Noe and others were convicted of conspiracy to defraud, and appeal. Affirmed.

Clark & Gulon, for appellants. The Attorney General, for the State.

EVERY, J. The objection to the jurisdiction and the exception to the ruling of the court in admitting the proof of the incorporation of the insurance companies are fully discussed in *State v. Turner* (at this term) 25 S. E. 810. It is therefore needless to repeat the reasons for holding as we did upon assignments of error which are identical with those relied on in this case.

Where the genuineness of the paper or the signature to a paper which it is proposed to make the basis of a comparison of handwriting is not denied, or cannot be denied, in the trial of the action, an expert witness may, in the presence of the jury, compare with it another paper or signature, whose genuineness is questioned. *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28; *Croom v. Sugg*, 110 N. C. 259, 14 S. E. 748; *State v. De Graff*, 118 N. C. 693, 18 S. E. 507. Under this rule the signatures to affidavits or pleadings filed in the cause by a party, or to a paper offered in evidence by the person whose signature is in question, and that of a testator to a will purporting to have been signed by him, in an action brought against the executor appointed and qualified thereunder, or a written contract the execution of which by the testator is denied, have been held to be proper standards of comparison to be used by such witnesses in their testimony before the jury. *Tunstall v. Cobb* and *State v. De Graff*, supra. The paper writing admitted as a standard of comparison was the bond, constituting a part of the record in the case, for the appearance of the defendant Fisher to answer this charge. The bond constituted a part of the record, was presumed to be genuine, and a judgment nisi on his default could have been rendered against him and his sureties on it, and made final on his failure to take the burden upon himself, and show it spurious on the return of notice to show cause. Until the presumption of its genuineness is satisfactorily rebutted, the signature to it must be treated like that of a party to a pleading in a civil action. The other exceptions are without merit, and, we must assume, were not seriously relied upon. The judgment is affirmed.

(119 N. C. 852)

STATE v. HASSELL et al.

(Supreme Court of North Carolina. Nov. 10, 1896.)

CRIMINAL LAW—REVIEW ON APPEAL—FAILURE TO STATE GROUNDS OF OBJECTION.

The overruling of an objection to a transcript of the record sent from the county from

which the cause was removed cannot be assigned as error if the objector refused to specify in what respects the transcript was defective; at least, where there is no contention that the record is not sufficient to show that the trial court had jurisdiction.

Appeal from superior court, Jones county; Graham, Judge.

C. R. Hassell and another were convicted of conspiracy to defraud, and appeal. Affirmed.

Clark & Guion, for appellants. The Attorney General, for the State.

AVERY, J. The assignments of error are substantially the same as those discussed in *State v. Turner*, 26 S. E. 810, and *State v. Noe*, Id. 812, at this term. It may not be improper to add, however, that one exception, which was made in all of the cases, seemed to be so clearly untenable that we have forborne in the other appeals to discuss it, but, in deference to the opinion of counsel, it may be well to pass upon it here. Objection was made to the transcript of the record from the county of Beaufort, sent under the order of removal. But counsel declined, when requested to do so, to point out or specify in what respects the transcript was defective and insufficient. The court may require counsel to state the grounds of objection to testimony of any kind, and, if counsel refuse to comply with this reasonable requirement, they do so at the peril of forfeiting the right to insist upon an exception to the ruling of the court admitting or rejecting it. *State v. Wilkerson*, 103 N. C. 337, 9 S. E. 415. It was the duty of defendants' counsel to point out the defects in the record, and, failing to do so, they are deprived of the right to insist that it is insufficient. It is not contended that the record is not sufficient to show that the court below had jurisdiction. If that proposition could be maintained, the duty might devolve upon this court of passing upon it, even *ex mero motu*. Judgment affirmed.

(119 N. C. 1)

KRAMER et al. v. OLD et al.

(Supreme Court of North Carolina. Oct. 20, 1896.)

CONTRACT IN RESTRAINT OF TRADE—VALIDITY—CONSIDERATION—BREACH—WHEAT CONSTITUTES—INJUNCTION.

1. A stipulation by vendors of mill property that they will not thereafter engage in the same business in the city in which the property is located is not invalid, as being in restraint of trade for an unreasonable length of time.

2. Where the vendors of a property and business agree not to engage in the same business in the same place thereafter, it is a violation of the contract for either of them to take stock in, help to organize, or manage a corporation formed to compete with the purchaser.

3. A contract by vendors of mill property not to continue a similar business in the same place thereafter was not without consideration, because the property was worth all that was paid for it.

4. Where vendors of mill property, who agreed not to continue a similar business in the same place thereafter, with others formed a corporation to engage in the same business at the same place, neither the corporation nor those interested in it, other than the vendors, could be enjoined from carrying on such business.

Appeal from superior court, Pasquotank county; Timberlake, Judge.

Action by C. E. Kramer and others against James Y. Old, W. T. Old, W. N. Old, and the Elizabeth City Manufacturing Company, to enjoin defendants from engaging in the milling business in Elizabeth City. From an order continuing until the hearing a temporary restraining order theretofore granted, defendants appeal. Modified and affirmed.

W. J. Griffin, for appellants. E. F. Aydlett, for appellees.

AVERY, J. The courts in later years have disregarded the old rules by which it was sometimes attempted arbitrarily to fix by measurement the geographical area over which a contract in partial restraint of trade might be made to extend, and to prescribe a limit of time beyond which it could not be made to operate. The modern doctrine is founded upon the basic principles that one who by his skill and industry builds up a business acquires a property at least in the good will of his patrons, which is the product of his own efforts (*Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212) and has the fundamental right to dispose of the fruits of his own labor, subject only to such restrictions as are imposed for the protection of society, either by express enactments of law or by public policy (*Hughes v. Hodges*, 102 N. C. 239, 9 S. E. 437; *Bruce v. Strickland*, 81 N. C. 267). But the property which one thus creates by skill or talent and industry is not marketable unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit, and for a reasonable length of time. *Cowan v. Fairbrother*, supra; 2 High. Inj. § 1174; *Cloth Co. v. Lonsont*, 39 Law J. Ch. 86; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Clark*, Cont. p. 451. To the extent that the assignor of this species of property is left at liberty to come into competition with the assignee, the market value of what is sold must fall below that of the untrammelled right to freedom from competition in the whole field from which the former derived the support of his business. The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is greater than it is necessary to make it in order to protect the purchaser from competition in his efforts to hold and get the full benefit of the business or right of competition bought by him. The three defendants who sold to the plaintiff retained the undisputed right to continue in the same business and operate at any point beyond Elizabeth City and the vicinity, and exercised it by operating their mills. But in our case it was not contended that the area of territory covered by the restrictive agree-

ment was so unreasonably great as to vitiate the contract, but that the time for which the defendants covenanted to refrain from entering into the same business imposed an unnecessary restriction upon the rights of the three defendants, and was, therefore, contrary to public policy, and void. It must be conceded that, in so far as it is consistent with the power to sell the property which is the creation of one's own labor, physical or mental, society has the right to claim an open field for every man's labor, skill, and competition with others, both for the benefit of his family and the more direct benefits accruing to society from removing restrictions and encouraging competition in every kind of trade. The reason of the law leads to the adoption of any rule that is calculated to reconcile all conflicts between the proper exercise of the *jus disponendi* of the individual and the interests of society at large. The services of no one person are so valuable to the public, in any field to which his business may extend, as to demand that he shall receive a smaller price for his right of competition, because an arbitrary rule forbids him to extend the restriction in point of time to the term of his own life or that of the purchaser, or for their joint lives. The enlargement of the restrictive area by later adjudications is founded, therefore, upon a principle which it was reasonable to apply in determining what is the lawful limit of time. Where the contract is between individuals, or between private corporations, which do not belong to the quasi public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of. *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Morgan v. Perhamus*, 36 Ohio St. 517; *Machine Co. v. Morse*, 103 Mass. 73.

The stipulation on the part of James Y. Old, W. P. Old, and W. N. Old, to quote the exact language of the contract, is "that they will not continue business of milling in the vicinity of Elizabeth City after the first day of September, 1891, and the full completion of this agreement." The contract having been in other respects performed, the agreement is now complete in the sense contemplated by the parties. The three defendants were, at most, restricted from engaging in the business for the lives of each and every one of them. Such a sale has been upheld, upon reason and authority, in other courts. The plaintiff bought their right to compete in their own persons in the business to which he succeeded as purchaser. It was not unreasonable that he should insist upon the stipulation that none of the three should interfere, while they lived, by competition at the particular place mentioned, either with him as purchaser, or his assignee in law or in fact. In the case of *Morgan v. Perhamus*, *supra*, the facts were that a milliner sold her stock and good will, and engaged "not to carry on the business at any time in future at the town of F. or within such distance of said town as would interfere with said business, whether car-

ried on by said L., S., and P., or their successors." The agreement was held to be binding by the supreme court, and the seller was enjoined from resuming business. There, as in our case, the time was not described, except as an inhibition on a particular person, with the implication that it should extend to her life. The law would have construed the contract as conferring the right to sell or transmit to a personal representative, as a part of the assets of his estate, the property bought, whenever the time was found to be co-extensive with the lives of the three defendants. *Cowan v. Fairbrother*, *supra*; *Clark*, Cont. pp. 454, 455, and note page 456; 2 High, Inj. § 1345; *Lewis v. Langdon*, 7 Sim. 422; *Bininger v. Clark*, 60 Barb. 113. In *McClurg's Appeal*, 53 Pa. St. 51, the agreement, which was held not to be unreasonable, was that a physician, who had sold his business and good will to another physician, should "never thereafter establish himself as a physician within twelve miles [of his original place of business] without the consent of the purchaser." The contract there, like that under consideration, could be fairly construed in no other way than as operating for the term of the seller's life. These cases and others are cited with approval by text writers, and seem, as a rule, to have established the reasonable doctrine contended for by the plaintiff in the states as well as in England. 2 High, Inj. § 1180; 1 Beach, Inj. §§ 462-470; *Whittaker v. Howe*, 3 Beav. 383. It is elementary learning that the single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do or refrain from doing certain things, and it is unnecessary to repeat, in every paragraph of the contract, that such stipulations are entered into for the consideration once expressed. It is sufficient to set forth that A. has paid or agreed to pay a certain sum, and that B. has agreed to do or abstain from doing certain things, which may be stated seriatim in separate paragraphs. A case almost exactly in point, because it relates to a somewhat similar agreement, is that of *Machine Co. v. Morse*, *supra*.

Though the contract is valid and binding, as between the parties, it in no way impairs the right of the defendants who were not parties to engage in any kind of business in Elizabeth City; but as a court of chancery we must declare that, where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit as well as the letter of the agreement. Under a fair and just interpretation of its terms, the stipulation meant that the three defendants would not engage in business, so as to bring their skill, names, and influence to the aid of any competitor carrying on the same trade within the prohibited limits. It was, therefore, a violation of the contract on the part of the three mentioned, or either of them, to take stock in or help to organize or manage a corporation formed to compete with the plaintiff in his business. *Jones v. Heavens*, 4 Ch. Div. 636.

While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague*, 114 N. C. 647, 19 S. E. 707), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals.

The judgment must be modified so as to restrain only the three defendants who were parties to the original contract from engaging in or from taking stock in or assisting in the organization of a corporation formed with the purpose of carrying on the business of milling in or in the vicinity of Elizabeth City. The order must be vacated as to the other defendants. Modified and affirmed.

(119 N. C. 809)

**STATE v. BEAL.**

(Supreme Court of North Carolina. Nov. 10, 1896.)

**HOMICIDE—SUFFICIENCY OF EVIDENCE.**

Defendant was tried on the charge of having screwed down the safety valve of the boiler of a steam engine, thereby intentionally causing an explosion, which resulted in the death of the fireman, G., and another. There was evidence that the defendant had been discharged as fireman, and was actuated by malice towards G., who had been given the place; that defendant was at the boiler, alone, about midnight before the explosion; that the valve had been screwed down by some one unknown, by which the explosion was caused; that, on the day before, defendant had said that the boiler would explode, and that after the explosion he had said that he had expected every minute that morning to hear the explosion, and in consequence had not gone near the boiler. *Held*, that the evidence was sufficient to take the case to the jury.

Appeal from superior court, Chatham county; Coble, Judge.

Elisha Beal was convicted of manslaughter, and appeals. Affirmed.

T. B. Womack, for appellant. The Attorney General and Perrin Busbee, for the State.

**OLARK, J.** The exceptions to evidence are without merit, and require no discussion. The prisoner insists, however, that the judge erred in refusing his prayer that there was not sufficient evidence to submit the case to the jury. The prisoner was charged with having caused the death of one Gunter by screwing down the safety valve of the boiler of a steam en-

gine of which Gunter was fireman, thereby intentionally causing an explosion, resulting in the death of Gunter and another man. There was evidence for the state that the prisoner had been discharged as fireman, Gunter being put in his place, and that he had malice towards Gunter in consequence thereof; that the prisoner was at the boiler, alone, about midnight before the explosion; that when the explosion occurred the valve had been screwed down by some one unknown, by which the explosion was caused; that, the day before, the prisoner had said the boiler would explode, and soon after it took place he was heard to say that he had expected every minute that morning to hear the explosion till it took place, and in consequence had not gone near it that morning, etc. The prisoner contended that this evidence was consistent with his innocence; besides, he controverted parts of it by his own testimony. There was evidence of his bad character. There was sufficient evidence to submit the case to the jury (*State v. Green*, 117 N. C. 695, 23 S. E. 98; *State v. Kiger*, 115 N. C. 751, 20 S. E. 456; *State v. Rhodes*, 111 N. C. 647, 15 S. E. 1038), and upon this and the other evidence it was the province of the jury to find the facts. The charge of the court carefully guarded the rights of the prisoner, and if, as the jury must have found, the death of the two men was caused by the prisoner's screwing the safety valve down with intent to cause the explosion, the jury took the most lenient view of the case in returning a verdict for a degree of homicide as low as manslaughter. By inadvertence the judgment of the court below is omitted from the transcript, but this court ex mero motu sent down an instantan certiorari to perfect the record in this particular. *State v. Preston*, 104 N. C. 733, 10 S. E. 84. No error.

(119 N. C. 84)

**DAVIS et al. v. SANDERLIN et al.**

(Supreme Court of North Carolina. Nov. 10, 1896.)

**LIMITED PARTNERSHIP—PUBLICATION OF TERMS—JUSTICE OF THE PEACE—ACTION AGAINST PARTNER—CONSTABLES.**

1. Under Code, § 3006, providing that the terms of a limited partnership must be published, immediately after its formation, for six weeks, in some newspaper of the county, or near the place of the partnership business, or the partnership shall be deemed general, a special partner, to escape general liability, must show such publication.

2. A justice of the peace has jurisdiction of an action to charge a defendant with a partnership debt where his liability depends entirely on the legal sufficiency of articles of limited partnership and matters connected with their registration and publication.

3. The action of a justice of the peace in issuing a summons while in another township is not illegal where it is returnable, and the matter is heard, in his own township.

4. The obligation of partners for a firm debt, being several as well as joint, under Code, § 187, is not merged in a judgment thereon against some of the partners only; and the

proper procedure against other partners, not served, is by a new action.

5. Under Code, § 3810, providing that it shall be lawful for city or town constables to serve all process directed to them by courts in their county, a constable of an incorporated town cannot legally serve a summons outside of its limits unless it is directed to him as constable of such town.

Appeal from superior court, Bertie county; Boykin, Judge.

Action before a justice of the peace by M. L. T. Davis & Co. against John W. Sanderlin, Elijah Rhodes, and W. W. Mebane, as partners, to recover on a debt due from the firm. Judgment had been obtained against defendants Sanderlin and Rhodes in another action in which Mebane was not served, and this action was brought to charge him. Judgment was rendered for plaintiffs by the justice and by the superior court on appeal, and defendant Mebane appeals. Reversed.

F. D. Winston and St. Leon Scull, for appellant. Martin & Peebles, for appellees.

MONTGOMERY, J. The parties to this action agreed upon the facts, and submitted the same to the court below, that judgment might be entered according to the opinion of his honor. It appears from the facts agreed on that the articles of limited partnership between the defendant Mebane and his former partners were drawn according to the requirements of the law, and that they were registered in the proper county. But it does not appear that they were published in a newspaper, as required by the statute. Section 3096 of the Code provides that "the terms of the partnership (limited) must be published immediately after its formation, for six successive weeks in at least one newspaper in the same county, or near the place of said partnership business, and if such publication be not made the partnership shall be deemed general." The partnership, therefore, was a general one, because of this failure to have the articles limiting the same published. We are not inadvertent to the fact that the argument of counsel for both the plaintiffs and defendant, contained in their printed briefs, make no point of this failure to publish the articles of the intended limited partnership. The main contention of counsel was over another point, viz. whether the articles were not void because the amount contributed by Mebane consisted of a bond and mortgage for \$300, with which it is admitted \$300 worth of goods were bought and put into the partnership business, instead of being in actual cash. It might be that the contribution of the bond and mortgage in this particular case would be a compliance with the statute, for the reason that with the security as much in value of goods was bought and put into the common stock as \$300 in money would have purchased, without discount. But the arguments of counsel do not necessarily set forth the ground on which the court gave judgment for the plain-

tiffs. The judgment was based on the facts agreed upon, and, as we have seen, those facts do not show that the articles of partnership (limited) were published; and hence, as a matter of law, the partnership was a general one, and his honor was bound so to declare.

The defendant in limine moved, both in the court below and in the court of the justice in which the action was originally begun, to dismiss, first, because: "That a court of the justice of the peace has no jurisdiction to try the subject-matter of this action. To charge Mebane, as a general partner, it was necessary to bring an action in the superior court to declare void said articles of partnership." The plaintiffs sought to recover from the defendant \$189, due by account for goods sold to the firm; and the liability of the defendant was a question of law depending upon the legal sufficiency of the articles of limited partnership and matters connected with their registration and publication. No equities were to be adjusted between the partners. It was a naked question as to whether the defendant Mebane was liable with the other defendants for the price of the goods. There is nothing in the motion.

The second objection was: "(2) That a justice of the peace, while out of his township, cannot issue a summons returnable to his township, as was done in this case, but must always be in his township, when issuing process." It nowhere appears in the record that the justice issued the summons outside of his township. If he had done so, however, it would not have been objectionable, provided he heard the matter in his own township.

The third ground urged for dismissal was: "(3) That a motion in the action tried before Gillam, J. P., in which judgment on his account was rendered as set out in the answer, was the legal mode of binding the defendant Mebane by said judgment, and not an original action as in this case." The plaintiffs in a former action had procured a summons to be issued by Gillam, J. P., against all three of the partners, including the defendant Mebane, for the same cause of action, and they had recovered judgment against the other defendants only, the defendant Mebane not having been served with the summons. No part of that judgment had been paid when the last action was brought against the defendant Mebane. A new action was the proper remedy in cases like this, as is admirably shown in the opinion of Smith, C. J., in the case of *Ruffy v. Claywell*, 93 N. C. 308. In that case the manner of procedure was exactly as the defendant contended ought to have been followed by the plaintiffs in this action, and the court held the motion the beginning of a new action. The procedure by motion is only to be had in cases where the contract is joint only, and not in cases where the contract is joint and several, as in the case at bar. The contract in the case before us is several (section 187, Code), and it does not merge in the judgment, as it would have done if the con-

tract had been joint only. Section 223 of the Code refers to contracts joint only.

But the last objection is a valid one. It is as follows: "(4) That J. D. Perry, being a constable only of an incorporated town, and not a township or general constable, had no power or authority to serve the summons in this action." Section 3810 of the Code provides that "It shall be lawful for city and town constables to serve all civil or criminal process that may be directed to them by any court within their respective counties, under the same regulations and penalties as prescribed by law in the case of other constables." Before the enactment of that statute, the constables of cities and towns, as constables, were not authorized under any circumstances to serve process outside of the limits of their respective cities and towns, although the process was directed "to any constable or other lawful officer of said county." These words referred to the constables appointed or elected for the several townships of the county, to the sheriff, to the coroner under certain circumstances. They refer to the same officers now, and, to authorize a town or city constable to execute process outside of his town or city, the process must be directed to him in that capacity. It is not necessary that the process should be directed to him in his individual name as town or city constable, but it must be directed to him in the name of the office he holds; that is, as constable of a certain city or town.

We have discussed all of the exceptions, because they are almost certain to arise in another trial of this matter. This action ought to have been dismissed because the summons was served upon the defendant by an officer not authorized by the law to serve it. Error.

(119 N. C. 805)

#### STATE v. MATLOCK.

(Supreme Court of North Carolina. Nov. 10, 1896.)

#### FORGERY—SUFFICIENCY OF EVIDENCE—TRIAL—OBJECTIONS TO EVIDENCE—WAIVER.

1. Evidence that the prosecutor's cashier missed from his employer's check book two numbered blank checks; that on the afternoon of the same day, defendant, who had been seen about the prosecutor's office in the forenoon, presented a check at the bank, numbered like one of the missing blank checks, and fraudulently purporting to be signed by the prosecutor; that, on being questioned by the bank teller, defendant tore up the check, and ran away; and that when arrested a part of the signed check was found on him, together with a blank check, the number on which corresponded with one of the missing checks, — is sufficient to establish a charge of forgery.

2. In a prosecution for forgery it appeared that defendant was about the office of the prosecutor when blank checks were abstracted from the latter's check book, and had presented at a bank that afternoon a check numbered like one of those missing, and purporting to be signed by the prosecutor. The state asked prosecutor's cashier if defendant sold any tobacco at the warehouse that day, to which witness replied that defendant "did not get any check if

he did sell any tobacco that day." Held that, though the answer was not responsive, defendant had the privilege to examine the witness further, and, having failed to do so, cannot complain.

Appeal from superior court, Durham county; Coble, Judge.

S. G. Matlock was convicted of forgery, and appeals. Affirmed.

Indictment for forgery, before Coble, J. "The jurors," etc., "present that S. G. Matlock," etc., "feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly aid and assist in the false making, forgery, and counterfeiting a certain instrument in writing, to wit, an order for the payment of money, commonly called a 'check,' which said false, forged, and counterfeited order and check is as follows: 'No. 5,637. Lea, Burch & Co. For tobacco. Proprietor Banner Warehouse, Durham, N. C. Nov. 15, 1895. Pay to S. G. Morgan or bearer, eighty-four <sup>00</sup>/<sub>100</sub> dollars. Lea, Burch, Hutchins & Co. Lea, Burch & Co. J. A. Warren, Cashier. To First National Bank, Durham, N. C. \$84.00.' The said Warren being cashier," etc., "and as such was authorized, and it was his duty, to draw the checks of said firm, and sign his name to them as cashier. With intent to defraud," etc. "And the jurors do further present that Matlock," etc., "feloniously did utter and publish as true a certain other false, forged, and counterfeited instrument in writing called a check," etc., "as follows (check same as above). The said Warren being cashier," etc. "With intent to defraud," etc. The jury found the defendant guilty, and the judgment was imprisonment in county jail for four years.

Evidence: J. M. Whitted testified: I live in Durham. Am teller of First National Bank. Said he had seen the check shown him upon the stand. Had seen defendant before. First saw check on November 15, 1895, about half past 9 o'clock. Had received information that the checks were out. Witness had number of checks. About half past 3 defendant came in with that check. Asked defendant from whom he got check. Said he got it at Banner Warehouse. Asked him who gave him check. Said he got it at Banner Warehouse. Turned to Mr. Ballard, to call Warren. Matlock present. Matlock said, give him check; snatched it out of witness' hand, and tore it. Witness picked up pistol, and said if he went out he would shoot him, and defendant said if he shot he would shoot him in the back. Witness took after defendant, who ran, and caught him. Check is for \$84. Searched the defendant, and found two pieces of the check. Defendant had torn the pieces. On cross-examination witness stated that it was about 3:30 o'clock p. m. when check was presented. First asked him where he got the check. Said he got it at the Banner Warehouse. Witness looked defendant straight in the eye, and asked him if Warren gave him the check, and he said he got it at Banner Warehouse, and witness called Ballard to the telephone. War-

ren and witness told Ballard to hurry up, and defendant jerked the check, and tore a piece of it off, and started off walking. Witness went out with a pistol in his hand, and defendant ran. Witness pursued him, and caught him. Jobb Burch testified that he was in the warehouse business, and a member of the firm of Lea, Burch, Hutchins & Co. Warren is cashier, and draws the firm's checks. Saw the defendant on November 15th, in office of Banner Warehouse. Check book was in the office, either on the desk or in the drawer. Saw defendant in office some time between 9 and 11:30 a. m., on November 15th. Saw him on floor of warehouse after dinner. The check was shown to the witness, and he said that the name "Warren" signed to the check is not Warren's handwriting, nor was it Lea's or Hutchins' or the witness' handwriting. Witness was asked as to the name of Warren signed to the check. On cross-examination he stated that they had a very heavy break that day. J. A. Warren testified: The check was shown him. Looked at signature, and said it was not his handwriting. It was his duty to draw checks, and sign them. Did not give this check to defendant. Missed check in the morning between 9 and 11,—Nos. 5,637 and 5,638,—checks missed have stubs which were left in check book. Woodall testified: Check shown him, and he was asked if he ever saw the check before. Defendant objected. Objection overruled. Defendant excepted. And the witness said he found the blank check on defendant's person after he arrested him. This check is No. 5,638. The witness fitted check to stub left in check book to show that check corresponded to stub, and showed to the jury. Defendant objected, and objection overruled. Defendant excepted. Paper shown witness, and he was asked if he found it in defendant's possession; said he took it out of defendant's pocket. The paper was offered in evidence under the defendant's objection. Other papers were shown witness, and he was asked where he found them, and he said, "In defendant's pocket." J. A. Warren recalled, and testified that the stub book was the book of the firm, and when witness discovered that the checks were missing he went to First National Bank, and left a memorandum of the numbers of checks on the bank, but did not remember the numbers of the checks he left there. He left the numbers that were torn out of the book, and exhibited the stub book out of which the checks were torn, and the stub book was offered in evidence and admitted. Defendant excepted. Check was shown witness, and he said he neither wrote it, nor signed it, nor delivered it to defendant, or any one else. Check set out in bill of indictment. End of it found in defendant's pocket. State rests. Defendant closes. Warren was recalled, and the court in its discretion allowed the state to ask him if defendant sold any tobacco that day. Witness said that defendant did not get any check if he did sell any tobacco that day. Defendant excepted.

Charge of court: "Defendant is charged with the forgery of a certain check. Forgery is the

fraudulent making or altering of a writing to the prejudice of another man's rights. The state must satisfy the jury from the evidence beyond a reasonable doubt of all the material facts necessary to constitute the crime charged: (1) That defendant falsely made, forged, and counterfeited the check in question, or that he caused and procured the same to be falsely made, forged, and counterfeited, or that he willingly assisted or aided in the false making, forging, and counterfeiting the same. (2) That it was done with the intent to defraud. (3) That the state must prove the check as alleged in the bill. Did the defendant forge the check as charged in the bill? Did he sign the name of Warren to the check, and did he do this with intent to defraud? State contends that he did, and that the evidence is sufficient to satisfy the jury beyond a reasonable doubt. Defendant contends that he did not, and that the evidence is not sufficient that he falsely made and forged the check as alleged. If the jury believe from the evidence beyond a reasonable doubt that defendant forged and counterfeited the check as charged, or that he caused the same to be falsely made," etc., "or aided," etc., "and that he did this with intent to defraud, then he is guilty. But if the evidence does not so satisfy the jury, you cannot find him guilty on the first count. The state relies upon circumstantial evidence to prove the guilt of the defendant, and the court instructed the jury that, where the state relies upon such circumstantial evidence, the facts and circumstances proved must not only be in harmony with the defendant's guilt, but must be inconsistent with any other rational hypothesis except that the defendant is guilty. Can all the facts proved in the case be true, and yet, the defendant not be guilty? The state further contends that, whether defendant forged the check or not, as alleged, that he did, as charged in the second count, feloniously alter and publish as true a certain other forged paper, with intent to defraud; that is, that he attempted to pass such paper as charged, and that when he did this he knew it to be a forged instrument. Defendant contends that the evidence is not sufficient to satisfy the jury beyond a reasonable doubt that he knew the check in question to be a forged paper when he attempted to pass it to the bank, if he did attempt to pass it. And the court instructs the jury, as to the second count, that if they are satisfied beyond a reasonable doubt that, if the defendant tendered or attempted to pass as true a false, forged, and counterfeited paper or check, as charged, and if they are further satisfied from the evidence that at the time he attempted to pass it he knew it to be forged and counterfeited, and did this with intent to defraud, then the jury should find him guilty. Defendant contends that, if he did offer to pass the check, he got it from some one else, and did not know, when he undertook to pass it, that it was forged, and the court instructs the jury that it devolves upon the state to show guilty knowledge on the part of the defendant that he knew it to be a forged instrument when

he attempted to pass it; and, unless the jury are so satisfied beyond a reasonable doubt, from the facts and circumstances proved, that defendant knew, when he attempted to pass the check, if he did attempt to pass it, that it was forged, then the jury cannot find him guilty under the second count. Defendant did not put himself on the stand. The law allows him this as a privilege, but, if he does not take advantage of it, the jury cannot consider the fact as prejudicial to him. The state must prove the defendant's guilt as alleged in the indictment, and the state must prove his guilt beyond a reasonable doubt from the evidence before the jury will be warranted in returning a verdict of guilty," etc. Verdict of guilty. Motion for new trial refused. Judgment. Appeal by defendant.

The Attorney General and Shepherd & Busbee, for the State:

MONTGOMERY, J. On the morning of the 15th of November, 1895, J. A. Warren, who was cashier of the prosecutors, upon finding that two checks, numbered respectively 5,637 and 5,638, had been fraudulently detached from the check book of the prosecutors, went to the First National Bank in Durham, where the checks used by the prosecutors were made payable when properly signed and delivered, and gave notice that the two checks numbered as above had been abstracted, and that a forgery was anticipated. The checks were in blank, and had not been signed, when last seen by Warren. The check book was kept in the office of the tobacco warehouse of the prosecutors, and the defendant had been seen in the office between the hours of 9 and 11 a. m. of the 15th of November, and also in the warehouse after dinner of the same day. About 3:30 in the afternoon of the same day the defendant presented for payment at the bank the check numbered 5,637, filled in for \$84, payable to S. G. Morgan or bearer, and purporting to be signed by the prosecutors and Warren. The bank teller, who had been notified, questioned the defendant so closely concerning the check that he tore it into two parts, and ran from the building, the teller following him. When the defendant was arrested, one part of the check was found in his pocket. Check numbered 5,638, being in blank, was shown on the trial to the witness Woodall, the officer who arrested the defendant, and the witness was asked if he ever saw the check before. He answered that he found it on the person of the defendant when he arrested him. He fitted the check to the stub in the check book, and showed it to the jury. The paper was then given in evidence. The defendant objected to this evidence. We do not see on what valid ground. The defendant was not represented by counsel here, either in person or by brief, and we are unable to find any error in admitting the testimony, or in the whole record. All the matters testified to were circumstances directly connected with the offense charged, and were material

and relevant. All of it was strong testimony tending to show, especially when taken in connection with the fact that the defendant had been seen in the room in which was kept the check book on the morning of its abstraction, that the defendant was the person who took and filled out, and signed the check which was presented to the bank for payment. The check book and the stubs attached, which fitted Nos. 5,637 and 5,638, were introduced as evidence in the case. The state was allowed to ask Warren if the defendant sold any tobacco at the prosecutor's warehouse on that day. The witness answered that the defendant did not get any check if he did sell any tobacco there that day. The defendant excepted to the answer. The answer was not responsive, but the defendant had the privilege to examine the witness further, if he had so desired; and, having failed to do so, he cannot complain. The defendant introduced no testimony, and made no exception to the charge of the court. No error.

(119 N. C. 322)

#### STATE v. GROVES et al.

(Supreme Court of North Carolina. Nov. 10, 1896.)

CRIMINAL LAW—TRIAL—CONSTRUCTION OF STATUTE—CATTLE DEFINED—EFFECT OF DEMURRER TO EVIDENCE.

1. The trial court in a criminal case may, in its discretion, permit the prosecution to recall a witness after it has rested its case.

2. In Code, § 1003, making it a misdemeanor to willfully and unlawfully kill or abuse any "horse, mule, hog, sheep or other cattle," the word "cattle" is used in its general sense, and embraces all domestic quadrupeds, including goats.

3. Where, at the conclusion of the case for the prosecution, the defendant demurs to the evidence, and the demurrer is overruled, it is proper for the court to refuse to permit the defendant to introduce evidence, and to charge the jury on the state of facts admitted by the demurrer.

4. An omission to charge the jury on a particular aspect of the case is not error unless an instruction is asked and refused.

Appeal from superior court, Duplin county; Coble, Judge.

James Groves and others were charged with the unlawful killing of goats. On the trial, after the state had rested, and a motion had been made to discharge the defendants for want of evidence on a material point, the prosecution was permitted to recall a witness on such point, to which defendants excepted. Defendants were convicted, and appeal. Affirmed.

Stevens & Beasley, for appellants. The Attorney General and Perrin Busbee, for the State.

CLARK, J. The court, in its discretion, properly permitted the witness to be recalled, and, indeed, might have done so even after the evidence had closed. *Olive v. Olive*, 95 N. C. 485. The object of a trial is to ascertain the truth of the matter in controversy.

The Code (section 1003) makes it a misdemeanor to willfully and unlawfully kill or abuse any "horse, mule, hog, sheep or other cattle," etc. The word "cattle" has a restricted sense, which applies only to the bovine species, and also a broader meaning, which includes all domestic animals. That it is used here in the latter and broader sense, is apparent from the context "horse, mule, hog, sheep or other cattle." Indeed, the broader sense is the more usual one. Worcester's definition, "a collective name for domestic quadrupeds, including the bovine tribe, also horses, asses, mules, sheep, goats, and swine," was approved by this court in *Randall v. Railroad Co.*, 104 N. C. 410, 418, 10 S. E. 691. To same effect are the *Standard*, *Webster*, and *Century Dictionaries*. In the *Scriptures*, the word "cattle" ordinarily and usually embraces goats, notably in the contract between Laban and Jacob. Gen. xxx., 30, 32. In *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, the word "cattle" is held to be broad enough to include even swine. In England the statute 9 Geo. I. c. 22 (commonly called the "Black Act") made it punishable with death, without benefit of clergy, "to maliciously and unlawfully kill any cattle." Under this it was held that the statute embraced domestic animals other than the bovine species, as a mare, in 2 East, P. C. 1074; *Rex v. Paty*, 2 W. Bl. 721, and "pigs," in *Rex v. Chapple*, 1 Russ. & R. 77. The demurrer to the indictment, therefore, on the ground that "other cattle" did not include goats, was properly overruled.

The defendant demurred to the evidence, and the court, after overruling such demurrer, properly refused to allow the defendant to introduce further evidence, and charged the jury upon the state of facts admitted by the demurrer. *State v. Adams*, 115 N. C. 775, 784, 20 S. E. 722, and cases there cited. As stated in that opinion, if the defendant has evidence, he should give the jury the benefit of it, and (unless his own evidence proves the case against him) it will be still open to him to ask an instruction that there is not sufficient evidence to go to the jury. But, if he demurs on that ground, the court will not permit him to "take two bites at a cherry" by fishing for the opinion of the court, and afterwards introducing testimony, if the demurrer is overruled.

There is nothing to show that the court was prayed and refused to charge that, if the defendants killed the goats by mistake, they would not be guilty. A mere omission to charge on a particular aspect of the case is not ground of exception, unless an instruction is asked and refused. *State v. Varner*, 115 N. C. 744, 20 S. E. 518, and numerous cases cited in *Clark's Code*, p. 382. Besides, there is no evidence set out tending to show that such state of facts was in proof, and the court in fact charged the jury that they must be satisfied beyond a reasonable doubt that the defendants willfully and unlawfully

killed the goats in an inclosure not surrounded by a lawful fence, thus excluding the idea of a killing by mistake. No error.

(119 N. C. 325)

#### STATE v. BROWN.

(Supreme Court of North Carolina. Nov. 10, 1896.)

CRIMINAL LAW—CELEBRATING MARRIAGE BY ONE NOT AN OFFICER OR MINISTER.

It is not a crime for one not an officer or minister to celebrate a marriage with the consent of the parties to it.

Appeal from superior court, Pender county; Starbuck, Judge.

B. J. Brown was indicted and tried for celebrating a marriage, he at the time not being an officer or minister, and there was a verdict of guilty. From a judgment granting a motion in arrest of judgment, the state appeals. Affirmed.

The indictment is as follows: "The jurors for the state upon their oath present that B. J. Brown, late of said county, on the 14th day of March, 1895, in said county, not then and there being an ordained minister of any religious denomination, or a justice of the peace of said county, and not being by law authorized so to do, did unlawfully, willfully, and corruptly celebrate and solemnize the marriage between Joseph W. Smith, a male person, and Mary E. Newkirk, a female person, contrary to the statute in such cases made and provided and against the peace and dignity of the state. (2) And the jurors," etc., "further present that defendant, in said county, on the day and year aforesaid, not then and there being an officer authorized by law to celebrate a marriage, to wit, an ordained minister of any religious denomination or a justice of the peace of said county, did unlawfully, willfully, corruptly, and falsely presume to act as an ordained minister of the Missionary Baptist denomination, and, so presuming to act as such officer, did then and there, in said county, celebrate and solemnize a marriage between Joseph W. Smith, a male person, and Mary E. Newkirk, a female person, and then and there pronounce them man and wife, not being by law authorized so to do, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state. (3) And the jurors aforesaid, upon their oaths aforesaid, do further present that the said B. J. Brown, in said county, on the day and year aforesaid, not then and there being a public officer duly authorized by law to celebrate a marriage, to wit, an ordained minister of any religious denomination, or a justice of the peace of said county, did unlawfully, willfully, corruptly, falsely, and fraudulently personate an ordained minister of the Missionary Baptist denomination, and so unlawfully, willfully, corruptly, falsely, and fraudulently personating an ordained minister of the Missionary Baptist denomination, a public officer authorized by law to celebrate a mar-

riage, did then and there, in said county, celebrate and solemnize a marriage between Jos. W. Smith, a male person, and Mary E. Newkirk, a female person, and then and there pronounce them man and wife, to the great perversion of public justice, to the evil example of all others, contrary to the statutes in such cases made and provided, contrary to law, and against the peace and dignity of the state. [Signed] Richardson, Solicitor."

The Attorney General and Stevens & Beasley, for the State.

**FAIRCLOTH, C. J.** The indictment contains three counts: (1) Charging that defendant, not being an ordained minister or a justice of the peace, and not being by law authorized so to do, did unlawfully, willfully, and corruptly solemnize a marriage between a male and female, etc.; (2) charging that defendant, not being authorized by law to celebrate a marriage, did unlawfully, etc., presume to act as an ordained minister, and celebrate a marriage between a male and female person, and to pronounce them man and wife, contrary to the statute, etc.; (3) charging that defendant, not being a public officer, nor an ordained minister or justice of the peace, did unlawfully, etc., personate an ordained minister, and so celebrate a marriage between a male and female person, and pronounce them man and wife, contrary, etc. The jury rendered a verdict of guilty, and, on motion of the defendant, judgment was arrested, and the solicitor excepted and appealed. The record discloses no evidence by the state or the defendant, nor any exception, except as above stated. Assuming, however, every fact alleged to be true, we are unable to discover any criminal offense known to the law. We are referred to no authority for the position of the state. We were referred to Code, § 1812, which only prescribes what is a valid marriage; also to Code, § 1112, which imposes a penalty, and declares it to be a misdemeanor for any officer to fail to return process, etc., or for any person, who is not authorized by law, to presume to act as any such officer. So the case is that of a private citizen, unofficial, celebrating a marriage between a man and woman, with their consent, and they are not complaining, and are presumably satisfied, and enjoying their new relation. We are not aware of any statute or principle of the common law declaring the action of the defendant to be a criminal offense. We are not considering the validity or invalidity or effect of the action of the several parties. Affirmed.

(119 N. C. 199)

**FERRELL et al. v. HALES (two cases).**  
(Supreme Court of North Carolina. Nov. 10, 1896.)

**TRIAL—ENTRY OF VERDICT—JUDGMENT—ENTRY BY CLERK—ENTRY NUNC PRO TUNC—OPERATION AND EFFECT—EFFECT OF APPEAL.**

1. A verdict received by the clerk by consent of parties, though the judge was not present at the time, is valid.

2. A verdict was returned on Saturday, the last day of the term, and, in the absence of the judge, was, by consent, received by the clerk. No entry of judgment was made at the time. *Held*, that a judgment entered by him the following Monday was a nullity.

3. An appeal therefrom did not operate to remove the record so as to render invalid an order entered by the judge at the next term.

4. A verdict was returned into court on the last day of the term, and, the judge not being present, was, by consent of parties, received by the clerk. At the next term the judge ordered the entry of judgment nunc pro tunc. *Held* that, as between the parties, the judgment was operative as though entered at the former term.

5. It was not essential to the validity of such judgment that notice of the entry should have been given.

6. Under Code, § 433, providing that a judgment is a lien from the first day of the term at which it is entered, a judgment entered nunc pro tunc on a verdict entered at a former term is, as to third parties, effective only from the term at which it was docketed.

7. Where tobacco is sold by sample, examination of outside bulks, and representations by the vendor, he is liable for latent defects.

Appeal from superior court, Durham county; Coble, Judge.

Action by W. L. Ferrell and W. N. Carter against J. J. Hales to recover damages from false representations on a sale of tobacco. Judgment for plaintiffs, and defendant appeals. Affirmed.

Manning & Foushee, H. G. Connor, and Shepherd & Busbee, for appellant. Winston & Fuller and Boone & Bryant, for appellees.

**CLARK, J.** There are two appeals in this case, one from the judgment entered by the clerk upon the verdict, and the other from the judgment rendered by the judge at the next term, nunc pro tunc; but for convenience both can be disposed of together. The verdict was rendered at 11:40 p. m., Saturday, of the second week. This case differs from *DeLafield v. Construction Co.*, 115 N. C. 21, 20 S. E. 167, in that the judge had not left the court, and, though he was not in the court room in person when the verdict was rendered, it was received by the clerk by consent of parties, and was, therefore, a valid judgment in all respects. The term was not extended by the judge, as authorized by chapter 226, Acts 1893, but the verdict was within the limits of the term if the judge were present; and he was present through the clerk, who could, by consent of parties, represent him for the purpose of receiving the verdict. *State v. Austin*, 108 N. C. 780, 13 S. E. 219. If the clerk thereupon had entered up the judgment, it would unquestionably have been valid, for the Code, § 412 (1), provides that upon receiving the verdict, "if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." Even if the clerk had merely entered a memorandum as "Judgt.," it would have been sufficient, according to the authorities, and the judgment in full could have been drawn out thereafter. *Davis v. Shaver*, 61 N. C. 18; *Jacobs v. Burgwyn*, 63 N. C. 198. But neither judgment nor memorandum of judgment was entered, there

being no action whatever taken beyond receiving the verdict. It was, therefore, clearly incompetent for the clerk to attempt to enter judgment on the Monday following. It must be declared a nullity, and in the appeal from the same the appellees will pay the costs in this court.

At the next term the record presented the case of a valid verdict, but with no judgment entered thereon. The judge could not set aside a verdict rendered at the previous term; and, if he could not enter judgment upon the facts found by the jury by their recorded verdict, the matter would have been forever suspended, like Mahomet's coffin.

"In Aladdin's tower  
"Some unfinished window unfinished must remain."

Not so in legal proceedings, which deal with matters of fact, not fancy. The judge at the next term, seeing the record complete up to and including the verdict, properly rendered judgment *nunc pro tunc*. This was practical common sense, and is justified by precedent. *Bright v. Sugg*, 15 N. C. 492; *Long v. Long*, 85 N. C. 415; *Smith v. State*, 1 Tex. App. 408. As to difficulties suggested, it may be observed that, while the judgment, as between the parties, is entered as of the former term, *nunc pro tunc*, as to third parties it can only be a lien from the docketing, which, by the Code, § 483, has effect from the first day of the term at which it was actually rendered. In the present case the judge at the second term who rendered the judgment was the same who had presided at the trial term, but, had there been different judges at the two terms, it is the latter who, in case of disagreement, should settle the case. The matters excepted to, up to and including the verdict, should be settled by the first judge, and his statement sent up in the case made by the last judge, as is the case with exceptions as to matters not immediately appealable for lack of final judgment, as in *Jones v. Call*, 89 N. C. 188, 96 N. C. 337, and 2 S. E. 647; *Blackwell v. McCaine*, 105 N. C. 460, 11 S. E. 360. It is also excepted to this last judgment that the case was in the supreme court by appeal from the alleged judgment by the clerk, but, as we have seen, that attempted judgment was a nullity, and of no more effect than would have been the same entry on the record by a stranger. The judge properly treated it as a nullity, and the appeal from such unauthorized entry on the record could not have the effect to take the case into this court so as to subtract it from legal orders of the judge presiding in the court below. No notice of motion was necessary at term time in a cause pending on the docket. *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089; *Sparrow v. Davidson College*, 77 N. C. 35; *University v. Lassiter*, 83 N. C. 38, and other cases cited in Clark's Code (2d Ed.) p. 652.

A careful examination of the exceptions to instructions given and for refusal to give instructions prayed shows no error. Without taking them up in detail, the court below is

sustained by the principles laid down in *Lewis v. Rountree*, 78 N. C. 323; *Love v. Miller*, 104 N. C. 582, 10 S. E. 685; *Blacknall v. Rowland*, 108 N. C. 554, 13 S. E. 191; *Id.*, 116 N. C. 389, 21 S. E. 296. The tobacco was sold by sample and examination of outside bulks, and upon representations made by the defendant. The defects were latent, and as to matters peculiarly within the knowledge of the defendant. No error.

(90 Ga. 636)

#### MCCANDLESS v. RODGERS.

(Supreme Court of Georgia. Nov. 2, 1896.)

##### APPEAL—REVIEW—DEFECTIVE RECORD.

The bill of exceptions in this case is in many respects so obviously defective and incomplete that it presents no question which this court can intelligently consider and pass upon.

(Syllabus by the Court.)

Error from superior court, Butts county; J. S. Candler, Judge.

Action by S. C. McCandless against Robert L. Rodgers. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

The bill of exceptions in this case sets forth that a bill for injunction in which S. C. McCandless was complainant and R. L. Rodgers respondent came on to be heard before Judge John S. Candler, at chambers, in Atlanta, on March 13th (no year being stated); that upon considering said bill "the same was denied. And now comes S. C. McCandless, within twenty days from said decision refusing said bill for injunction, and alleges said denial to be error." The bill of exceptions nowhere shows in what county or in what court the litigation was pending. It states that certain things were the only parts of the record necessary to a clear understanding of the error complained of, but does not state what parts of the evidence were material, nor does it state that no evidence was introduced upon the hearing. It does not appear from the bill of exceptions when the decision complained of was rendered. The certificate of the judge to the bill of exceptions says nothing as to the evidence, but states that the bill of exceptions is true, and specifies all of the record necessary. It also contains the following: "This bill of exceptions, signed with this additional statement of fact: The hearing of the bill was on the 13th of March. I reserved my judgment until the 21st March, when the injunction was denied. I gave papers, with order to my clerk in Atlanta to mail to clerk of superior court of Butts county. I returned to my office in Atlanta from one of my outside courts on March 30th, and found that clerk in my office had neglected to forward papers with order denying injunction to clerk Butts superior court. I at once forwarded same to clerk, and wrote letter to clerk with papers, requesting him to notify Mess. Ray & Ray of order at once. They represent to me that the clerk of Butts superior court did not notify them of my having filed papers and order with him on 30th

March until 13th of April. They have tendered me this bill of exceptions on 16th April, and, while it is already too late, unless order is treated of date March 30, 1896, which, being the date of the rendition and filing order in clerk's office Butts superior court, should be treated as the date denying the injunction." This certificate was dated April 16, 1896. No certificate whatever of the clerk of the superior court as to the bill of exceptions appears upon the bill of exceptions, but in the transcript of the record, not attached in any way to the bill of exceptions, appears a certificate as follows: "Georgia, Butts County. I do certify that the within is the true original bill of exceptions which was filed in my office," etc. This certificate follows certain portions of the record and precedes other portions. For these reasons no further report is made.

Ray & Ray, for plaintiff in error. Robt. L. Rodgers, in pro. per.

PER CURIAM. Judgment affirmed.

(97 Ga. 164)

SAVANNAH, F. & W. RY. CO. v. WALLER.

(Supreme Court of Georgia. Aug. 16, 1895.)

RAILROADS—INJURY TO LICENSEE IN YARDS—  
ACCIDENT.

1. Mere permission by, or implied license from, a railway company for children to enter its yard for the purpose of carrying meals to their fathers, there being a perfectly safe way for the children to pass and repass without going under freight cars standing upon tracks in the yard, will not subject the company to liability for injuries caused to one of these children by pushing upon him a car under which he had suddenly gone for the purpose of getting a ball which had been thrown there, but for the throwing of which the company was in no way responsible; and it not appearing that the company's servants by whom the car was put in motion knew, had reason to know, or were in a position to discover, that the child was under it at the time. The sudden throwing of the ball, the child's being attracted thereby, and his rapidly following it under the car, all together, constituted an emergency which the company could not reasonably have anticipated or guarded against; and consequently the unexpected catastrophe which resulted from the movement of the car at the very moment when the child was exposed to danger was a mere casualty or accident, for which the company should not be held liable. Atkinson, J., dissenting.

2. Where, by permission of its officers, the yard of a railroad company, where its trains are constantly drilling, is frequented at a given hour daily by young children, who come there on lawful business, such permission, when acted upon regularly for a number of years, is at least notice to the defendant of the probable presence of such children at such place at such hour, and, in the running and drilling of its cars during the time when they are usually present, the company is bound to exercise such care as would afford reasonable protection to any of such children as, happening to be upon the yard, might have casually strayed, or by some object been allured, upon one of its tracks; and the measure of precaution so to be taken is to be estimated with reference to the apparent peril of the position, coupled with the capacity of the child to know and appreciate its danger, and the absence, or probable absence, of such discretion

as would enable it to take proper measures for its own protection. Per Atkinson, J., dissenting.

3. Where, in an action against a railroad company for damages for personal injuries inflicted, it appears that in switching its cars a train of the company was run backward through its yard at a time during the day when, with the permission of the officers of the company, young children, not of sufficient discretion to take precautionary measures for their own safety, were accustomed to assemble there, and that one of such children, running under a stationary car to get a ball which had been thrown there, was run over and injured in consequence of this car being suddenly put in motion by the backing train coming in contact with it, and where it further appears that no lookout was stationed upon the rear of said backward-moving train, or elsewhere thereon, so as to command a view of its movements, and give notice to those in charge of the engine of danger to one of such children who may have either casually strayed upon the track, or who might by any means have been allured thereon, and where it further appears that no other equivalent precautionary measures were taken to prevent injuries which might have been probably thus inflicted, a verdict of the jury finding against the defendant upon the question of negligence, and awarding damages for the injury, is supported by the evidence, and is not contrary to law. Per Atkinson, J., dissenting.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by John J. Waller, by next friend, against the Savannah, Florida & Western Railway Company to recover damages for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

The following is the official report:

The plaintiff, a boy of seven years and nine months, was caught under a moving car of the railroad company, and his right leg was so crushed as to render necessary an amputation just below the knee. His father was employed by the company as a laborer in repairing cars, his place of work at the time being in the company's yard in the city of Savannah, on the other side of the track where the injury occurred from that where his home was situated. For about a month the plaintiff had been bringing his father's dinner, and was accustomed to go across the track for this purpose. This practice by plaintiff and others was known to the company, and the time allowed for dinner (30 minutes) did not admit of the father's going to his home for the same. On the day in question, about 1 o'clock, the plaintiff had carried the dinner, and was returning. At the same time three employes of the company, other than his father, were engaged in throwing and catching a ball from either side of the track where the injury occurred. As plaintiff approached, walking on the space between two tracks, the ball was thrown towards one of the men, who failed to catch it, and it bounced upon a cross-tie, and went under the end of the last of a number of freight cars standing still upon the track. One of the men said to plaintiff, "Sonny, get that ball." He thereupon ran for it, and it seems that some negro boys were running for it at the same time. Plaintiff went upon the track, and then under the end of the

car, putting his foot upon the brake beam, and reaching for the ball. While in this situation the standing cars were struck at the other end of the train by a number of other cars pushed by the company's engine for the purpose of making a coupling. They rolled 20 or more feet, and plaintiff was knocked down two or three times in the effort to escape, and succeeded in doing so only with the loss of his leg. He brought suit for damages, and obtained a verdict against the company for \$4,000. The company excepted to the overruling of its general demurrer to the declaration, to the denial of a nonsuit, and to the refusal of a new trial.

Erwin, Du Bignon & Chisholm, for plaintiff in error. W. W. Gordon, Jr., for defendant in error.

**LUMPKIN, J.** The nature of this case may be gathered from the recitals in the headnotes; there being no substantial conflict, in so far as they relate to the facts, between the one announced by a majority of the court, and those in which Justice ATKINSON expresses his dissent to the judgment rendered. We differed, however, in applying the law to the facts.

Unless the railway company was negligent relatively to the child who was injured, he was not entitled to recover. It was not, as to him, negligent unless it violated some duty which it owed to him with reference to the particular act by which the injury was occasioned. It cannot be denied that a railway company has an undoubted right to shift and move freight cars at its pleasure upon the tracks in its yard, nor that, under ordinary circumstances, it would be under no obligation to keep a watch upon the movement of these cars for the purpose of preventing an injury to a child, or any other person, who might casually happen to be upon one of the tracks when a car was set in motion. It is insisted, however, that as the plaintiff was one of a large number of children who were permitted by the company to enter its yard for the purpose of carrying meals to their fathers, who were employes in the service of the company, and that as it was known to the company these children were likely to be in the yard at or about the dinner hour, and would probably go under standing cars, it owed to them a duty of seeing to it that such cars were not suddenly put in motion so as to endanger their lives or limbs. We do not think that the mere permission by the company for these children to enter its yard for the purpose stated carried with it, under all conceivable circumstances, a duty so sweeping as this; there being a perfectly safe way for the children to pass and repass, while in the yard, without going upon the tracks where cars were standing, and no occasion for their going under the cars at all. Certainly the invitation by the company to the children, if the above-mentioned permission or license may properly be so termed, did not contemplate that they should go under or so near to these cars as to become in danger. But it

is said the company might have foreseen that because of their indiscretion and want of judgment, arising from their tender years, these children were liable to exceed the license they actually had, and that the company ought, accordingly, to have taken the proper precautions to insure their safety in case they should do so. Granting that this would be true, if the injury to the plaintiff had happened while things were going on in the usual and ordinary way in the company's yard, we feel constrained to hold that this particular injury was at last the result of a mere casualty. Conceding, for the sake of argument, that the company was under a duty, in the usual course of its business in its yard, to see that a car was not put in motion while one of these children was under it, or just in front of it, it would then have to take the chances of becoming liable for an injury resulting in this way. But we do not think the company was under the burden of taking all the chances of what occurred in the present case. It had nothing to do with the throwing of the ball. It could not foresee or prevent the ball's going under the car, or anticipate that the child would be attracted by it and would rapidly follow it. It does not appear that the servants of the company by whom the car was put in motion actually knew, had reason to know, or were in a position to discover, that the child was under the car at the time it received the impetus which sent it forward. Indeed, the engineer handling the locomotive attached to the train of cars which came in contact with the standing car was a considerable distance from the latter when the train struck it. Taking all the facts together, the Chief Justice and the writer are of the opinion that they constituted an emergency not reasonably to be anticipated, and that the unexpected catastrophe resulting from the movement of the car at the precise moment when the plaintiff was exposed to danger should be treated as a mere accident. The particular combination of circumstances by which his injury was occasioned would very rarely exist. Just such a thing as this would not probably occur once in 10 years, though hundreds of children should during that period enter the company's yard for the purpose above mentioned. It cannot, we are quite sure, be fairly insisted that, to guard against and prevent a calamity of this kind, any higher or greater degree of diligence should be required of the company than ordinary diligence. There is no rule of law, nor any precedent, which, in our opinion, would justify a court in holding that the company, in view of its relations to the plaintiff, under all the circumstances disclosed by the evidence, was bound to exercise more than ordinary care for his safety. Assuming the correctness of this position, it follows that if, in order to make the company liable, the rule of extraordinary diligence must be put upon it, there could be no lawful recovery. We are satisfied that nothing short of "that extreme care and caution which very prudent and thoughtful persons" would have exercised under like circumstances could have enabled the

company to foresee, guard against, and prevent all the different occurrences from which the injury resulted. In our opinion, it was not less careful as to the protection and safety of the plaintiff than persons of ordinary prudence would have been. It seems clear, at any rate, that it was at least as prudent in this respect as the child's own father. We do not mean to even intimate that if the latter had been negligent his negligence would have been imputable to the child. The idea we intend to convey is that the same facts which show ordinary diligence on the father's part are available to show a like degree of diligence on the part of the company, and we think the evidence in this case establishes that degree of diligence as to both. This being so, the company did not violate any duty it owed the plaintiff, and consequently should not have been held liable. As requiring it to exercise for his protection extraordinary diligence would be exacting from it a higher degree of care and prudence than the law imposes upon it, its failure to observe such diligence, if such was the fact, was not, relatively to the plaintiff, negligence at all, and could not, therefore, be the basis of a recovery in his favor. We have given this case much thought and deliberation, and our conclusion is that under the evidence the verdict cannot be supported upon legal principles, and ought to be set aside. Judgment reversed.

ATKINSON, J. (dissenting). Aside from the facts stated in the official report, it is only necessary to refer to what, in the treatment of the questions made in this cause, both by the majority and myself, is an accepted fact; and that is that the plaintiff, at the time of the infliction of the injuries complained of, was a child of too tender years to be chargeable with negligence on his own account. This admission obviates a discussion in justification of the finding of the jury in so far as it found that fact in his favor. Dealing with him as a person wholly irresponsible, and chargeable with no measure of diligence for his own safety, we are to consider what are the relative rights of the person injured, and the relative duties of the defendant company. It may be stated, as fundamental, that under the provisions of the Code a railroad company, in the running and operating of its trains, at all times, at all places, owes to all persons at least the duty of ordinary care. This is a necessary deduction from the Code provision which from the proof of injury raises a presumption of negligence, and places upon the company the burden of proving ordinary care; for if the duty was not imposed by statute the presumption could not arise. Just what amount of vigilance constitutes ordinary care is necessarily a question of fact, and cannot, in the nature of things, be measured by any standard which in advance can be prescribed by law, and hence such are questions to be determined by a jury. So far as this particular case is concerned, it would make no difference whether this child was a licensee or not; whether

he was in the position where he was injured by permission of the company or not. Being of too tender years to be chargeable with negligence, he was wanting in capacity to become a willful trespasser, and therefore is to be judged by the same rules as would apply to any animate, though irrational, object injured under like circumstances. Let us suppose that, instead of being a human being, he had been an ordinary domestic animal, and, being injured, the owner had brought suit to recover; what would it have been necessary for him to prove? It would have been necessary only to prove ownership, value, injury. In order to rebut the presumption it would have been necessary for the defendant company to show that its servants were in the exercise of ordinary care, and this has been frequently held to involve proof that its servants were on the lookout; that in that respect they were not negligent; that they did not see, and could not have seen, the animal injured, in time to prevent the injury; and that after the danger became apparent they used all ordinary and reasonable means to prevent the catastrophe. It would be no reply to the action to say that the animal had no right to be at the point injured; for it has been held by this court that, even in those districts where it is unlawful for animals to run at large, the duty of the company to take precautions to prevent injury to them is not thereby lessened. So with the child injured in the present case. As to one of his mental capacity, it would be no reply to say that he had no right to be where he was injured. Being irresponsible, he was under no duty to lookout for his own safety; and therefore the company could not avoid a recovery by showing that he was negligent, but only by showing that its servants at the time of the injury were in the exercise of ordinary care. In the present case, however, not only was the person injured not a trespasser, but he was in the dangerous position of walking along its tracks by permission of the railroad authorities, and was injured at a time during the day when the company must have known, from experience and observation extending over many years, that many children of his tender age were wont to be at that place, and exposed constantly to the very dangers into which, in consequence of their youth, they were likely to be allured; and yet when, under these circumstances, one of them is injured, and the company offers no excuse by way of evidence showing diligence upon its part, it is said that to require proof such as would be necessary to shield it if the action were for injuries to an animal is to impose upon it the duty of extraordinary care. No diligence at all was shown upon the part of the defendant company, and yet, in the face of the statute imposing upon it the burden of proof in such cases, it is held that no recovery could be had. Upon the principle of the Turn-Table Cases, which are familiar to the profession, I am content to rest my individual judgment that the law of the case was with the plaintiff. The

fasts the jury found with him; and upon these two propositions it is, with the greatest deference for the opinion of my learned brethren, earnestly submitted that the judgment of the trial court, approving the finding of the jury and denying a new trial, should be permitted to stand.

(97 Ga. 172)

**LITTLETON et al. v. LOAN, MERCANTILE & STOCK ASS'N.**

(Supreme Court of Georgia. Oct. 5, 1895.)

**SPECIAL AGENCY — NOTICE — LIABILITY OF PRINCIPAL.**

1. One who deals with a special agent, knowing at the time the limits within which the agent, under the terms of his appointment, has authority to bind his principal, is bound to act with reference to this knowledge, and cannot hold the principal liable for loss occasioned by acts of the agent in excess of, or contrary to, the latter's authority in the premises.

2. Where an agent to buy had no authority to make his principal directly liable to the seller for the price of the goods purchased, but was required to ship the same to the principal, draw upon the latter in favor of a specified bank, with bills of lading attached to the drafts, which drafts the principal had arranged with the bank to cash so as to supply the agent with money to pay for his purchases, one who, with knowledge of these facts, sold and delivered goods to the agent for his principal, and, without seeing to it that the agent complied with the above-stated requirements, accepted in settlement for the goods the agent's individual check on the bank in question, which was dishonored, could not recover from the principal the value of the goods without proving affirmatively that he actually received them; and even then the latter would not be liable if he in fact paid for the goods by honoring the agent's draft in pursuance of the terms under which the agency was created.

3. In view of the law as above announced, the evidence in this case did not warrant the verdict in the plaintiff's favor, and it was error to refuse a new trial.

4. Where the relation established between a principal and agent is that of a general agency upon the part of the latter to purchase cotton upon the credit of the principal, the seller of cotton to such an agent for the account of the principal is not affected by private instructions of the latter to a third person, not affecting the power of the agent to purchase, but only directing how, in what manner, and upon what terms such third person would be authorized to pay drafts drawn by the agent for the purchase price of such cotton, even though such private instructions be known to the seller. Per Atkinson, J., dissenting.

5. If the agent have competent authority to complete the contract of purchase, and, in pursuance of such authority, the purchase be completed, and delivery to the agent thereunder be effected, the seller is entitled to be paid the purchase price, notwithstanding the infidelity, negligence, or disobedience of instructions by the agent in his further dealings with his principal respecting the delivery to the principal of the cotton so purchased. Per Atkinson, J., dissenting.

6. According to the principles above announced, under the evidence submitted in this case, the court committed no error in refusing to grant a new trial. Per Atkinson, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by the Loan, Mercantile & Stock Association against Littleton & Lamar for the price of cotton. From a judgment for plaintiff, defendants bring error. Reversed.

Brought forward from the last term.

E. F. Hinton, J. H. Lumpkin, and Cutts & Hixon, for plaintiffs in error. C. J. Thornton, Morgan McMichael, and Peabody, Brannon, Hatcher & Martin, for defendant in error.

LUMPKIN, J. The record discloses that Littleton & Lamar, of Americus, had at Buena Vista an agent named Lowe, whose business it was to buy and ship cotton to them. They required him to ship daily the cotton he bought, and had arranged with a bank in Buena Vista to cash his drafts drawn upon them for purchases made, when the same were presented to the bank with bills of lading attached. Lowe had no authority, except as above stated, to draw upon his principals in settlement for any cotton purchased by him; and no authority at all, so far as Littleton & Lamar were concerned, to keep an account of his own at the bank, and draw upon it his individual checks in settlement of such purchases. All this appears from a letter addressed to the bank by Littleton & Lamar, of which the following is a copy: "Buena Vista Loan & Savings Bank, Buena Vista, Ga.—Sirs: Mr. O. E. Lowe is in your town for the purpose of buying cotton for us, and we wired you to pay for his purchases, requiring him to ship daily, drawing cost with B/L attached. We had his draft for \$100.00 presented to us in your favor for what he says is a 'bonus' you required, which we refused to honor. We hoped that our established credit here and at all the cotton ports would be sufficient guaranty for any transactions we might see proper to authorize, hence our refusal. If you see proper to pay for Mr. Lowe's purchases, requiring him to ship daily, with B/L attached to draft, we will always honor same. Very respectfully, Littleton & Lamar." Short, as manager of the plaintiff corporation, sold to Lowe, as agent, a lot of cotton, and accepted in payment Lowe's individual check upon the bank, without requiring him to draw upon Littleton & Lamar with bills of lading attached. The check was dishonored by the bank, and thereupon the corporation of which Short was manager brought an action against Littleton & Lamar for the price of the cotton, and obtained a verdict for the same. It plainly appears from Short's own testimony as a witness that, before making the sale in question, he was fully aware of the nature and extent of Lowe's agency for Littleton & Lamar. The following is an extract from his testimony: "Before I sold any cotton to this party [Lowe], I was shown that letter that has just been read to the jury [referring to the letter above quoted]. I saw that letter. Mr. Lowe came to me, and stated that he was there for the purpose of buying cotton for them [Littleton & Lamar]; that the

bank had refused to pay for his cotton without a bonus, and he had a letter of credit at the bank that he thought was a sufficient guaranty. He applied to me to purchase cotton for them. He referred me to this letter, and I went there, and examined this letter."

There is no difference of opinion between the majority of this court and Justice ATKINSON, who dissents from the judgment rendered, as to the questions of law involved. Indeed, these questions are simple and well settled. Our disagreement arises entirely from the conflicting views we entertain as to the character of Lowe's agency for Littleton & Lamar. If he was their general agent to buy cotton, it would seem that his principals would be bound to pay for cotton sold and delivered to him for them, whether they actually received it or not; but, if he was only their special agent, having limited authority, one who dealt with him as agent, and who had full knowledge as to the limits within which he, under the terms of his appointment, had authority to bind his principals, was bound to act with reference to this knowledge, and, consequently, could not, in law, hold the principals liable for loss occasioned by acts of the agent in excess of or contrary to his authority in the premises. Chief Justice SIMMONS and the writer are satisfied that Lowe was only a special agent, and that in the performance of his duties as such he was restricted by the terms set forth in the letter to the bank. If we are right in this view, it was incumbent upon Short, knowing the facts, to see to it that Lowe paid for each purchase by drawing upon Littleton & Lamar with the requisite bill or bills of lading attached to his drafts. When Short accepted Lowe's individual check upon the bank, he did so at his own risk, and could not hold Littleton & Lamar liable for the value of the cotton sold and settled for in this manner, without proving affirmatively that such cotton was actually received by them. Even then Littleton & Lamar would not be liable if they in fact paid for the cotton by honoring Lowe's draft or drafts, which came to them through the bank in pursuance of the terms under which Lowe was appointed agent and of their arrangement with the bank to supply him with money with which to pay for cotton purchased. The evidence does not show that the particular cotton, the price of which is the subject-matter of this suit, ever went into the hands of Littleton & Lamar at all, and we therefore think the verdict in the plaintiff's favor was entirely unwarranted, and ought to be set aside. Judgment reversed.

ATKINSON, J. (dissenting). Finding myself unable to agree to the conclusion reached by the majority of the court in the present case, I shall proceed to a statement of the reasons which seem to me to justify a contrary view. It will be observed upon an examination of the opinion filed by my brethren that the real point of difference be-

tween us is as to the effect of the evidence submitted touching the character of the agency under and by virtue of which the agent acted in the purchase of the goods for the recovery of the value of which this action is brought. For a statement of the necessary facts I refer to the opinion of the court, pronounced through Justice LUMPKIN. It will be seen that the defendants had an agent, who for them was authorized to buy cotton at the point designated, from any person whomsoever, without limitation as to quantity, quality, or price to be paid. He had full power in the name of his principal to complete the contract of purchase. He was at his general discretion to select the person from whom he would purchase, agree upon the price paid, the thing to be purchased (provided only it was cotton), to perform every needful act in the transmission of title from the sellers to his principal, including the acceptance of delivery of the thing sold. Up to this point there was not the slightest limitation upon the authority of the agent. In dealing with the seller, he in all respects represented and was the alter ego of the principal; and this, according to my view, constituted him a general agent,—one exercising general powers with respect to the purposes of the agency, as distinguished from one exercising powers with respect to a particular subject. Nor does it occur to me that the mere fact that the scope of the agency did not extend beyond the purchase for the principal of one commodity in general renders it the less a general agency. My brethren agree that, if the agency was general, and not special, the principal is bound. The distinction between the two classes of agency has been so aptly stated by Mr. Justice Strong, speaking for the supreme court of the United States, in the case of *Butler v. Maples*, 9 Wall. 766, that, in support of my own view, I take the liberty of quoting from his opinion as follows: "The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency; but authority to make purchases from any persons with whom the agent may choose to deal, or to make any indefinite number of purchases, is a general agency; and it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents,—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two

kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only." Upon authority of the distinction thus stated, the writer is content to rest his judgment that the agency now under review was general, and not special, as contended by the majority. If this premise be established, it is conceded by the majority that the position of the writer is sustained. But I shall nevertheless undertake to examine the scope of the general agency in the light of what my brethren treat as concurrent instructions limiting its scope, which are deducible from the letter quoted in the opinion of the court; and in doing so I will in the outset endeavor to make a distinction between instructions from the principal to the agent which operate as limitations upon the power itself and those instructions which relate to transactions between the agent and the principal and between the agent and persons other than the seller dealing with him with respect to the same matter. The former inhere in and become a part of the power, and, if known, affect third persons; the latter do not, and a disobedience of such instructions makes questions between the agent and his principal only. The scope of the agency in the present case comprehended the employment by the agent of such means as were necessary in the purchase of cotton. What means were to be so employed was left to the discretion of the agent; but, after the purchase was in all respects complete, and the entire transaction, so far as the purchase was concerned, was concluded by a delivery of the cotton, then only did the alleged instructions apply. It will be seen that they in no way related to the contract by which the ownership of the cotton was changed, but related only to the manner in which the agent, upon the part of his principal, should perform the duty of payment. For his own protection against the infidelity of his agent, the principal required that, in the event the agent should see proper to pay for purchases by draft upon the bank, bills of lading should be attached to drafts drawn by the agent upon the bank, to which the letter containing the alleged instructions was addressed, and in that event authorized the bank to honor the drafts; and, if the bank had paid such drafts without requiring bills of lading, as instructed, the principal could not have been held liable thereon. But I find nowhere in the record any requirement that the agent shall purchase for cash or credit only, or that in payment for cotton he must at all events draw through the bank. The letter only guaranteed to the bank drafts drawn in accordance with its terms, and did not undertake to limit the agent as to the manner of payment. When, however, the cotton purchased had been delivered by the seller to the common carrier upon the order of the general agent, the liability of the principal to the seller for the purchase price was completed; and what difference could it make

to the seller whether the agent thereafter obeyed instructions or not? It might affect the agent, and might affect the bank dealing with him, but not the seller. The violation of such instructions could not, by any possibility, affect, much less discharge, the liability of the principal for the price of the goods. Had the agent obeyed instructions, the bank might have paid the draft delivered by him to the seller; but it is impossible for me to understand how, in law or morals, the repudiation of the draft could discharge the principal from liability for the price of the cotton. That the cotton, for the purchase price of which this action was brought, was actually sold by the plaintiff, and by him delivered to the common carrier upon the order of the agent of the defendant, who had competent authority to buy, cannot be disputed; and to say that the infidelity, misfeasance, or nonfeasance of the agent, for whose conduct the defendant is in no manner responsible, should absolve his principal from the duty to pay, is equivalent to permitting the principal to take advantage of his own fraud, and this I cannot consent to sanction. I think my brethren have misconceived the scope of the agency in question, and have fallen inadvertently into the error of confusing instructions to the agent as to the manner of his dealing with the bank with limitations upon his power to act for his principal in the execution of the purpose of that agency; and therefore am of the opinion that the judgment should stand affirmed.

(97 Ga. 746)

**LIVERPOOL & L. & G. INS. CO. v. SAVANNAH GROCERY CO.**

(Supreme Court of Georgia. Feb. 10, 1898.)

**GARNISHMENT—ANSWER—JUDGMENT.**

1. Although a summons of garnishment is regularly issued in due time before the term of the court to which it is made returnable, service thereof must be perfected before the commencement of such term, in order to compel an answer from the garnishee on or before the first day of the term next thereafter ensuing.

2. A judgment rendered against a garnishee before the expiration of the time within which he is allowed by law to answer is void, and it is not necessary to his relief therefrom that he show to the court that his answer, had the same been filed before the judgment, would have presented sufficient legal reasons to prevent its rendition.

(Syllabus by the Court.)

Error from superior court, Screven county; E. H. Callaway, Judge.

Action by the Savannah Grocery Company against the Liverpool & London & Globe Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dell & Wade and H. C. Kittles, for plaintiff in error. Lee & Giles and Hines & Hale, for defendant in error.

SIMMONS, C. J. Upon a pending suit process of garnishment was sued out on

April 23, 1894, returnable to the May term of the superior court. That term began on May 21st, and closed on May 26th. The garnishee was served with summons on May 23d. No answer was filed. The plaintiff obtained judgment against its debtor at the October term of the superior court of the county where the main action was pending. On November 20th, during the November term of the superior court of the county where the garnishment was served, judgment was rendered against the garnishee, it being recited therein that the garnishee had failed to answer. On the next day, and during the November term, the garnishee moved to set aside this judgment, one of the grounds of the motion being that the garnishee had until the next term to answer. The motion was overruled, and the garnishee excepted.

1. The law requires that summons of garnishment shall be issued a specified number of days before the term to which it is made returnable,—20 days being the time prescribed where the suit in which it is issued is pending in the superior court of another county than that in which the garnishee resides, as was the case here. Code, §§ 3536-3538. The law also provides for service of the summons, but is silent as to the time when such service shall be made. The requirement that the summons shall issue a certain number of days before the return term is for the benefit of the garnishee, the object being to afford him timely notice of the proceeding. This requirement, however, would be of no benefit to him unless service, as well as the issuance of the summons, were required to take place before the term; and we think it is clear that the return term is to be fixed with reference not only to the time of the issuance of the summons, but to the time of the service, and that such service must precede the term. In the present case, as we have seen, the summons was issued more than 20 days before the May term, but was not served before the term. The garnishee was, therefore, under no duty to answer at that term. The law further provides that: "When any person summoned as garnishee fails to appear in obedience to the summons, and answer at the first term of the court at which he is required to appear, the case shall stand continued until the next term of the court; and if he should fail to appear and answer by said next term, the plaintiff may, on motion, have judgment against him," etc. Code, § 3304. This section has reference expressly to attachment cases, but this court has held that the law is the same in all other cases. *Sanders v. Miller*, 60 Ga. 554. It follows that the court in this case erred in rendering judgment against the garnishee, the term at which the judgment was rendered being the first after service of the summons.

2. It was contended that the garnishee, having had notice before the end of the first

term, ought to have appeared at that term, and raised the objection of want of proper service, and, having failed to do this, was bound by the judgment; and, further, that a statement setting forth a substantial defense would have to be made by the garnishee before the court would be authorized to set aside the judgment. We do not agree with counsel in these contentions. The judgment having been rendered before the expiration of the time within which the garnishee was by law allowed to answer, it was void; and, this being so, the garnishee was, as a matter of right, entitled to have it set aside. The cases relied on by counsel for the defendant in error in which a meritorious defense was required to be shown were cases in which there was default on the part of the moving party. In the present case there was no default. Judgment reversed.

(99 Ga. 634)

### ZORN v. HANNAH et al.

(Supreme Court of Georgia. Nov. 2, 1896.)

ACTION ON WAREHOUSE RECEIPT — DECLARATION.

The declaration, with or without the amendment, set forth a cause of action, and it was therefore error to dismiss the action on general demurrer.

(Syllabus by the Court.)

Error from superior court, Upson county; C. C. Smith, Judge.

Action by A. M. Zorn, for the use of H. D. Adams & Co., against G. W. T. Hannah & Co. Judgment for defendants, and plaintiff brings error. Reversed.

The following is the official report:

Zorn, suing for the use of H. D. Adams & Co., alleged that G. W. T. Hannah & Co. were indebted to him for said use \$156.72, being the value of four bales of cotton stored with defendants, as warehousemen, on the 22d and 27th of November, 1893, as appeared by copies of receipts for the cotton annexed; that the four bales aggregated in weight, 1,959 pounds, and were reasonably worth the sum above mentioned; and that petitioner had demanded of Hannah & Co. said four bales, which they had refused. Attached to the declaration were copies of the receipts, four in number. The first was dated November 22, 1893, and was as follows:

"Iron Warehouse. G. W. T. Hannah & Co.,  
"Proprietors.

"Mark [4].

"No. [161].

"Weight [450].

"P. Marks [175].

"Rec. from A. M. Zorn one bale of cotton, —marks, numbers, brands, etc., as margin,—subject to the presentation of this receipt only on paying customary expenses and all advances. All cotton stored with us fully insured. Acts of Providence excepted.

"[Signed] W. D. McKenzie,

"For the Proprietors."

The others were similar.

The declaration was amended by alleging: "The four bales were destroyed by fire on or about December —, 1893, and were destroyed by reason of defendants' negligence or carelessness, in this: That they, on the day the cotton was burned, allowed [it] to be stored on platform on outside of the warehouse, within ten or twelve feet of the railroad track; and within very short while after the passing of an engine on the Macon & Birmingham Railroad the cotton placed or stored on the outside of the warehouse was discovered to be on fire, from which fire the warehouse and the entire contents were destroyed. By reason of thus negligently or carelessly allowing the cotton placed on the outside of the warehouse, plaintiff's said four bales, so stored there with the defendants as warehousemen, were destroyed, and this damaged petitioner \$156.72. Defendants were [bailees] for [hire], and as such were liable for the production of said four bales when demanded, and, under the contract set out in the receipt, agreed to fully insure the cotton so stored, which they failed to do. On account of all which facts above stated, defendants should account to plaintiff in the sums heretofore set forth." Defendants demurred upon the ground that plaintiff's cause of action, if any exists, is not sufficiently, plainly, and distinctly set forth, and that the allegations were too general, and not distinctly alleged. The demurrer was sustained, to which ruling plaintiff excepted.

R. V. Hardeman & Son and Worrill & Lester, for plaintiff in error. M. H. Sandwich and J. Y. Allen, for defendants in error.

PER CURIAM. Judgment reversed.

(98 Ga. 708)

#### CONNOR v. LASSETER et al.

(Supreme Court of Georgia. July 13, 1896.)

##### ACTION FOR SALARY—DEFENSES.

1. It is a good defense to an action by a teacher upon a written contract to pay him a stipulated sum per month for his services in teaching a private school that, in order to induce the persons by whom he was employed to sign the contract, he falsely and fraudulently represented to them that he possessed certain specified and essential qualifications as a teacher, which he did not in fact possess. Such defense is available to show failure of consideration, either total or partial.

2. Where, however, such contract contained an unambiguous and unconditional promise to pay the stipulated salary, it was not competent, in defense to an action thereon, to plead or prove that the plaintiff agreed in parol to apply for and obtain a license from the school authorities of the county "to teach in the public schools of said county," that he would teach a public school under such license, and allow the amount collected by him from this source to go as a credit upon what was to become due him under the contract with his employers.

3. In so far as the rulings of the trial court

in passing upon the defendants' pleas and in admitting evidence were at variance with what is above announced, error was committed.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by William M. Connor against Z. W. Lasseter and others. Judgment for defendants, and plaintiff brings error. Reversed.

Hal Lawson, for plaintiff in error. Williams & Laud, for defendants in error.

LUMPKIN, J. This was an action by Connor against Lasseter and others upon a written contract to pay him \$65 per month as a salary for his services as a teacher. He alleged full performance of his contract, and sought to recover a balance claimed to be due him thereon. Among other things, the defendants pleaded that they had been induced and influenced to sign the contract by reason of false and fraudulent representations on the part of plaintiff to the effect that he possessed certain specified and essential qualifications as a teacher, which he did not in fact possess; and, further, that he had agreed in parol to apply for and obtain a teacher's license from the school authorities of the county in which the school to be taught by him was located; that he would teach a public school under that license, and allow whatever he collected from the public school fund to go as a credit upon what was to become due him under the written contract with his employers. The first of these defenses was good in law. It really amounted to a plea of failure of consideration, either total or partial, and was available, to the extent it was sustained by evidence, in reducing the amount of the plaintiff's recovery, or defeating a recovery altogether. The second defense was not a good one in law. It was, in effect, neither more nor less than an attempt to vary by parol the terms of a plain and unambiguous written contract. Connor's employers agreed in writing, absolutely and unconditionally, to pay him a stated monthly salary for his services as a teacher. There was nothing in the contract, as written, binding him to obtain a license to teach a public school, or to teach under it, or to give his employers credit for any sums which might be paid him as a teacher of a public school. As to these matters the contract was entirely silent, and it really related exclusively to the teaching of a private school. Alleged conditions and stipulations of the kind mentioned in the plea with which we are now dealing plainly cannot be ingrafted upon a contract of this kind by parol. The court erred in allowing such a defense to be filed or proved. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(99 Ga. 636)

**SOUTHERN BANKING & TRUST CO. v. FARMERS' & MERCHANTS' BANK.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**APPEAL—REVIEW—RECORD.**

The only question made in the record being whether or not the trial judge erred in directing a verdict, and the determination of this question, of course, depending upon a consideration of the evidence, and it appearing that the evidence at the trial consisted largely of documents, which are unnecessarily set forth in full, including the formal and totally immaterial parts thereof, with no attempt whatever at briefing the same as the law requires, this court will not examine the evidence for the purpose of determining whether or not error was committed, but will assume that the judgment below was correct. *Ingram v. Clarke*, 22 S. E. 334, 96 Ga. 777, and cases cited.

(Syllabus by the Court.)

Error from superior court, Upton county; C. O. Smith, Judge.

Action by the Southern Banking & Trust Company, for use, against the Farmers' & Merchants' Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

Worrill & Lester and M. H. Sandwich, for plaintiff in error. J. A. Cotten, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(98 Ga. 366)

**SWAIN v. STEWART.**

(Supreme Court of Georgia. April 27, 1896.)

**WIDOW'S ALLOWANCE—RIGHT TO SELL LAND—EVIDENCE.**

1. The marriage of a widow after the death of her husband does not deprive her of the right to a year's support out of his estate, nor prevent her making an application for a year's support for the benefit of herself and a minor child of the deceased.

2. Where a year's support, consisting in part of land, was set apart for the benefit of a mother and her minor child, it was, according to the doctrine laid down by this court in previous decisions, the right of the mother to sell and convey such land in fee simple for the purpose of deriving from the proceeds a support for herself and the child; and this right was not affected by the fact that the mother had married again.

3. Where, in such case, the mother was confined in jail under a sentence for a misdemeanor, and sold the land embraced in the year's support partly to raise money to pay a fine so as to obtain her discharge from custody, and partly in consideration of supplies furnished for herself and the child, the sale was lawful, and passed a good title to the purchaser.

4. The court erred in rejecting evidence tending to show that the sale was made under the circumstances and for the purposes above recited.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; Seaborn Reese, Judge.

Action by Elizabeth Stewart, by her next friend, against Josh. Swain. Judgment for plaintiff, defendant brings error. Reversed.

J. F. Reed and Saml. H. Sibley, for plaintiff in error. H. M. Holden, for defendant in error.

**SIMMONS, C. J.** Preston Stewart died in 1879, leaving a widow and a minor child. In 1884 the widow married Gunn. After her second marriage, she applied for and had set apart by the ordinary a year's support for herself and the minor child out of the estate of her first husband. The year's support consisted of a small amount of personalty and a tract of land. The minor child, after the death of her mother, brought, by next friend, an action of complaint for the land against Swain, who claimed title as tenant of T. E. Bristow, under a deed from the mother. Upon the trial of the case the court ruled that the latter had no title to the land, and her deed could convey none, and refused to allow testimony in behalf of the defendant to the effect that at the time the deed was made, Gunn, the second husband, was not then living with or supporting her; that the plaintiff was dependent upon her mother for support; that the mother was imprisoned under a sentence of fine or imprisonment; and that the consideration of the deed was partly for supplies furnished the mother and the plaintiff, and partly the payment of the fine and costs adjudged against the mother, she being then in jail under the sentence. There was a verdict for the plaintiff, and the defendant made a motion for a new trial, in which the rulings above mentioned were complained of. The motion was overruled, and he excepted.

1. The first question to be determined is whether a woman can legally have set apart out of the estate of her deceased husband a year's support for the benefit of herself and a minor child of the deceased, after she has married again. Under section 2571 of the Code, where a man dies, leaving an estate, and leaving a widow, or a widow and minor child or children, it is the duty of the ordinary, upon her application, to have set apart for them a year's support out of the estate of the deceased. This section has been held by this court to be a part of the statute of distributions. *Farris v. Battle*, 80 Ga. 189, 7 S. E. 262. As soon as the husband dies, his widow acquires, under the provisions of this section, a vested interest to a year's support, which interest is superior to all claims of creditors or of adult children of the deceased. If she dies before the year's support is set apart, her administrator is entitled to have it set apart for the benefit of her estate. *Brown v. Joiner*, 77 Ga. 232, 3 S. E. 157. The right to a year's support being a vested right to her as an individual, her second marriage would not deprive her of this right. "Whenever a right by law has attached by reason of widowhood, there must be some law by which it is divested, or it will remain."

2. A year's support having been set apart, the property thus set apart vested in the widow and child (Code, § 2574), and, under several decisions of this court, an absolute sale by the widow, not only of her own interest, but that of the interest of the child also, would convey a good title to the purchaser, if made to ob-

tain the support which the statute contemplates. In *Tabb v. Collier*, 68 Ga. 641, it was held that a sale by a widow, with the approval of the ordinary, of the land set apart as a year's support, conveyed a good title to the purchaser. In *Cleghorn v. Johnson*, 69 Ga. 369, it was held that a sale by the widow alone, for the purpose of obtaining means for the support of herself and the minor children, conveyed a good title, and that the approval of the ordinary was unnecessary. In the case of *Tabb v. Collier*, supra, the court said: "If the property so set apart is not adapted to the use of the family, it may, without the aid of courts or chancellors, be converted, and made available for the purposes intended. We do not understand that, to be enjoyed, further notices, guardians, and orders are to be obtained to change land (already given for support) into bread before it is allowed. To do so would consume not less than two months, and in most cases a longer time, in which time the family might come to want." These decisions have been followed in the cases of *Steed v. Cruise*, 70 Ga. 177; *Farris v. Battle*, supra; *Collins v. Covington*, 84 Ga. 129, 10 S. E. 540; *Lowe v. Webb*, 85 Ga. 733, 11 S. E. 845. While we may not be satisfied with the reasons for allowing the widow alone to sell and convey property set apart to herself and a minor child or children, yet we are bound by the former decisions of this court upon the subject, until they are reviewed in the manner prescribed by law. The case of *Vandigrift v. Potts*, 72 Ga. 665, relied on by counsel for the defendant in error, is very different in its facts from the present case. There the year's support had been set apart by the ordinary before the remarriage of the widow, and after her remarriage she and her husband sold the land, not for the support of herself and the minor children, but for the purpose of reinvesting the proceeds in other land, to which title was taken in the name of herself and her husband.

3. It was argued that the sale was void if made partly for the purpose of obtaining money with which to pay the fine of the woman. We do not think so. The child was then a mere infant, and needed the care of the mother. Her second husband was not chargeable with the support of the child, and was not supporting the mother, having previously separated from her. She had no means of supporting the child, outside of the property set apart as a year's support, except what she could earn from her own labor. It was her duty to support the child, and if she remained in prison it would suffer. We think it was proper, therefore, in view of the needs of the child and her inability to provide for it otherwise, that she should sell the land in order to procure the means to pay her fine, and thereby secure her release from imprisonment.

4. It follows from what we have said that the court erred in rejecting evidence tending to show that the sale was made under the circumstances and for the purposes above recited. Judgment reversed.

(99 Ga. 7)

# CARVER et al. v. MAYOR, ETC., OF DAWSON.

(Supreme Court of Georgia. May 11, 1896.)

CITY CHARTER—REGISTRATION OF VOTERS—ISSUE OF BONDS.

1. Construing section 18 of the act of September 21, 1883, "to establish a new charter for the city of Dawson," in the light of the legislative intention to be gathered from the entire act, it was not contemplated that the power and authority conferred upon the mayor and aldermen "to provide for the registration of all voters in said city" should be exercised with reference to any elections other than those for the municipal officers of the city.

2. This being so, no registration of the qualified voters of the municipality was essential as a test for ascertaining whether or not the requisite two-thirds majority had been obtained at an election upon the question of issuing bonds for the purpose of establishing waterworks and electric lights in that city, but section 508 (l) of the Code was applicable.

(Syllabus by the Court.)

Error from superior court, Terrell county; H. C. Sheffield, Judge.

Action by A. J. Carver and others against the mayor and council of Dawson. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. H. Guerry and J. A. Laing, for plaintiffs in error. M. C. Edwards, Jr., for defendants in error.

LUMPKIN, J. In 1883 the general assembly passed an act to establish a new charter for the city of Dawson. Acts 1882-83, p. 404. Section 18 of that act confers upon the mayor and aldermen power and authority to provide for the registration of all voters in that city, but does not definitely and distinctly declare for what elections the registration of the voters shall be had. It is, however, strongly inferable that the only elections in contemplation by the general assembly were those to be had for the municipal officers of the city. In endeavoring to arrive at the legislative intention with regard to this matter, we have carefully studied the entire act, and, as a result, have reached the conclusion that the general assembly did not intend to either authorize or require a registration of voters with reference to any other municipal elections than those of the kind last above mentioned. If this conclusion is a correct one, it follows, in view of the previous adjudications of this court in cases more or less similar, that no registration of the qualified voters of this particular city was essential as a test for ascertaining whether or not the requisite two-thirds majority had been obtained at the election now under review, it being one which had been held upon the question of issuing bonds for the purpose of establishing waterworks and electric lights in that city. The true test to be applied in this case was that provided for in section 508 (l) of the Code. In *Gavin v. City of Atlanta*, 86 Ga. 132, 12 S. E. 262, it appeared that the registration provided for in the city charter related to "any municipal elections in said city,"—that is, to all elections

held therein; and consequently it was held that it was essential to look to the number of voters registered, in order to ascertain whether or not a two-thirds majority of the qualified voters of the city had been obtained at the election then under review. In *Mayor, etc., v. Wade*, 88 Ga. 699, 16 S. E. 21, it was shown that the municipal authorities had ample power to require a registration for any corporate election, including one upon the question of approving a certain school act; but the difficulty was, they sought to apply to an election for that purpose an existing registration ordinance which related only to elections for municipal officers. The registration act dealt with in *Kaigler v. Roberts*, 89 Ga. 476, 15 S. E. 542, was one which applied only to elections for governor and other officers. Accordingly it was held that no preliminary registration was requisite to an election held under section 508 (1) et seq. of the Code upon the question of issuing courthouse bonds, and therefore that section 508 (1) would apply for the purpose of ascertaining whether or not two-thirds of the qualified voters of the county had voted in favor of the proposed bonds. This case is, in principle, very similar to the case at bar. The ruling in 89 Ga. and 15 S. E. is followed in *Howell v. Mayor, etc.*, 91 Ga. 139, 16 S. E. 968, it appearing that the system of registration provided for in the charter of the city of Athens related exclusively to elections for municipal officers. In *Mayor, etc., v. Wilson*, 96 Ga. 251, 23 S. E. 240, it was held that, inasmuch as the mayor and council had "power and authority to provide for the registration of voters prior to any municipal election in said town," it could not, in the absence of any registration at all, be legally ascertained whether or not, at a particular election, two-thirds of the qualified voters had voted "For public schools." In other words, that having the authority to provide for a registration applicable to that election, and having failed to exercise it, the fact that two-thirds of those voting at the election voted in favor of the establishment of the proposed school system was not a legal test upon the question. The decision of this court in the case of *Heilbron v. Mayor, etc.*, 96 Ga. 312, 23 S. E. 206, so far as applicable, is in harmony with the foregoing decisions. Judgment affirmed.

(98 Ga. 723)

## DRAKEFORD v. ADAMS.

(Supreme Court of Georgia. July 27, 1896.)

## RECEIVERS — RECOVERY OF ASSETS — WEIGHT OF EVIDENCE — NOTICE OF ORDER.

1. It is not essential to the maintenance of a petition by a receiver against one alleged to have in his possession money which the court has ordered shall be delivered to the receiver for the latter to prove beyond a reasonable doubt the fact that the respondent had such money in his hands, custody, or control after the passage of the order upon which such petition was based. While this fact must be clearly and satisfactorily established, it may be proved by a preponderance of the evidence; the case being in its nature purely remedial, and therefore a civil, and not a criminal, proceeding.

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2. If the person alleged to have such money in his possession knew of the passage of the order in question, and its contents, it is immaterial whence his information on the subject was derived. As to the knowledge he actually had, he is chargeable to the same extent as he would have been had he been duly served with a copy of the order in question.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

In the matter of the *Elder, Dempster, Gaston & Co. Liberian Company* against *Frank Drakeford*, P. H. Adams, the receiver, obtained a rule against said defendant; from the order in which case, defendant brings error. Affirmed.

Wm. W. Davies and H. M. Reid, for plaintiff in error. Mayson & Hill, for defendant in error.

SIMMONS, O. J. The receiver in the case of the *Elder, Dempster, Gaston & Co. Liberian Company v. Frank Drakeford* obtained a rule against Drakeford to show cause why he should not be adjudged in contempt for his refusal and failure to turn over to the receiver a certain fund of money belonging to the plaintiff. The case was tried before a jury, under the act of December 22, 1892 (Acts 1892, p. 65). The court submitted certain issues to the jury, which, with their answers thereto, were as follows: "(1) Did defendant, Drakeford, have possession, custody, or control of the fund alleged by the receiver to be withheld after the time of granting the order of court appointing a temporary receiver, which order was dated March 28, 1895, and after he had knowledge or notice that such an order had been granted? Answer. Yes. (2) Did he, or not, have such power, custody, or control when the receiver demanded it from him? Answer. Yes. (3) Is said Drakeford withholding, or taking part in withholding, funds ordered to be turned over to the receiver, and in his power, custody, or control? Answer. Yes. (4) If yes, how much? Answer. \$909.55." The defendant made a motion for a new trial, which was overruled, and he excepted.

1. The grounds of the motion for a new trial which were mainly relied upon in the argument before us were that the court erred in refusing to charge the jury as follows: "If there is ground for any reasonable doubt of Drakeford's ability at the time the order of court was passed and served upon him to obey said order requiring him to turn over certain funds to P. H. Adams, receiver, you should find for the defendant,"—and that the court erred in not charging the jury that "they must be satisfied beyond a reasonable doubt of the truth of the allegations in the receiver's petition for a contempt rule against the defendant before they could, under the law, find the issue submitted to them, or any of said issues, affirmatively against the defendant." In cases of this character the ability of the defendant to comply with the order should be

clearly and satisfactorily established before the jury should find against him, but it is not essential that they should be satisfied beyond a reasonable doubt. It is not required, in any civil case, that the proof shall be so conclusive as to exclude reasonable doubt. Our Code (section 3749) declares that "in all civil cases the preponderance of testimony is considered sufficient to produce mental conviction." See the opinion in *Atlanta Journal v. Mayson*, 92 Ga. 641, 18 S. E. 1010, where former decisions of this court touching reasonable doubt in civil cases are referred to and discussed. It was argued that this proceeding was, in its essence, a criminal proceeding, and that the rule applied in criminal cases was therefore applicable. We do not concur with counsel in this view. In all contempts, it is true, there is an element of criminality, involving as they do the willful disobedience of orders or decrees made in the administration of justice, but a contempt proceeding is not always a criminal proceeding. A distinction is made between cases in which the process is merely punitive, and those in which it is remedial; that is to say, in which the contempt consists in the refusal by a party to do something which he is ordered to do for the benefit or advantage of the opposite party, and he stands committed until he complies with the order. The substantial distinction, as stated by Judge Seymour D. Thompson, is that "one is a mode of execution of judgments and decrees in civil cases, while the other is punishment for an offense of a criminal nature." "Criminal Contempts," 5 Cr. Law Mag. 172. And see *Rap. Contempt*, § 21. In the case of *Livingston v. Livingston*, 24 Ga. 381, the point was made that a commitment for contempt for refusal to comply with an order of court to deliver up personal property was a criminal proceeding; but the court held it was not, and said the commitment was "purely remedial. It is for the exclusive benefit of the plaintiff in the proceeding." And see *Cobb v. Black*, 34 Ga. 166; *Ryan v. Kingsbery*, 89 Ga. 228, 15 S. E. 302. The only contempt cases we have found, or have been referred to, in which the rule that the case against the defendant must be made out beyond a reasonable doubt has been held applicable, are cases of what are called "criminal contempts." This rule was established originally in felony cases, in *favorem vite*, at a time when death was the penalty of every felony, and was never, at common law, applied in civil or remedial proceedings, even though the proceeding involved imprisonment as a means of enforcing the order of the court. "The true doctrine would seem to be that in cases of strictly criminal contempts the rules of criminal evidence should be applied, while, in cases where the principal or only object is to redress a private injury, any kind of evidence which will satisfy the conscience of the court [or the jury, where the case has been submitted to a jury] will suffice." *Rap. Contempt*, § 126.

2. It was also contended in behalf of the defendant that, before any duty to obey the order of the court would rest upon him, the order must be legally served upon him. We think that if he knew of the passage of the order, or its contents, it was immaterial whence his information on the subject was derived. As to the knowledge he actually had, he was chargeable to the same extent as he would have been had he been served with a copy of the order. *Osborne v. Tenant*, 14 Ves. 136; *Telephone Co. v. Dale*, 53 Law J. Ch. 295; *Hull v. Thomas*, 3 Edw. Ch. 236; *People v. Brower*, 4 Paige, 405; *Livingston v. Swift*, 23 How. Prac. 1; *Aldinger v. Pugh*, 57 Hun, 181, 10 N. Y. Supp. 684, affirmed 132 N. Y. 403, 30 N. E. 745; *Winslow v. Naysen*, 113 Mass. 411; *Ramstock v. Roth*, 18 Wis. 522; *Poertner v. Russel*, 33 Wis. 193, 202; *Beach, Inj.* §§ 268, 269; 4 Enc. Pl. & Prac. "Contempt," 778; 5 Cr. Law Mag. 180, and cases cited.

3. There was sufficient evidence to support the verdict, and the court did not err in refusing a new trial. Judgment affirmed.

(98 Ga. 730)

#### MACEY v. BOWLES.

(Supreme Court of Georgia. / Aug. 3, 1896.)

ADMINISTRATOR'S SALE—VALIDITY—VENDOR AND PURCHASER—BONA FIDE PURCHASER—RESCISSON—PLEADING—INJURY TO PREMISES—LIABILITY OF PURCHASER.

1. The purchase by an administrator at his own sale of land belonging to the estate of his intestate being voidable at the option of an heir upon his election, within a reasonable time, to set the sale aside, the administrator could not, in his own name and right, before the expiration of such time, convey to another, who had notice of the facts, a good title to the land.

2. Although a person who bargained with an administrator for land which the latter had purchased at his own sale, and which he was undertaking to sell in his own right, paid a part of the purchase money, gave a promissory note for the balance, took a bond for titles, and entered into possession without notice or knowledge of any defect in his vendor's title, such person could not, as against the right of the heir to set the sale of the administrator to himself aside, be treated as a bona fide purchaser for value, if he discovered the truth before completing the payment of the purchase money or taking a deed from his vendor.

3. On the trial of an equitable petition filed by such purchaser to enjoin an action brought by the vendor in a city court for the balance of the purchase money, the plaintiff would be entitled to obtain a rescission of the contract of purchase under a judgment adjusting all the equities between these parties.

4. It would not, under the facts recited, be incumbent upon the plaintiff, as a prerequisite to the right of rescission, to account to the defendant for the value of a house upon the land, which had been destroyed by fire, unless it appeared that the burning was caused by the plaintiff's fault or negligence.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Action by Charlotte Mackey against Joseph L. Bowles to rescind a contract for the purchase of land, and recover back payments on

the price, and for injunction. From a judgment for defendant, plaintiff brings error. Reversed.

J. O. O. Black and Bryan Cumming, for plaintiff in error. Fleming & Alexander, for defendant in error.

LUMPKIN, J. Joseph L. Bowles was the administrator of his deceased wife, of whom he and a minor son were the only heirs. As such administrator, he sold a tract of land, and became the purchaser of it at his own sale; this result being accomplished by his conveying the land to one Curtis, who conveyed it back to Bowles. Afterwards the latter bargained the land to Mrs. Mackey, who paid a portion of the purchase money, and went into possession, gave her note for the balance, and received from Bowles a bond for titles. While affairs were in this condition, she discovered the fact (of which she had previously been ignorant) that Bowles had purchased the land at his own sale as administrator; and in the meantime a mill upon the premises, constituting a material element in the value of the property, had been destroyed by fire. Bowles brought an action against Mrs. Mackey for the unpaid purchase money, and she thereupon filed an equitable petition, alleging, in substance, the facts above recited, and praying that the contract be rescinded, that she recover of the defendant certain sums which she had paid out for repairs, and also what she had paid upon the purchase price. She further prayed that the action brought by Bowles be enjoined, that the equities between herself and him be adjusted upon her petition, and for general relief. It does not appear how, or through whose fault, the fire above mentioned was occasioned. At the trial the jury found that Mrs. Mackey was not entitled to a rescission, and that the defendant recover of her the balance of the purchase money for the property. The facts were practically undisputed; and whether or not the verdict can be sustained depends upon the legal questions involved in the case.

1. This court, by repeated adjudications, has settled the law that a purchase by an administrator at his own sale of property belonging to the estate of his intestate is voidable at the option of an heir, upon his election within a reasonable time to set the sale aside. It follows as an inevitable conclusion that the administrator could not, in his own name and right, before the expiration of such time, convey a good title to the land to one who did not occupy the position of a bona fide purchaser. It was practically conceded that the time had not yet expired within which the minor son of Bowles could exercise his option to set aside the purchase which his father had made from himself as administrator. It therefore becomes necessary to determine whether or not Mrs. Mackey is to be regarded as a bona fide purchaser from Bowles.

2. As will have been seen, Mrs. Mackey, at

the time she contracted to purchase from Bowles, was ignorant of the fact that he had purchased at his own sale as administrator. In this connection, the court was requested to charge that, if she discovered this fact before completing the payment of the purchase money, she would not be a bona fide purchaser without notice. This request was refused, and on this subject the court charged that, if Mrs. Mackey did not know at the time of contracting with Bowles for the purchase of the land that he was a purchaser at his own sale as administrator, then she was a bona fide purchaser without notice. In his order overruling Mrs. Mackey's motion for a new trial, the judge stated that, in his opinion, the above charge was not sound as an abstract proposition of law, but refused the new trial because, in his judgment, the verdict for the defendant was demanded by the evidence. We agree with his honor that the charge in question was erroneous, but do not concur in his conclusion that the verdict was demanded. Under the facts recited, Mrs. Mackey was not such a bona fide purchaser as that she could, by paying the balance of the purchase money, and accepting a deed from Bowles, defeat the right of the minor to set aside the administrator's sale, and assert title to an undivided half of the premises. "Want of notice, both at making of purchase and payment of purchase money, must be shown, to constitute a person a bona fide purchaser. It is not sufficient that he had no notice when he purchased, if notice was given him before he paid over the purchase money." *Warner v. Whittaker*, 6 Mich. 133. In the case just cited, it appeared that the purchaser had paid a part of the purchase money, and given a bond for the balance. The doctrine of this case is supported by the text in 16 Am. & Eng. Enc. Law. See pages 884, 886, and 889, and the numerous cases cited in the notes. We make the following extract from page 839: "One who claims the protection of a court of equity as a bona fide purchaser must show that he had acquired the legal title before notice or knowledge of facts equivalent to notice." In *Losey v. Simpson*, 11 N. J. Eq. 246, it was held that "actual payment of the purchase money is, in general, necessary to the character of a bona fide purchaser for a valuable consideration, and giving a security, or executing an obligation for payment, will not be sufficient." In *Wormley v. Wormley*, 8 Wheat. 421, the supreme court of the United States laid down the rule that "a bona fide purchaser, without notice, to be entitled to protection, must be so not only at the time of the contract or conveyance, but until the purchase money is actually paid." The opinion in that case was delivered by Mr. Justice Story, who pronounced the doctrine just stated to be "a settled rule in equity." One of the earlier cases decided by our own court is to the same effect. It is that of *Phinzy v. Few*, 19 Ga. 66. It appears in that case that Mrs. Few bargained to Phinzy a house and lot in Athens, under a contract by which

she bound herself to make to him "good and sufficient titles" to the property; he on his part promising to pay her \$1,800 for the same. At the time this contract was made, Phinzy had no notice or knowledge of any defect in Mrs. Few's title. He afterwards ascertained that certain executory devisees of Mrs. Few's father had a title to, or lien upon, the property in question, and consequently refused to pay the purchase money. Mrs. Few then sued him upon the contract, and obtained a judgment. Upon a review of the same, this court held that, inasmuch as Phinzy received notice of an incumbrance upon the title before paying the purchase money, he could not, as a bona fide purchaser, complete the contract with Mrs. Few; and, accordingly, that his defense to her suit was good. It will be observed that there is, in principle, quite a strong resemblance between that case and the case at bar. In *Carter v. Pinckard*, 68 Ga. 817, this court decided that: "To constitute one a bona fide purchaser for value and without notice, so as to hold a title obtained by his grantor by fraud, he must not only have had no notice, but must also have paid the purchase money." That was also a case in which a portion of the purchase money had been paid.

3. In the case last cited this court also held that, in order to raise the question of protecting the purchaser to the extent of that portion of the purchase money which he had paid before notice, there must be appropriate pleadings. Mrs. Mackey's equitable petition clearly brings her case within this requirement, for, as will have been seen, she prays for a rescission and for a recovery of the money she had paid to Bowles while yet in ignorance of the defect in his title.

4. The remaining question is, upon whom, in adjusting the equities between the parties, should fall the loss occasioned by the burning of the mill? If the fire was attributable to the negligence of Mrs. Mackey, it would seem clear that the loss should be hers. As above stated, however, the record does not disclose how the fire occurred, or that it was occasioned by the fault of any person. The general rule seems to be that the destruction of a building after the making of a contract for the purchase of the land upon which it is situated, followed by possession on the part of the purchaser, will constitute no defense to an action for the purchase money, for the reason that the purchaser at once acquires an equitable interest in the property and, in that sense, immediately becomes the owner of it. *McKeechnie v. Sterling*, 48 Barb. 330. The same rule is laid down in 1 *Warv. Vend.* 195. But the author adds: "This rule, in its application, presupposes an ability and a willingness to convey on the part of the vendor; for the purchaser, in a case of this kind, can only be said to be owner from the date of the contract, when the vendor is prepared to convey a clear title, and is not in default. If the vendor is so situated that he cannot make title according to the contract, the purchaser will not be regarded

as the owner; and, if the property is damaged before the vendor is in condition to convey, the loss must fall on him, and not on the purchaser." In support of the text the cases of *Christian v. Cabell*, 22 Grat. 82, and *Huguenin v. Courtenay*, 21 S. C. 408, are cited. In the first of these cases the loss was caused by a fire, and in the latter by a storm. In each of them it appears that the purchaser had not gone into possession before the damage occurred, and they are, therefore, not precisely applicable to our case. Nevertheless, we are of the opinion that, under the peculiar facts now under consideration, the qualification laid down by *Warvelle* to the general rule ought to control here, for the reason that Bowles not only has not now a title to the property, but also that it is not within his power within any reasonable time to acquire full title, and it is a matter of the greatest doubt and uncertainty whether he can ever do so at all. Under these circumstances it would be neither fair nor equitable to treat Mrs. Mackey as an owner of the property upon whom the loss by fire should fall, because she is not in fact the owner, and there is no certainty that she can ever become so. Her right to rescind, which seems undoubted, rests upon the fact that there is no valid and mutually binding contract between herself and Bowles, and it would be clearly inconsistent to make her, in the character of owner, responsible for the loss occasioned by fire, when it is obvious that nothing which she or Bowles, or both of them, can do, could invest her with ownership, even if it was their present mutual desire and purpose so to do. Judgment reversed.

(88 Ga. 776)

HERRINGTON, Ordinary, v. WALTHAL  
et al.

(Supreme Court of Georgia. Aug. 18, 1896.)

PARTNERSHIP—RIGHTS OF SURVIVOR.

The present declaration does not make a case substantially differing from that passed upon by this court in *Petrie v. Steedley*, 21 S. E. 512, 94 Ga. 198, and therefore the court committed no error in sustaining the defendants' demurrer.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by S. M. Herrington, ordinary, to the use of C. B. Petrie, against E. G. Walthal and others. From a judgment for defendants, plaintiff brings error. Affirmed.

John J. Strickland, for plaintiff in error. Erwin & Cobb, for defendants in error.

LUMPKIN, J. At the March term, 1894, of this court, it held that an action brought by Dr. Petrie against the administratrix of his deceased partner, Dr. Steedley, to recover back the whole of a premium which had been paid by the plaintiff to the defendant's intestate for being taken into a partnership with the latter

in his professional business, as a physician, was not well founded. 94 Ga. 196, 21 S. E. 512. It appeared from the allegations of the declaration that the term of the partnership agreed upon between the two physicians was for two years, and that the same had been dissolved by the death of Dr. Steedly a little more than three months after the partnership was formed, and that the contract was silent touching death or dissolution thereby, and also silent touching any return of the money paid as a premium. In the opinion of this court, the petition in that case was fatally defective, because in no event would the plaintiff have been entitled to recover the whole of the premium, and his declaration contained no offer to apportion it, did not allege that it was apportionable, and set forth no facts upon which an apportionment could be made. After the above-mentioned decision had been rendered, Dr. Petrie brought an action for a portion of the premium against the sureties upon the bond of Mrs. Steedly as administratrix of her deceased husband, alleging that the administratrix had removed from this state, so that she could not be served. Pending the action she returned to Georgia, and the plaintiff then moved to have her made a party to the case. This motion was denied, and a demurrer to the declaration was sustained. The plaintiff excepted to both of these rulings.

We deal with the case as if it had been originally brought against the administratrix and the sureties, and was free from any difficulty or question as to parties. Granting that it was complete in this respect, we are of the opinion that the new declaration does not set forth a cause of action. It does allege that the representations made by Dr. Steedly as to the value of his practice and the income derived therefrom were untrue, and had the effect of deceiving Petrie, alleging further that "Steedly's practice was worth not half the sum represented." And it also undertakes to apportion upon the time basis the \$1,000 paid as a premium, the theory being that as the partnership was to last for two years, and had expired in about one-eighth of that time, Petrie should recover seven-eighths of the \$1,000, viz. \$875. It requires but little reflection to show that an apportionment upon this basis would be entirely arbitrary. If Petrie was introduced to the community as the partner of a physician in good repute and enjoying a remunerative income, it would seem, from the standpoint of conjecture, that he must have derived more benefit than the sum of \$125 from this association, especially in view of the fact that by the death of his partner he in all probability succeeded to a practice which otherwise he might not have been able to build up in years. Again, the allegation as to Steedly's misrepresentation concerning the value of his practice is altogether too vague and uncertain to be made the basis of any just or rational apportionment. The difficulties here outlined are suggested in the opinion of the present chief justice on page 198, 94 Ga., and page

512, 21 S. E. Indeed, the whole matter lies too largely within the domain of conjecture and guesswork to make any legal apportionment practicable. The plaintiff in the present case undertook—without success, in our opinion—to overcome the difficulties in his way. The truth is, we do not believe it possible, in a case like this, to set forth any facts upon which a just and equitable apportionment could be made. This conclusion is, we think, abundantly sustained by the case of *Whincup v. Hughes*, L. R. 6 C. P. 78, cited in the former case. Judgment affirmed.

(98 Ga. 751)

### HIGGINS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 10, 1896.)

CARRIERS—EXPULSION OF TRESPASSER—VIOLENCE OF CONDUCTOR.

1. A railroad conductor represents the company by which he is employed in determining what persons are entitled to ride upon trains committed to his care; and his act in expelling from a train a person not entitled to ride thereon as a passenger, being one performed by him in the line of his duty, is in law the act of the company.

2. Even a trespasser who intrudes upon a freight train under a fraudulent arrangement with an inferior employé who has no authority in the premises is entitled to protection against violence on the part of the conductor, wantonly and unnecessarily exercised in expelling him from the train; and for injuries to his person resulting from such violence the railroad company is liable.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by H. T. Higgins against the Southern Railway Company. From a judgment dismissing the complaint, plaintiff brings error. Reversed.

Preston, Jordan & Ayer, for plaintiff in error. Hill, Harris & Birch, for defendant in error.

LUMPKIN, J. The plaintiff's action was dismissed on demurrer. It appears from the allegations of his declaration that he was riding upon a freight train of the defendant, "on top of a caboose," with the permission of a flagman, but without the knowledge or consent of the conductor. The latter, upon discovering the plaintiff, cursed him; and while he was running "across the caboose, in order to get off," shot him with a pistol, inflicting a severe and dangerous wound upon his thigh. Undoubtedly it is the duty of a railroad conductor to determine what persons are entitled to ride upon a train committed to his care, and to expel any person found upon such train who has no right to be there. In so doing, his acts are, in legal contemplation, the acts of his master, for the reason that they are performed in the line of his duty. For the purpose of expelling such a person from a train, the conductor may lawfully use whatever amount of force is reasonably proper and necessary; but he

certainly cannot commit, even upon a trespasser, a malicious, wanton, and murderous assault. The plaintiff, according to his own allegations, was undoubtedly a trespasser. The permission given him to ride upon the train by the flagman amounted to nothing, and the conductor would unquestionably have been justified in ejecting the plaintiff from the train if he had done so in the proper manner. It is certainly true that the means employed by him were not only unauthorized, but criminal. At the same time, the object he sought to accomplish was strictly in the line of his employment, and the master is, in law, responsible for the damages which resulted to the plaintiff through the violent and unlawful means employed by the conductor in discharging his duty. This case differs from that of *Railroad Co. v. Wood*, 94 Ga. 124, 21 S. E. 288. There the unlawful act of violence committed by the company's servant, even upon the assumption that it was a part of his duty to keep trespassers off the train, occurred when it could no longer be effective for this purpose; and hence the act in question was undoubtedly beyond the scope of the employment in which the servant was engaged. It was, however, intimated in that case that, if the act of the servant had been done in attempting to prevent a trespass upon the company's property, and the trespasser had been injured by the company's servant on account of his using more force than he ought to have used in accomplishing his purpose, the company would have been liable. Judgment reversed.

(97 Ga. 152)

#### YOUNGBLOOD v. COMER.

**PATTERSON v. CENTRAL RAILROAD & BANKING CO. et al.**

(Supreme Court of Georgia. Aug. 12, 1895.)

For majority opinion, see 23 S. E. 509.

ATKINSON, J. (concurring). The court is requested to review and overrule the decisions rendered by this court in the cases of *Henderson v. Walker*, reported in 55 Ga. 481, and *Thurman v. Railroad Co.*, 56 Ga. 376, in which it was held, many years ago, that a receiver, operating a railroad property under its franchises, is not, in his official character, liable to one employed for damages resulting from injuries inflicted in consequence of the negligence of a co-employee. The majority of the court is of the opinion that the decisions in question should stand as law; and, being of a contrary opinion, I shall endeavor to state the reasons which lead me to that conclusion. The statutory provision under which the liability is sought to be imposed is as follows: "If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the

recovery." This section of the Code (section 3086) is taken from the act of 1856, to which reference will hereafter be made; and it is insisted that the word "company," as employed in the section of the Code, is equivalent to the term "railroad companies of this state," as employed in the act above referred to. The public policy of this state, in its relation to the exercise of corporate franchises by railroad companies, was early declared by distinct legislative enactment. Upon grounds of public policy, the common-law rule of nonliability for the commission of torts by their servants upon the persons of fellow servants when employed about the common employment was changed so as to permit a recovery by one servant injured in consequence of the negligence of another, provided the person so injured was himself free from fault. This statute was directed against railroad companies, not because they were corporations only, nor because of any spirit of hostility to those about to embark in railroad building, but because it was deemed a necessary police measure for the regulation of the business of running railroads. In the legislative mind the business was classed as extrahazardous, and it did not intend that persons operating railroads under charter powers should impose upon their servants the extreme peril of a business in the conduct of which they could exercise no, much less a controlling, influence over the conduct of co-employees. Incorporated railroad companies being the creatures of the law, the creator, at the moment of conception, impresses upon their lives, as a condition of existence, as a condition precedent to the exercise of any of the powers conferred by their several charters, that they shall be liable as above indicated. Upon those railroad companies whose corporate existence antedated the passage of the act, this change in the law applied as a police measure affecting the business of operating railroads under charter powers; and, according to the opinion of the writer, this court fell into an error when, in the case now under review, the words "railroad companies," as used in the act, were limited in their significance to railroad companies *eo nomine*, and were not extended to all persons, whether natural or artificial, who were engaged in the business of running and operating a railroad under and by virtue of charter powers. At the time of the passage of the act, mere private railroads were unknown; and hence it may well be supposed that when it designated the objects upon which it was designed to operate as the "railroad companies of this state" it intended that its application should extend to all railways operated under direct authority of the state. They were quasi public corporations, and the legislature could lawfully impose upon them the burden of this statute as a condition of existence; and hence we are led to believe that when the expression above quoted was used it was the purpose of the legislature to apply it to the business, and not to persons or corporations which were railroad companies *eo*

nomine only. If its significance were so confined, there would be no authority for applying the rule of liability above indicated to railroad and banking companies, or to canal and railroad companies, or to individuals who, having, under the present law, purchased the properties and franchises of a railroad company, chose to take out a certificate of incorporation under some name other than that of a railroad company; because, while in fact operating railroads, such are not railroad companies only. And yet the courts of this state have constantly applied the rule in question to all such corporations and persons engaged in the business of operating railroads under charter authority, and without reference to whether it was or was not by name a railroad company. The statute in question having been enacted for the protection of employes of such companies operating railroads, the business conducted under their charters would seem, upon reason, to be impressed with the liabilities imposed by law, without reference to the person or agency which might lawfully thereafter be employed in the conduct of the business for which it was chartered; and, this being true, there is no reason apparent to my comprehension why a receiver, like any other person who may attempt to exercise the charter power, should be exempt from the liability thus imposed. The statute in question is one highly remedial, and, being of that nature, should be liberally construed in advancement of its obviously beneficial purposes. In its construction, to cling tenaciously to its letter ignores its spirit and purpose, and defeats the manifest legislative intent. It is true that the receiver represents the court in so far as the mere custody of the property is concerned; but when the court undertakes to exercise the charter power to operate the property in its custody, the receiver likewise represents the corporate franchise, and necessarily assumes, in his official character, the responsibilities, duties, and obligations imposed upon the franchise which he seeks to exercise. It is impossible to disassociate the corporate entity and these responsibilities; and this very idea has received no stronger sanction than is derived from the very opinion which this court is now asked to review, as will appear from the following quotation from the learned justice who delivered its opinion: "The property and franchises of the company have been seized, and the court, subordinate to the laws of the land, is the lord paramount." In other words, the court is authorized to possess itself of and operate the road in subordination to the law of the land; and one of the conditions imposed upon all railroad companies in the operation of railroad properties is that they shall assume the liability imposed by the general law. This is as much the law of the land, as applied to chartered railroad companies, as the law which imposes responsibility upon common carriers for injuries to passengers and property; and therefore it is difficult to understand why the statute should not extend as well to receivers as to the char-

tered companies themselves. The same principle of public policy is involved; there is the same reason for its application in the one case as in the other; and the only reason assigned for its nonapplication is, not that the character of the property has undergone a change, not that its obligations to the law are less binding, but that by a species of judicial legerdemain there has been a substitution of judicial for corporate directory and management. Upon this subject Mr. Beach, in his work on Receivers (section 717), states the rule to be: "In this country, where receivers are frequently empowered to manage and carry on the business of the parties or corporations of whose property they have the charge on behalf of the court,—and this especially in the case of railway receiverships,—their duties require them to enter into new obligations, and subject them to the same liabilities for damages for injuries as are incurred by others who carry on similar enterprises for their own benefit. Being actually engaged in business, justice to those with whom they deal demands that they shall be held to the same accountability, whether their liabilities arise from contract or tort,"—citing for the text, *Ex parte Brown*, 15 S. C. 518, and *Little v. Dusenberry*, 46 N. J. Law, 614, in which latter case the court remarks: "It accords with sound principle and reason that a receiver exercising the franchise of a railroad company shall be held amenable in his official capacity to the same rules of liability that are applicable to the company while it exercises the same powers of operating the road." To the same effect, see *Hugh, Rec.* § 395, and the numerous cases there cited. See, also, *Hornsby v. Eddy* (Eighth Circuit Court of Appeals) 5 C. C. A. 560, 56 Fed. 461, and *Murphy v. Holbrook*, 20 Ohio St. 137. The overwhelming weight of judicial authority is at this time opposed to the doctrine of the cases now under review, and, in the light of passing events, it may well be doubted whether they should stand as law.

Let us examine the statute now under review in the light of other statutes which undertake by reference to particular names to regulate a particular business. We find in the tax acts, as they have year after year been passed by the general assembly, a special tax levied upon circus companies, sewing-machine companies, and insurance companies doing business in this state. Suppose a company incorporated for either of these purposes should become insolvent, and a court of equity should seize its assets, and undertake to operate its business through a receiver, would it be pretended that the court, through its receiver, could run a circus, or a sewing machine or insurance business, without paying the licensed tax imposed by law? Certainly not, for the reason that, while the legislature, in imposing the tax, employed language which might be so construed as to limit the levy to the particular persons or corporation named, yet its manifest purpose was to levy the tax upon the business, and when any

person undertook to conduct the business the tax act would apply to him, not because he was mentioned as being subject to its terms, but because his business drew him within its operation. The act now under review was passed by the general assembly in the year 1856 (see Acts 1855-56, p. 154), and since then has been incorporated in the Code in various sections. It is entitled "An act to define the liability of the several railroad companies of this state, for injury to persons or property, to prescribe in what counties they may be sued and how served with process." The several sections of the act, as they relate to the distinct subjects treated, each refer to "the several railroad companies of this state." The first section prescribes where, how, and in what manner "the several railroad companies of this state" may be sued and served; the third section—being the one imposing the liability sought to be enforced in the present case—provides that "the several railroad companies of this state" shall be liable, etc. These sections are cited for the purpose of calling attention to the fact that since the rendition of the decision now under review this court has, in a well-considered opinion, in the case of *Ball v. Mabry*, 91 Ga. 783, 18 S. E. 65, extended the meaning of the words "the several railroad companies of this state," as employed in the first section of the act, so as to embrace and bring within the provisions of the act suits against receivers of the assets of such companies. In that case suit for damages for personal injuries was brought against a receiver in his official character in one of the counties through which the railroad operated by him ran. He filed a plea to the jurisdiction, alleging his residence elsewhere, and this plea was stricken on demurrer; and in discussing the question of jurisdiction the court, through the present chief justice, says: "The receiver does not operate the railroad as an individual, but exercises the charter rights and franchises of the company of which he is receiver. As receiver, he resides in each county through which the railroad passes. Exercising the franchises of the company, he becomes a common carrier, and stands in the shoes of the company, and is liable to be sued in the county in which the cause of action originated, as the company would have been, under section 3406 of the Code, before he was placed in charge as receiver." If, under the provisions of the act above referred to, the receiver, as an incident to the exercise of the corporate franchise, acquired a residence, for the purposes of suit, in a county other than his residence, if the venue of a suit against him is attached to the place where the cause of action originated by words which literally apply only to "the several railroad companies in this state," it is difficult to understand why the use of the same words would not attach to him in his official character the liability imposed by the statute upon the company itself. This decision is, to my mind, a distinct recognition of

the doctrine stated, and almost in the language of the text writers above referred to, and seems to me ample authority to treat the receiver as "standing in the shoes of the company," and liable accordingly.

The Chief Justice, in delivering the opinion of the court in the present case, seems to rest its judgment, to some extent at least, upon the doctrine of stare decisis, and seems to intimate that, inasmuch as the general assembly has not seen fit by positive statute to repeal the effect of these decisions, and change the rule laid down, this court should not now reverse its former ruling. The doctrine of stare decisis, it is admitted, is a wholesome and salutary one when applied to a proper subject; and where rights have grown up under a juridical interpretation of a statute it is better, in many instances, that the construction thus placed upon it should stand, than that such rights should be again called in question. But it is respectfully submitted that the doctrine has no application where the courts are dealing with a matter concerning which they have seen proper themselves to legislate. The doctrine that courts of equity, through receivers, may engage in the conduct of any kind of industrial enterprise, much less run and operate a great line of railway, has no foundation in positive statutory legislation in this state. The general assembly has never directly authorized such a proceeding, and never indirectly, except so far as silence, and a casual reference to the manner in which funds in the hands of such receivers should be distributed, may be construed as an approval of the practice; but the power is one which the courts themselves have, of comparatively recent years, for themselves evolved from that other implied power supposed to reside in all courts of chancery, to seize and protect against loss and destruction the property of insolvent persons and corporations for the benefit of all concerned. In this process of preservation courts have come commonly to consider the operation of railways necessary to their preservation, and hence have drawn the power to run and operate such properties. Courts of equity have appealed to no law to authorize this act; and hence, when, in the execution of the great trust imposed upon chartered corporations, "the court, as the lord paramount," seizes to its use corporate property, it should at least see to it that it exercises the franchises seized "in subordination to the law of the land." The courts should observe, not violate, the law; and this court, in sanctioning the exercise of that power by the circuit judges, should impose upon their receivers the same liability which the statute law has attached to the property in the hands of the persons from whom it was wrested by judicial process. If, in the one instance, the courts possessed the inherent authority to evolve the power exercised, they would have the same authority to regulate the exercise of the power; and it would seem that in this

process of regulation no more appropriate rule could be adopted than the one which follows the analogy of the express law, and imposes upon receivers operating railroads the same liabilities which rest upon railroad companies. The question, then, is, not whether the legislature will permit the rule called in question longer to stand, but whether this court will not of itself adopt one which is more in consonance with the spirit and reason of the law, and more nearly in harmony with its subsequent adjudications upon a similar subject.

Aside from considerations of public policy, the abstract justice of the situation demands that railway companies which have incurred a bonded indebtedness, and have incumbered their property, or which have been practically wrecked by the improvidence or dishonesty of their boards of directors, should not occupy better positions under the law than those which, by thrift and industry, have escaped financial disaster. Under the operation of the rule in question, railroad companies are invited to improvidence; for if, by becoming involved, and defaulting in meeting its obligations, one of them can procure the establishment of a juridical protectorate over its property and franchisees, which will relieve it of all responsibility to employes under the law of the land, if it can thus escape the burdens of corporate existence, what encouragement will it receive from the law to perform its duties? If insolvency means immunity, then why should railroad companies whose properties are incumbered strive to be solvent, or why should creditors of such corporations desire to have them remain under corporate control? Allow the doctrine contended for by the majority of the court, and we find that by a single stroke of the pen a circuit judge has power to practically repeal the law governing the operation of railway lines extending over hundreds of miles of territory. The general assembly says to a railroad company to-day: "If, by the negligence of a fellow servant, you injure one of your employes, you are liable. If you injure a person who is neither a passenger nor an employe, or if you injure the property of any person, the presumption of the law is you are negligent. If you fail to check your train and blow the whistle as you approach a public crossing, you will be liable for injuries to a person being thereon." To-morrow the circuit judge appoints a receiver to do the same work, to discharge exactly the same duties to the public and to individuals, and the doctrine of the decisions now under review says that these provisions of the law thenceforth shall have no application. So far-reaching and so disastrous in its consequences is the doctrine stated that I cannot bring my mind to believe that the court, as constituted at the time the decisions in question were rendered, fully appreciated the extent of their application. The principle of these decisions leads irresistibly to a judicial repeal of the

law establishing the railroad commission, of the law imposing the burden of proof upon railroad companies in cases of injuries to persons or property, and as well to a repeal of the statute regulating the running of trains at public crossings, in so far as the same may have heretofore been supposed to apply to railroads operated by receivers; for in each of these instances, by the letter of the several statutes, their provisions are made applicable to railroad companies, and cannot, under authority of these decisions, be extended to railroads operated by receivers. These statutes are each designed to accomplish an end highly beneficial to the interests of the public. I cannot give my assent to a doctrine which impairs their force, and my brethren of the majority must walk alone the path which leads to their partial judicial repeal. My own judgment is that the two decisions called in question should be overruled; but, inasmuch as my brethren disagree with me, I feel bound by the doctrine declared in them, and hence concur in the judgment of the majority affirming the judgment of the lower court.

(38 Ga. 801)

## WILLBANKS v. UNTRINER.

(Supreme Court of Georgia. Aug. 18, 1896.)

NEW TRIAL—GROUNDS—EXCEPTIONS—EXECUTION  
—SALE—MODE—VALIDITY—HOMESTEAD  
—ABANDONMENT.

1. The overruling of a demurrer to a declaration, even if erroneous, is not a proper ground of a motion for a new trial. If no exception pendente lite to an error of this kind is filed, it must be excepted to directly in the bill of exceptions. An exception taken in the manner last mentioned cannot, however, be considered by this court unless made within the time prescribed by law.

2. One of the questions at issue being whether or not a levy on certain realty was excessive, it was error to charge that the officer could have levied upon an undivided one-half, one-third, one-eighth, or one-tenth therein, or that he could have levied upon the entire property and sold an undivided interest in the same. When realty is capable of subdivision, and a given portion of it, sufficient in value to satisfy the execution, can be cut off and sold separately without injury to the balance of the property, it is the duty of the levying officer to pursue this course; but he cannot, when the defendant in execution owns the entire fee, sell an undivided interest, and thus make the purchaser at his sale a tenant in common with the defendant in execution.

3. There being in the record no copy of any homestead proceedings, it is impossible to determine whether or not the plaintiff's alleged homestead was, in the first instance, lawfully set apart.

4. If it was, the mere fact that she left this state would not defeat the homestead. If she left animo revertendi, and with no intention of abandoning her domicile in Georgia, the homestead would remain valid; if she left with no intention of returning, it would be otherwise. In each instance the question of intention should control.

5. If a sheriff's sale was, in other respects, lawful, the mere fact that he gave a bidder to whom the property had been knocked off time within which to raise the money to pay for the property would not render it a credit sale. The

bidder was liable as soon as his bid was accepted, and the sheriff's responsibility for the purchase money immediately began. The matter of indulgence was between these two, and in no way affected the rights of other persons interested.

6. Where an entry of "No personalty to be found" has been duly made upon a justice's court execution before it is levied upon land, a sale of the land thereunder is not rendered invalid because, as matter of fact, the defendant in execution at the time of the levy actually owned personalty sufficient in value to satisfy the execution.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action by L. Untriner against L. A. Willbanks and another to set aside an execution sale and for injunction. From a judgment for plaintiff, defendant Willbanks brings error. Reversed.

The following is the official report:

On July 15, August 19, and November 18, 1891, judgments were rendered against Mrs. Untriner in favor of the Gibbs Drug Company, Mauch, and Edwards for the principal sums of \$36.50, \$38.56, and 38.35, besides interest and costs on each. On May 27 and June 1, 1895, the executions issued from these judgments were levied by a constable on a house and lot in Toccoa, the constable having previously made an entry on each execution, of "Search made, and no personal property found on which to levy this *fi. fa.*" The property was exposed for sale on July 2, 1895, by the sheriff, and knocked off for \$180 to Willbanks as the highest bidder. On the next day Mrs. Untriner brought her petition against Willbanks and the sheriff, praying for decree setting aside the sale as null and void, and for injunction and general relief. Answers were made by the defendants, and on final trial the jury, in answer to specific questions submitted by the court, found in favor of the plaintiff. A motion for new trial was made and overruled. The petition alleges that on July 30, 1891, plaintiff had the house and lot (being an improved lot, 110x125 feet, on which is situated a boarding house) set apart as a homestead for herself and her four minor children, naming them; that the Gibbs Drug Company, Mauch, and Edwards appeared in the list of creditors attached to the application; that the contracts on which the judgments in their favor were rendered did not waive homestead, nor do the *fi. fas.* show any such waiver, nor was there any affidavit filed as required by the Code; that when the executions were filed with the sheriff, claim was interposed under the homestead in terms of the law, and filed by the sheriff in the clerk's office, but he proceeded to sell the property although said claim was in his hands; and that the levy was excessive, the total amount of the executions being only about \$128, and the property being worth \$1,000, and subject to division, and a part of it being amply sufficient to pay off and discharge the *fi. fas.* In the answer of Willbanks he says it is doubtless true that

plaintiff attempted to homestead as alleged, but the homestead was void, because she was a married woman, living with her husband, and claimed the property as her own, and because she did not own the house and lot at that time; and that, soon after obtaining the homestead in 1891, she and her family removed to Alabama, and have not been residents of Georgia for several years, and are not now; and that defendant bought the property without notice of any irregularity, and the purchase was bona fide and honest. The sheriff answered that plaintiff stated to him that she had taken the benefit of a homestead exemption, and at the same time she stated that her home was in Alabama; that he ratified the acts of the constable; and that, while a claim was put into his hands, he was advised by eminent counsel that it was not legal, for which reason he did not stop the sale. There was testimony for the plaintiff that the property in question is well worth \$1,000, and could be so divided as to leave the house on one part of the lot, where it would answer as well for the purposes of a boarding house (it being used as such) as it would on the entire lot, and the vacant lot so cut off would be worth \$250. The house has 16 rooms, and the property is rented out by plaintiff for \$16 a month, this including the furniture in the house, which furniture is worth \$125 to \$150. She left Toccoa in April, 1893, and had been since living in Alabama. Upon the question of change of residence the evidence is somewhat conflicting. She testified that she never left Toccoa to stay; had always considered it her home; rented the place out to send her children to school in Alabama; had always intended to return; never carried anything away with her but her clothing, but left every piece of furniture she had in the house, where it is now. While she was in Alabama, her husband died there. She has there an organ, and certain live stock, which she took on debts made there; has also 600 gallons of wine she made there; and she runs a boarding house and small store there. Plaintiff's attorney (who was also counsel for the sheriff) testified that on the 7th of June the constable who made the levies told him that he made the levies on two of the *fi. fas.* that day, and that the papers had not been in his hands before. This was several days after the property had been advertised. The sheriff stated to the plaintiff that the property would not be sold, and at his request witness carried the claim to the clerk's office, and filed it. He filed but one claim. From the testimony of the sheriff and of Willbanks it appears that Willbanks knew there was a claim filed when he bought the property. After it was knocked off to him, he asked the sheriff if he could give him a few days to get up the money; and, after consulting the attorney for the plaintiffs in the *fi. fa.*, the sheriff said he could. Willbanks went away, borrowed the money, and returned two days later, when he learned of the restraining order in the present case, on account of

which he did not pay or tender the money, nor was any deed made by the sheriff.

The motion for new trial contains the following grounds:

(1) Error in not sustaining the demurrer to the petition. (2) Error in charging the jury: "On question of excessive levy I charge you that, instead of levying on the entire property, an undivided interest could have been levied on. If you find that the executions for \$126 were levied on property worth \$300 or \$1,000, you would be authorized to find the levy excessive, as the officer could have levied on a one-half, one-third, one-eighth, or one-tenth interest, or he could have levied on the entire property, and sold an undivided interest as above." (3) Error in charging: "Did plaintiff abandon her homestead? If this lady had removed from the state, intending to change her domicile to another state (and her intention is a matter for you), she would have abandoned the homestead. The thing for you to arrive at is, what was the intention of the plaintiff?" (4) The court remarked, during the discussion of this homestead question before the jury, that a party could reside out of the state for 10 years if he did not intend to abandon his homestead, and the intention is one for the jury; and, if homesteadant did remove from the state intending to change her domicile, then that would be abandonment of homestead. (5) Error in charging: "Did the defendant pay or tender the money on sale day? I charge you that, unless the money was paid or tendered on sale day, he would not be a bona fide purchaser. If it was agreed by the sheriff and plaintiffs in *fi. fa.* that the purchaser could go and get the money, and bring it back, the sale would be a credit sale, and void." (6) Verdict contrary to law and evidence, etc.

C. L. Bass and Jones & Bowden, for plaintiff in error. J. B. Estes, Geo. P. Erwin, and J. C. Edwards, for defendant in error.

**LUMPKIN, J.** The nature of this case will be gathered from the official report.

1. Upon the question that the overruling of a demurrer to a declaration is not a proper ground of a motion for a new trial, see *Griffin v. Justices*, 17 Ga. 96; *Merchants' Line v. Austin*, 76 Ga. 306; *Rogers v. Rogers*, 78 Ga. 683, 3 S. E. 451; *Nicholls v. Popwell*, 80 Ga. 604, 6 S. E. 21. The same thing is true as to a demurrer to an indictment. *Flemister v. State*, 81 Ga. 768, 7 S. E. 642; *Robson v. State*, 83 Ga. 166, 9 S. E. 610. These are only instances of the many decisions of this court relating to this matter, and the legal profession should by this time understand that the overruling of a demurrer to a declaration is matter for direct exception. It seems that the counsel for the plaintiff in error in the present case did so understand, because they not only made the overruling of their demurrer to the declaration filed by the plaintiff below a ground of their motion for a new trial, but they also excepted directly to this action of the court in their bill of ex-

ceptions. In this, however, they were too late, because the bill of exceptions was not filed within the time allowed them by law for excepting to rulings made at the trial.

2. The rule is well settled that whenever land is capable of subdivision, and a given portion of it, of sufficient value to satisfy an execution, can be levied on and sold separately without injury to the balance of the property, it is the duty of the sheriff or other levying officer to pursue this course. But there is no law which makes it incumbent on the officer to levy upon and sell a fractional undivided interest in realty, the entire title to which is in the defendant in execution. The officer cannot, in this way, make the latter and the purchaser at the judicial sale tenants in common.

3. Whether or not the plaintiff's alleged homestead was lawfully set apart to her seems to have been one of the questions involved in this case; but we cannot pass upon it, for the reason that the record before us contains no copy of any homestead proceedings. While a married woman living with her husband is not, under the present constitution, entitled, as the head of a family, to have a homestead set apart to her out of her separate estate, she may be allowed a homestead out of the same as a person having the care and support of dependent females, if in her case this ground for the allowance of a homestead exists. *Johnson v. Little*, 90 Ga. 781, 17 S. E. 294. Whether the question here indicated arose at the trial of the present action we are, however, unable to say, for the reason above stated.

4. Upon the assumption that the homestead was valid, the mere fact that the party at whose instance it was set apart left this state would not defeat it. An entire abandonment of her domicile in Georgia would. In this case, as in all others where the person suing out the homestead has left this state, the continuing validity of the homestead depends upon the question of domicile; and in determining that question it should be ascertained whether the residence beyond the limits of this state was intended to be permanent or only temporary.

5, 6. The correctness of the propositions laid down in the last two headnotes is, we think, sufficiently manifest without elaboration. Judgment reversed.

(100 Ga. 75)

## BUCHANAN v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

ASSAULT AND BATTERY — JUSTIFICATION — OPPROBRIOUS WORDS — INSTRUCTIONS — PRESUMPTIONS ON APPEAL — JURY — MISCONDUCT.

1. If, on the trial of an indictment for assault and battery, it is manifest that the defense relied upon was the use by the person assaulted, to the accused, of opprobrious words or abusive language, immediately before the beating occurred, it is the duty of the court, even without a request so to do, to give in charge to the jury the provisions of section 103 of the Penal Code; and, unless the record shows to the contrary, it will be presumed that this was done.

2. It will not, however, be presumed that the proper instructions upon this subject were not

given to the jury merely because the trial judge refused to give in charge a request which, though probably intended to invoke in behalf of the accused the law embraced in the above-cited section, was not itself couched in apt or appropriate terms.

8. There was no error on such trial in refusing to charge as follows: "The law allows one to strike another for the use of opprobrious words and obscene language to him, leaving it to the jury to judge whether the beating is in excuse of the provocation used or given; that is, whether the beating is excessive is for determination of the jury." A failure by the court "to give such instruction" as that embraced in the language above quoted, "anywhere in the general charge," was not erroneous, and does not raise any presumption of a failure to give proper instructions in this connection.

4. It is bad practice to allow a member of a jury who had retired to consider of their verdict in a criminal case to be withdrawn for the purpose of aiding the solicitor general in striking a jury in another criminal case, in which the juror was the prosecutor; but where this was done within the knowledge of counsel for the accused in the case first mentioned, and he did not then and there move for a mistrial, or otherwise seek a correction of the irregularity, he cannot, after taking the chances of an acquittal, complain of such irregularity. The question whether or not the withdrawal of the juror would, under the circumstances of the present case, have been cause for a mistrial, is not presented for determination.

(Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. Milner, Judge.

Frank Buchanan was convicted of assault and battery, and brings error. Affirmed.

The following is the official report:

Buchanan was indicted for assaulting and beating Culler, and, after conviction, excepted to the refusal of a new trial. It appears that Buchanan went with Hooker to Culler's house to see him about his cows getting into a field which Buchanan had subrented to Hooker. While there, Mrs. Culler accused Buchanan of hurting her cow, which he denied, and Hooker admitted having done it by throwing a rock at the animal. Buchanan, Hooker, and Culler then started to go to the field in question, to look at the fence inclosing it; and on the way Culler began to talk about a cow which he had long previously sold to Buchanan, and for which he had never received all the purchase price. An excited conversation on this subject ensued, during which Buchanan several times averred that this cow was rogulish and a fence-breaker, and said he could prove it by 25 men. Thereupon, according to Culler's testimony, "I told him whoever said that she was either roughish or a fence-breaker when I let him have her, and that whoever said she got over my fence more than twice told a lie. He then hit me with his fist, and said, 'It's a lie, it's a lie, it's a lie,' as he struck me. \* \* \* I am an old man. \* \* \* Defendant is a young man." Hooker testified that Buchanan did not hit Culler with his fist, but with the back of his fingers, his hand being open. The motion for new trial alleges, in addition to the general grounds, that the court erred in refusing to charge the jury, on request of defendant, that "the law allows one

to strike another for the use of opprobrious words and obscene language to him, leaving it to the jury to judge whether the beating is in excuse of the provocation used or given; that is, whether the beating is excessive is for determination of the jury," and failed to give such instruction anywhere in the general charge. Also, error in permitting the solicitor general, without the consent of defendant or his counsel, to withdraw Willbanks, one of the jurors trying this case, from the jury room, after they had retired to make their verdict, to assist the solicitor general in striking a jury in the case of State v. James Phipps, charged with burglary, in which case Willbanks was prosecutor. This ground is supported by the affidavits of defendant and his counsel. The state presented affidavits by Willbanks and the solicitor general showing that after the jury in this case had retired the Phipps case was called for trial, and the solicitor general stated to the court, in the presence and hearing of Col. Mann (who was counsel for the defense in both of the cases), that he wanted Willbanks, the prosecutor, to assist in striking the jury, whereupon the court instructed the bailiff in charge of the jury to tell Willbanks to come into court for this purpose. He came, and, after being so engaged for two or three minutes, Col. Mann stated to the court that he did not want to be considered as consenting to Willbanks' absence from the jury. The solicitor general stated that he had understood Col. Mann so to consent, but requested Willbanks to return to the jury room, which he did immediately, and after considerable deliberation the jury agreed upon a verdict of guilty. During his absence from the jury room nothing was said by or to him about the Buchanan case.

W. E. Mann, for plaintiff in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

PER CURIAM. Judgment affirmed.

(100 Ga. 62)

#### BROADNAX v. STATE

(Supreme Court of Georgia. Oct. 19, 1896.)

CAPACITY TO COMMIT CRIME—PRESUMPTION—HOMICIDE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

There was no evidence at the trial showing the age of the accused, or that on account of his tender years he was mentally incapable of committing a crime, and therefore he was presumptively *capax delicti*. The evidence for the state was sufficient to warrant the conviction, and the ground of the motion for a new trial relating to newly-discovered evidence is without legal merit.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Sam Broadnax was convicted of murder, and brings error. Affirmed.

The following is the official report:

Sam Broadnax, a child 11 years old, was indicted for the murder of Frank Roberts, a

child  $\frac{1}{2}$  years old, by giving him potash. The defendant was found guilty, his motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc.; also, because of newly-discovered evidence. In support of this ground, movant produced the affidavit of Ned Broadnax: "I was eight years old November, 1895. I went with Sam to wash the clothes. I had the potash. Sam had father's dinner and a bundle of clothes. Sam dropped a waist, and sent me back to find it. I set the potash on the wagon tongue, and went back. Sam did not give it to Frank. He got it himself off the wagon tongue." Also, the affidavit of defendant: "I did not give the potash to Frank. I did not have it. I had the clothes under one arm, and father's dinner in the other hand. I dropped a waist, and sent Bud back for it. I did not see what he did with the potash. He told me he put it in the wagon, and Frank got it. I would not have allowed Frank hurt if I could help it. Ned got scared, and put it on me, and I knew of no one who could show I did not do it." Also, the affidavit of defendant's counsel: They did not know the facts stated in the affidavit of Ned Broadnax at the time of the trial, so far as the same relates to the placing of the potash on the wagon tongue by Ned, and the taking of the same by Frank without the knowledge or consent of defendant. Defendant was so young and inexperienced, and was so positive he did not know how Frank got the poison, that deponents could not and did not get any information from him on the subject. Information on the subject of the placing of the potash on the wagon tongue has come to them since the trial.

Lewis & Moore, for plaintiff in error. W. M. Howard, F. H. Colley, Sol. Gen., J. M. Terrell, Atty. Gen., and T. L. Reese, for the State.

PER CURIAM. Judgment affirmed.

(100 Ga. 66)

#### WORTHEN v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

##### LARCENY—INSTRUCTIONS.

There was no error of law, and the evidence warranted the verdict.  
(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

John Worthen was convicted of simple larceny, and brings error. Affirmed.

The following is the official report:

Worthen and McCrory were indicted for the offense of simple larceny of a bale of lint cotton. Worthen was found guilty, and his motion for a new trial being overruled, excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in asking wit-

ness Jonas Couch the following question: "A two-horse wagon, with a bale of cotton, how long would it take, as fast as you could walk?"—the ground of error assigned being that there was no evidence that the wagon testified about had a bale of cotton in it. Error in charging: "Certain wagon tracks have been introduced which they say were the tracks of the wagon of the defendant. It is a question for you to determine whether those were made by the defendant, or whether they were tracks made by a wagon in possession of the defendant at the time this cotton was carried away. Tracks alone, uncorroborated by other testimony or circumstances in the case, would not be sufficient to justify a conviction; but if the tracks, connected with the other circumstances, convince you, as reasonable men, that the defendant is the guilty party, then you will be authorized to return a verdict of guilty against him."

J. J. Bull, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(100 Ga. 63)

#### FORD v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

##### CAPAX DOLI—AGE—SUFFICIENCY OF EVIDENCE.

1. A person under the age of 10 years is incapable of committing any criminal offense. Pen. Code, § 84. A person between the ages of 10 and 14 years cannot be lawfully convicted of a crime or misdemeanor, unless it appears from the evidence that he was capax doli, and the burden of proving that he was so rests upon the state. Pen. Code, § 83, and cases cited.

2. It being doubtful, under the evidence introduced in the present case, whether the accused was above the age of 10 at the time the alleged offense was committed, and certain that he had not then attained the age of 14, and the evidence not showing that he knew "the distinction between good and evil," the verdict of guilty was contrary to law, and there should be a new trial.

3. The newly-discovered evidence will, at the next hearing, most probably throw further light upon the question of the age of the accused.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Juroy Ford was convicted of burglary, and brings error. Reversed.

The following is the official report:

Juroy Ford was indicted for the offense of burglary, in having broken and entered the dwelling of O. L. Beeland on April 18, 1896, with intent to commit a larceny, and having stolen therefrom a pipe. He was found guilty with a recommendation to mercy, and, his motion for new trial being overruled, excepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also because of newly-discovered evidence. In support of the last ground movant produced the affidavit of Henrietta Reese. She is personally acquainted with defendant, and was personally acquainted with his mother in her life. Defendant was born some time

in March, 1889, and deponent went in at the Coker's, in East Americus, to see defendant and his mother, and has continuously known defendant, and is certain as to his age. Also the affidavit of Queen Smith: She was present when the defendant was born, and knows that he is not yet 10 years old. She knows this from the fact that she is a midwife, and attended his mother and assisted Dr. Westbrook in the confinement of defendant's mother. Also the affidavits of defendant and his counsel that they did not know of this evidence until after the trial. It appears from the record that defendant's father and the husband of defendant's grandmother both testified, giving circumstances, that defendant was born in March, 1889. There was evidence for the state from two witnesses that they had known defendant six or seven years; that they did not know his age when they first knew him, but he was a good big boy. One of them testified that when he first knew him defendant looked to be about five or six years old, and was then big enough to trot up town and carry vegetables; and the other that six or seven years ago defendant and his sister used to haul a little wood and light wood around in a little wagon. Both of them testified that they knew the general character of defendant's father, that it was not very good, and that from their knowledge of it they would not believe him upon oath in a court of justice.

L. J. Blalock, for plaintiff in error. J. M. Du Pree, Sol. Gen., and J. B. Hudson, for defendant in error.

PER CURIAM. Judgment reversed.

(100 Ga. 68)

#### WISE v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

##### HOMICIDE—INSTRUCTIONS—OPINION EVIDENCE.

There was no error in admitting evidence; the charge complained of, when considered in connection with the entire charge given, was neither erroneous nor misleading; and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Henry county; M. W. Beck, Judge.

George Wise was convicted of voluntary manslaughter, and brings error. Affirmed.

The following is the official report:

George Wise was indicted for the murder of Sandy Murphy. He was found guilty of voluntary manslaughter, and, his motion for new trial being overruled, excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc., and to the charge of the court. Further, because the court erred in permitting E. Bryant and Leo Stroud to give in evidence their opinion as to what caused the death of Sandy Murphy, without giving the facts upon which said opinions were

founded, and their evidence showing that they had not made a careful examination of the wounds. It appears from the record that Alec Stroud testified, among other things: "George Wise killed Sandy Murphy with a knife. Sandy was doing nothing to him at the time. I was ten or twelve feet from them. Sandy ran off. I saw him next morning, in the branch, dead. I examined his body. He was cut in three places,—in the left breast, in the left side, and in his arm. He was stabbed to the hollow with a knife. The wound in the left side was five or six inches long. Don't think the cut was to the hollow in the side, but was in the breast." Bryant testified: "I saw the body of Sandy after he was dead. I got down, and pulled up his shirt, and looked at the wound. He was stabbed in the left breast, and cut in the side and arm. I suppose either the wound in the side or breast caused his death. I am not a physician. I did not examine the wounds closely; just looked at them. They looked like they were done with a knife. Wound four or five inches long in the side, and stab in the breast. Did not examine to see how deep the wounds were in side or breast. I could not tell the effect of them. They only looked like bad cuts, and he was dead. I supposed they killed him." Error in charging: "If you find that at the time of the killing Sandy Murphy was making an attack on George Wise with a weapon, and yet it was not such an attack as would put a reasonably courageous man under fear that his life, limbs, or body were in jeopardy, you would not be authorized to acquit the defendant,—that is, if you find under the facts and circumstances of the case that the defendant did the killing, but should find him guilty of the offense of voluntary manslaughter,—because, before one would be justified in killing, he must be at the time the object of such an attack at the hands of the deceased as would excite the fears of a reasonable man that his life, limbs, or body were in jeopardy;" this charge being confusing, and tending to lead the jury to believe that an assault with a weapon was not such an attack as would justify the killing.

T. W. Thurman, E. J. Reagan, and W. T. Dicken, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(100 Ga. 80)

#### EWALT v. STATE.

(Supreme Court of Georgia. Oct. 26, 1896.)

##### CRIMINAL LAW—REASONABLE DOUBT—HOMICIDE—ACCIDENT OR MISFORTUNE.

1. The charge as to reasonable doubt was, in the absence of any request for more specific instructions on this subject, sufficiently full and accurate, and there was nothing to warrant a charge upon the law of involuntary manslaughter.

2. The evidence showing conclusively and beyond doubt that the accused intentionally, and without provocation or justification, shot at the deceased three times with a pistol, each shot

taking effect, and the facts admitted by the accused in his statement, notwithstanding a naked assertion therein that the killing was accidental, showing that the homicide was committed as above stated, a charge to the effect that, if the killing was the result of accident or misfortune, the homicide was excusable, was more favorable to the accused than he had any right to demand, and the court's omission to define what would constitute accident or misfortune affords the accused no cause of complaint.

(Syllabus by the Court.)

Error from superior court, Baldwin county; John C. Hart, Judge.

Joe Ewalt and Charles Mathis were charged with the murder of Walter Hemphill. Ewalt was found guilty, with a recommendation of imprisonment for life. His motion for new trial was overruled, and he excepted, and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in charging: "It is excusable, sometimes, to take human life. When one by misfortune or accident takes human life, and it is made satisfactorily to appear that it was without evil design or intention, or culpable neglect, it would be excusable under these circumstances;" the court not having in this charge given any definition of "misfortune or accident," nor given any illustration by which the jury were made to understand or could perceive what was meant by "misfortune or accident," and because the rule was made too stringent; the accused being made or required to make it satisfactorily appear that it was without evil design or intention, or culpable neglect, before the homicide would be excusable under the law. Because the court did not in his charge define or explain the doctrine of reasonable doubt. Because the court failed and refused to charge section 4327 of the Code, on involuntary manslaughter, notwithstanding counsel for the defense in his opening argument to the jury so requested the court, and notwithstanding the court's attention was called to the same throughout the entire argument. Because the court failed and refused to charge the jury on involuntary manslaughter, when the evidence, both by the witnesses and the statement of the accused, authorized and required it, and when there was evidence to support it. Error in refusing to charge, as requested by defendant in writing: "If you believe from the evidence that the defendant Joe Ewalt intentionally pointed a pistol at deceased, Walter Hemphill, but without any intention to shoot or kill him (Hemphill), and that the pistol was discharged, and from the effects of which Hemphill was killed, then I charge you that the defendant would not be guilty of murder, but only involuntary manslaughter in the commission of an unlawful act. I further charge you that, if you have a reasonable doubt in your mind as to whether or not defendant did discharge his pistol at Hemphill with intention to shoot or kill him,

under the law you would be authorized to give the defendant the benefit of such doubt."

W. C. P. Breckenridge and Whitfield & Allen, for plaintiff in error. Roberts & Pottle, Anderson, Felder & Davis, H. G. Lewis, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(100 Ga. 81)

## SOLOMON v. STATE.

(Supreme Court of Georgia. Oct. 26, 1896.)

CRIMINAL LAW—READING LAW TO JURY—ASSAULT WITH INTENT TO KILL.

1. While it is the right of counsel for the accused in a criminal case to read law to the jury and comment thereon, this court will not control the discretion of the trial judge in refusing to allow counsel to read from a Supreme Court Report of this state the facts of a decided case for the purpose of commenting upon and comparing the testimony in that case with the facts of the case on trial.

2. This case turned upon the question whether the accused unlawfully, or in self-defense, stabbed the person alleged to have been assaulted, and the evidence fully warranted the verdict of guilty. Even if the charges complained of were not in all respects accurate, they contain nothing which would justify this court in setting aside the judgment of the court below refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Houston county; George F. Gober, Judge.

Solomon was charged with assault with intent to murder John McDaniel. He was found guilty of stabbing, and, his motion for a new trial being overruled, he excepted and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in charging: "Malice," as used in this definition, is not used in the sense of 'ill will' or 'hatred.' 'Malice,' as used, means the deliberate intention unlawfully to take the life of a fellow creature in a case where the law would neither justify nor in any manner excuse, provided the killing took place as intended;" the objection to said charge being that it does not show whether it was meant as an explanation of "express or implied malice," and was calculated to confuse and mislead the jury. This ground was approved, when taken in connection with the entire charge. Error in charging: "I charge you that when one man cuts another with a knife, and the knife draws blood, that in law is a stabbing. I mean to say that the cutting is sufficient." The objection to this charge is that it is contrary to the definition of "stabbing," as held by all courts and laid down by authorities. This ground was approved when taken in connection with the entire charge on that subject; the judge below stating that, as set out, it was not a fair presentation of the charge on that subject. Error in charging: "I charge

you further that when one man cuts another with a knife the burden is upon him to show a reason and excuse for it. The law presumes it a malicious cutting, and the burden is upon him to show an excuse or justification." The objection to this charge is that it relieves the state of making out its case beyond a reasonable doubt, and casts the burden on the defendant, requiring him to prove his innocence before he has been charged with stabbing, not in his own defense or other circumstances of justification. This ground was approved, when taken in connection with the entire charge, the judge below stating that it was qualified as to justification. Error in charging: "There has been something said in reference to threats, and the relations between these parties,—I mean the trouble between them. You have heard this evidence, and it is for you to say in reference to it." The objection to this charge is that the court expressed an opinion as to a part of the testimony, and failed to charge the jury as to the effect of the threats or trouble between the parties, if any, and because the way the court spoke of the threats was calculated to mislead the jury in considering the importance of said threats and trouble. As to this ground the judge below states: "There was no controversy as to there being trouble between the witness and the defendant. The defendant went into it fully, and the court simply intended to leave the matter to the jury, under the rules given them in charge." Because the court erred in failing to charge the jury that the state must show the weapon or knife used was a weapon likely, in its nature, to produce death. As to this ground the judge below states: "There was no request. Besides, the presiding judge stated that the defendant was charged with making an assault with a weapon likely to produce death. This question is out of it now, as the defendant was convicted of the misdemeanor." Because the court erred in refusing to allow defendant's attorney to read in the hearing of the jury, and comment upon and compare the testimony in that case, decided by the supreme court, to this defendant's case, then being tried. As to this ground the judge below states: "Defendant's counsel undertook to read the evidence in another case, from a Supreme Court Report, to the jury. I interposed, and told him that he must argue the evidence in this case on trial, and that we had no concern with the particular facts of any other case."

W. C. Davis and R. N. Holtzclaw, for plaintiff in error. A. W. Lane, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

(100 Ga. 81)

#### MOORE v. STATE.

(Supreme Court of Georgia. Oct. 26, 1896.)

LARCENY—EVIDENCE.

This case presents the bare question whether or not the evidence was sufficient to sustain

the verdict of guilty, and, it appearing that the conviction was totally unwarranted, it was contrary to law, and there must be another trial.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

Judge Moore was convicted of larceny, and brings error. Reversed.

The following is the official report:

Moore was convicted of larceny from the house, and his motion for a new trial was overruled. The ground of the motion is that the verdict is contrary to law and evidence. For the state it appeared that a lot of flour was stolen from a warehouse where Moore had worked for about three weeks prior to the theft. This flour was never allowed to be sold in Atlanta, but was sold and shipped out of the state. One of the sacks stolen was found, on the morning the warehouse was broken open, by the side of the door of Moore's house, outside of the door. Other families lived in the same house, but not on the second floor. Defendant's wife said George Hutchins brought the flour there, and defendant denied knowing anything about it. Flour was found also at the house of defendant's mother, and a trail led there. About 3 o'clock of the night the warehouse was broken open, a witness saw several men going towards defendant's house, but could not say who they were, nor what they had.

J. E. Crane and F. L. Haralson, for plaintiff in error. Jas. F. O'Neill, for the State.

**PER CURIAM.** Judgment reversed.

(99 Ga. 618)

#### HAILE v. CURRY.

(Supreme Court of Georgia. Oct. 26, 1896.)

APPEAL—INSUFFICIENT BILL OF EXCEPTIONS.

As will appear from an inspection of the official report, the bill of exceptions in this case is so defective and incomplete that it presents no question with which this court can intelligently deal.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. I. Turnbull, Judge.

Action by D. W. Curry against Mrs. Edward Haile. From a judgment for plaintiff, defendant brings error. Affirmed.

The following is the official report:

An execution in favor of D. W. Curry against Mrs. E. Haile for \$8.10 principal, with interest and costs, based on a judgment of a magistrate's court of June 6, 1894, was on October 26, 1894, levied upon one sofa, four carpets, one bookcase and books, four bedsteads, four washstands, three bureaus, one Brussels carpet, 21 chairs, one dining table, one sideboard, kitchen furniture and fixtures, as the property of defendant. The husband of defendant put in a claim that the property levied upon was exempt from levy, as property which had been set apart under section 2040 of the Code. There seems to have been a termination of the case in the magistrate's court unfavorable to the claimant, and

he took the case by certiorari to the superior court. Neither the petition for certiorari nor the answer of the magistrate appears in the record or bill of exceptions, and neither of them is specified in the bill of exceptions as material to be transmitted to this court, so that it is impossible to state what assignments of error, if any, were made in the petition for certiorari. In the bill of exceptions, and attached thereto, is set forth the evidence which apparently was introduced upon the trial in the magistrate's court, the documentary portion of which is set forth without abbreviation; and the bill of exceptions specifies as material to be sent up in the transcript of the record the same things which are set forth in the bill of exceptions, or which are attached thereto. The body of the bill of exceptions was in these words: "The case of D. W. Curry v. Mrs. E. Halle came on to be heard at the November adjourned term of Floyd superior court; Waller Turnbull, the judge, then and there presiding; the same being a certiorari from J. P. court, 919 dist., G. M. The following is a brief of the evidence, to wit: The fl. fa. against Mrs. E. Halle, with entry of levy thereon, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this bill of exceptions. E. Halle was sworn in behalf of plaintiff in fl. fa., under the act for examining adverse party, who said he and his wife both bought various pieces of furniture; he bought the furniture in his bedroom and the china set; that his wife's mother, Mrs. Chapman, now dead some three years, left the dining-room table now levied on, with five dollars, to his wife, also the sideboard, worth three or four dollars, and also the silver tableware, worth \$——; that his wife, Mrs. E. Halle, had bought some of the furniture herself, and some of it Mrs. Chapman left her at her death; that there was more than fifteen dollars worth of the furniture levied upon and claimed by claimant that belonged to his wife; that he refused to say what he bought, or what was here, and what he had, and that he would not say where he got the money with which he bought furniture came from,—whether Mrs. Chapman (who was a woman in good financial circumstances) or his wife gave him the purchase money therefor, or whether it was his own; that the place they lived on came to his wife from Mrs. Chapman, and also some of the furniture. Plaintiff introduced the schedule in favor of himself, a copy of which is hereto attached, and marked Exhibit 'B,' and made part of this bill of exceptions; and, after argument had, the court passed the following order: 'The within certiorari being called and argued in its order, it is hereby adjudged that the within certiorari be sustained, and the property levied on, as set forth in said levy on the fl. fa. in this case, is adjudged subject to levy and sale; and judgment is ordered against claimant in this behalf, and for the costs herein incurred. This November 12, 1895. W. T. Turnbull, J. S. C., R. C.' Which ruling appellant claims as error: (1) Because as much as three hundred dollars of household and kitchen furniture is ex-

empt from levy and sale by virtue of any power whatsoever, by the constitution of the state of Georgia. (2) Because, if proper to direct fl. fa. to proceed at all, it should only have been directed to proceed against such of the property as the evidence disclosed as being defendant's in fl. fa. And now movant excepts to the said ruling, and now, within thirty days after said time, tenders this his bill of exceptions, and asks that the same be certified as required by law; and movant specifies the fl. fa., the claim affidavit, E. Halle's testimony, the evidence of E. Halle, the judgment of court on certiorari, as all the evidence and papers as material to a clear understanding of the case." One of the exhibits mentioned was the fl. fa. above referred to, with the levy thereon; and the other was what purported to be an exemption of personalty, covering certain household and kitchen furniture, etc.

Hal Wright, for plaintiff in error. A. G. Ewing, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 620)

#### MERCHANTS' NAT. BANK OF ROME v. WARLICK.

(Supreme Court of Georgia. Nov. 2, 1896.)

##### APPEAL—SUFFICIENCY OF EVIDENCE.

No new question of law is presented. The evidence fully warranted the verdict, and there was no error at the trial.

(Syllabus by the Court.)

Error from city court of Floyd; G. A. H. Harris, Judge.

Action between the Merchants' National Bank of Rome and John I. Warlick. From a judgment for the latter, the former brings error. Affirmed.

Reece & Denny, for plaintiff in error. Hoskinson & Harris and Dean & Dean, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 621)

#### KING v. MCGHEE et al.

(Supreme Court of Georgia. Nov. 2, 1896.)

##### BILLS AND NOTES—SURETIES—ACTION AGAINST PRINCIPAL—AMENDMENT.

Sureties upon a promissory note, whether they sign the same upon the face or upon the back thereof, are entitled, upon paying the note, to maintain an action thereon against their principal; and a declaration filed by them, wherein they sue upon the note as the owners of the same, may be amended by setting forth the facts as they exist, and stating their true relation to the contract evidenced by the paper declared upon.

(a) For the distinction between indorsers and sureties by indorsement, see Sibley v. Bank, 25 S. E. 470, 97 Ga. —.

(Syllabus by the Court.)

Error from city court of Floyd; G. A. H. Harris, Judge.

Action by E. J. McGhee and J. L. Camp against J. King. From a judgment for plaintiffs, defendant brings error. Affirmed.

The following is the official report:

E. J. McGhee and J. L. Camp sued J. King, alleging: J. King is indebted to them \$1,000 principal, besides interest, upon a promissory note, copy of which is annexed. He is also indebted to them for 10 per cent. as attorney's fees upon principal and interest of said sum. Said amount of principal, interest, and attorney's fees is due and unpaid, and he refuses to pay the same. The copy of the note attached was dated April 10, 1895; was for \$1,000; was signed J. King; was due 60 days after date; was payable to B. I. Hughes, cashier, or order, at a certain bank named; and contained stipulations for the payment of interest and attorney's fees. On the back of the note are the names, "E. J. McGhee," "J. L. Camp." To this petition defendant demurred on the ground that it set forth no cause of action authorizing plaintiffs to recover. Before deciding the question raised by this demurrer, plaintiffs offered the following amendment: Said E. J. McGhee and J. L. Camp indorsed said note of \$1,000, a copy of which is attached to plaintiffs' petition, for accommodation, and without consideration to them; that said King failed to pay said note at maturity, or since; and that said plaintiffs, as such indorsers, have paid the same, and did pay the same before the bringing of this suit, as they were by law bound to do. To the allowance of this amendment defendant objected because there was nothing to amend by, and because the amendment set forth a new and distinct cause of action. The objection was overruled, and to this ruling defendant excepted. Defendant then demurred to the declaration, and to the declaration as amended, on the ground that no cause of action was set forth either in the original petition or the petition as amended, and that the amendment set forth a new and distinct cause of action. The demurrer and amended demurrer were overruled, and to this ruling, also, defendant excepted.

Fouché & Fouché, for plaintiff in error.  
Dean & Dean, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 622)

ROUNSAVILLE et al. v. LANGSTON et al.  
(Supreme Court of Georgia. Nov. 2, 1896.)

#### APPEAL—REVIEW.

Under the facts disclosed by the record, there was no error in the judgment rendered by the trial judge, by whom the case was tried without the intervention of a jury.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. Jones, Judge.

Action by Langston & Woodson against J. G. Bullock to set aside a fraudulent conveyance. Hersberg & Co. and others intervened, and were made parties plaintiff, and J. W. and J.

A. Rounsaville intervened as parties defendant. From the judgment rendered, defendants Rounsaville bring error. Affirmed.

For a prior report, see 24 S. E. 972.

J. Branham and Sanders & Davis, for plaintiffs in error. O. E. Carpenter and J. A. Blance, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 623)

#### CALLAWAY v. DOUGLASVILLE COLLEGE.

(Supreme Court of Georgia. Nov. 2, 1896.)

#### JURISDICTION—RETURN OF SERVICE—PLEADING—CONTINUANCE.

1. A legal return of service is essential, in a civil action, to give the court jurisdiction of the person of the defendant, and until such return has been made the defendant is not required to plead to the merits.

2. Under the facts disclosed, there was no error in refusing to direct a verdict for the plaintiff, nor in continuing the case.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Jones, Judge.

Action by Ella Callaway, for herself, and as next friend for her minor child, against the Douglasville College. From an order denying plaintiff a verdict, and continuing the case, plaintiff brings error. Affirmed.

The following is the official report:

To the May term, 1895, of Douglas superior court, Mrs. Callaway, for herself and as next friend of her minor child, sued the Douglasville College to recover an amount alleged to be due her deceased husband for salary as principal and teacher in said college, which amount has been set apart by the ordinary as a year's support for her and the minor child. The suit was brought in conformity to the statute of 1893 known as the "Neal Act." The case was regularly set for trial for November 29, 1895, at the trial term of the suit. No plea was filed up to the time the case was called, on November 29th, nor was any plea then offered, nor had any counsel marked his name for defendant, and none was marked on the docket when the case was called on November 29th. Plaintiff's counsel moved to be allowed to take a verdict for the amount sued for, but W. T. Roberts, Esq., stated to the court that he was counsel for defendant, and objected to a verdict being taken, on the grounds that his associate was absent and had left the court room because the court had taken up the criminal docket, and did not expect to take up any more civil business. The sheriff's entry of service did not show that any officer or agent of defendant had been served, but showed that J. T. Duncan had been served. Plaintiff was allowed to amend the entry of service by stating that Duncan was secretary and treasurer of defendant. Plaintiff then insisted that she be allowed to take a verdict. The court refused to allow the verdict, and stated that he did not call the docket

at the first term, as required by the act of 1893, and that J. S. James, one of counsel for defendant, had leave of absence for the day. The court was engaged in the trial of criminal cases, and had previously announced that no civil business was to be heard that week, and the case had not been reached or called in its regular order at the time plaintiff moved to take a verdict. It, however, had been set for that day, and plaintiff, by leave of the court, moved for verdict. The court refused to allow the verdict taken, and continued the case, to which ruling plaintiff excepted.

W. P. Davis, W. B. Willingham, and J. M. Edge & Son, for plaintiff in error. J. S. James, W. A. James, and W. T. Roberts, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 637)

**NEWMAN v. MALSBY et al.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**NEW TRIAL—BRIEF OF EVIDENCE.**

Under the facts disclosed by the record, and which are summarized in the official report, there was no abuse of discretion in refusing to allow further time for perfecting the incomplete brief of evidence, nor in dismissing the motion for a new trial upon the ground that no legal brief of evidence had been duly filed.

(Syllabus by the Court.)

Error from city court of Newman; A. D. Freeman, Judge.

In August, 1895, there was tried in the city court of Newman the case of Malsby & Avery against J. C. Newman. There was a verdict for plaintiffs. Defendant moved for a new trial, and the motion was set to be heard on September 30, 1895. Upon the day set for hearing, counsel for plaintiffs moved to dismiss the motion because defendant had failed to file a brief of the evidence. Upon this motion the following state of facts was made to appear: Six days prior to the hearing of the motion, defendant gave to plaintiffs' counsel a substantial brief of the evidence, except the evidence of the two plaintiffs and three witnesses for the plaintiffs, which by mistake was left out of the brief. Plaintiffs' counsel failed to call defendant's attention to the omission, and kept the brief of evidence, and made no complaint until the time set for the hearing of the motion. Defendant claimed that the evidence left out of the brief was in fact made out, that he made it out himself, that, if it was not with the brief, he thought it was, and could not account for its absence. He asked only a short time to complete the brief, and stated that it would take only a short time to complete it, and claimed that the brief would have been prepared and completed had plaintiffs' counsel called his attention to the fact that the brief was not complete. It is also true that after the case was tried the court took a recess for two weeks to enable parties desiring to carry cases to the

supreme court to prepare motions, etc. At the end of the two weeks the court met, and movant said he had not quite completed the brief of evidence, and the court took a recess for two more weeks for it to be got ready; and, when the court met at the expiration of said last two weeks, movant had not made an effort to perfect a brief of the evidence from said last recess, and had not called upon counsel for the other side, whereupon the court refused to grant defendant further time, and granted the motion to dismiss, to which ruling defendant excepted and brings error. Affirmed.

J. C. Newman and L. M. Farmer, for plaintiff in error. Freeman & Wright and Dorsey, Brewster & Howell, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(99 Ga. 628)

**ATLANTA & W. P. R. CO. v. IRWIN.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**ANIMAL KILLED ON TRACK—EVIDENCE.**

The evidence showing beyond doubt that the plaintiff's mule was killed by the defendant's train, and the presumption of negligence being against the company, a prima facie right to recover was shown. The evidence relied upon by the defendant to show due diligence was contradicted by other evidence, and therefore, on the whole, the verdict was sufficiently supported, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Campbell county; S. W. Harris, Judge.

Mrs. Ita Irwin sued the Atlanta & West Point Railroad Company for damages from the killing of a mule. There was a verdict for plaintiff for \$60 principal. Defendant's motion for a new trial was overruled, and it excepted, and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc., and to the charge of the court. The evidence for plaintiff was, in brief, as follows: The mule was plaintiff's property when it was killed. She bought it of one Sims. It cost her nearly \$100. Sims owed her for provisions furnished, and she paid 30-odd dollars to the man from whom Sims purchased the mule,—part of the purchase money,—and Sims gave her the mule for what he owed her, which, including the purchase money, amounted to nearly \$100. The mule was 12 or 14 years old, was gentle, and was in good condition when killed. Eighty dollars would have been a reasonable price for it. It was killed on the night of January 17, 1893. The railroad of defendant runs through plaintiff's farm. On that night the stock all came up except a horse and this mule and a colt. The next morning the mule and the horse were found lying dead on the left of the railroad as you go towards West Point. The freight train of defendant pass

ed going from Atlanta to West Point about 9 or 10 o'clock on the night of January 17th. The horse and mule were about 45 feet apart when found, and both right on the edge of the track. It had snowed on the night of the 17th, and the ground was covered with snow the next morning. After the snow melted off, there could be seen indications of where the train had dragged the stock on the ties apparently some, 15 or 20 steps. There was blood on the ties. From the blow post to where the mule was found is 261 yards. From where the mule was found to the public road crossing is 174 yards. The stock were in the pasture on the day of January 17th, and the pasture is in the bottom in the rear of the house where plaintiff lived. There is a wire fence part of the way between the pasture and the railroad, but up "this side" of the house the stock could come around, and get up to the railroad track. The whistle of the engine was blown at a crossing about a mile and a half from plaintiff's place, and was not blown again until about two and a half miles below plaintiff's place. The alarm signal was not blown when the stock was killed. The night was very dark. There was no moonlight, and when the train passed it was spitting snow a little, but not much. At night, with a proper headlight,—of a dark night,—one could see stock on the track from 200 to 300 yards. The moon went down that night at a few minutes after 5 o'clock. There was nothing for stock to eat up about the railroad track. The county is a stock-law county, but in the winter, after crops are gathered, people in that community let their stock out when the ground is not too wet. Plaintiff's husband did not know the stock was about the railroad that night. He went out in front of the house several times after dark, looking for them. Plaintiff introduced Grier's almanac for 1893. It showed that the moon set on the 17th 12 minutes after 5 p. m. A witness testified: "There was new moon by this almanac January 17, 1893, at 7:35 p. m. That does not mean that you could see the moon that night. The moon set that night a few minutes after 5 o'clock."

Defendant's engineer testified: "My engine and machinery were in good condition, and had good headlight, and it burning. Had heavy train, and was running about 20 or 25 miles per hour. Engine struck stock near 22-mile post, about 200 yards north of Irwin's crossing. Blow post stands at south end of curve. I blew usual signal for crossing as I passed the blow post, and continued to blow for about 150 yards. Soon as I stopped that blowing, I discovered the stock on track, about 50 yards ahead of me. I was on lookout, and could not have seen them sooner. As soon as I saw the stock I shut off steam, and grabbed the whistle cord to blow the stock alarm, and by the time I could blow one blast the engine struck the stock. Had no time to put on brakes, re-

verse engine, or check train, as it was only two or three seconds after I saw them before the engine struck. I did all I could to save them, and could not have done more to save my wife and children had they been on the track. Used all means at my command that could be used in that time. It was cloudy, though not right dark. Can see further off dark night. That night could only see about fifty yards. Ordinarily can't see over fifty yards with any distinctness. The fireman was putting in coal at the time, I think. Saw all he could have seen had he been on his box. Front brakeman, I think, was on engine. Was allowed to go there to warm in bad weather. He could not possibly see more than I saw. He could not put on brakes had he been at top of car. Did not have time to stop had every car had a brakeman. Saw stock soon as light would display it. The brakeman who was on the engine is not now in defendant's service, and I don't know where he is, but think he is in Alabama. The train perhaps could have been stopped in half a mile. Could have been no perceptible checking of speed in fifty yards. Had to let steam out of cylinders before reversing engine, and did not have time to do this. We were about an hour behind time. Passed Fairburn about 8:30 or 9 o'clock. It was not snowing or raining when the stock was killed. Was not real dark, because I could see that the moon was giving light. Could have seen some further if there had been no moonlight. Am positive the moon was giving light. It began to get light from the moon when we got to East Point, which was about 7 o'clock. When I first saw the stock, it was standing on the track. If it had been daylight, I could have seen them 300 yards, as the road was straight that far before we struck them. There seemed to be some seven or eight head of stock on the track when I first saw them. I said, 'Look out!' and gave the alarm signal." The fireman testified: "Was putting in coal when the engineer said, 'Look out!' Raised up, and just as I got straight enough to see out, stock was hit. Engineer had just blown crossing whistle at signal post. He said, 'Look out!' and blew one or two blasts of stock alarm. When stock struck could not have seen sooner. No one had time to do more. Was cloudy when I left Atlanta. Moon made little light. Moon slightly up and shining when we were at East Point. Fifty yards is good distance to see with headlight at night. When we got to East Point, the moon rose. It was about seven or seven and a half o'clock. Am as positive that the moon was giving light at the time as I am that I saw the stock, for I could see both. We were running at a pretty good rate when the stock was killed. Were behind, and were making up time." From other witnesses for defendant the following appears: The mule was about 16 years old. When it was 10 years old one of the witnesses sold it for \$155. He thought

it was worth \$60 to \$75, and was a good mule. Did not know how old a mule got before it died. Had the first one he ever bought. It was 24 years old, and is a right good mule. According to another witness, the mule would be worth \$60 if 12 or 14 years old, and, if 16 years old, \$5, \$10, or may be \$15; but if it had lived until plow time it might have been worth \$70 or \$75. He never examined mules closely.

Dorsey, Brewster & Howell, L. S. Roan, and C. S. Reid, for plaintiff in error. Longino & Gollightly, for defendant in error.

PER OURIAM. Judgment affirmed.

(99 Ga. 629)

**SPARKS et al. v. SHELNUTT.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**EXEMPTIONS—MARRIED WOMAN.**

1. A married woman, having the care and support of her dependent daughters, though not the head of a family, is, under the present constitution, entitled to an exemption from levy and sale of property belonging to her separate estate. *Johnson v. Little*, 17 S. E. 204, 90 Ga. 781.

2. The exemption in the present case was valid, and the court erred in holding otherwise.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

An execution in favor of N. Shelnutt against M. J. and M. P. Sparks for \$19.10 principal, with interest and costs, based on a judgment of April 19, 1894, was levied on 1,500 pounds of cotton in the field, unpicked, as the property of defendants in *fi. fa.* Mrs. M. P. Sparks, for herself and her two minor children, Luna and Ada, interposed a claim to the property levied upon. The claim was tried before a jury in a magistrate's court, and there was a verdict finding the property subject. Claimant took the case by certiorari to the superior court, alleging that the verdict was contrary to the law and the evidence. The only issue passed on by the superior court, and conceded to be the only and controlling issue, was the validity of the homestead hereinafter mentioned. The certiorari was overruled, and to this ruling claimant excepted and brings error. Reversed.

The following is the official report:

Upon the trial before the jury, plaintiff put in evidence the execution and levy, and evidence that the property levied upon was in the possession of the defendants in *fi. fa.* at the time of the levy. Claimant put in evidence her petition for homestead. This petition set out that petitioner is the wife of Moses Sparks, and is a citizen of Carroll county, where the application was made; that her husband refused to apply for a homestead; that she had two minor children (Luna, 16 years old, and Ada, 13 years old); that neither she nor her husband had any real

estate, but desired to have exempted the personal property embraced in a schedule attached, belonging to her husband and herself; that this schedule contained a minute and accurate description of all the personal property belonging to her and her husband, and another schedule attached contained a correct list of the names of the post offices of the creditors of herself and her husband. Among other things in the schedule of property was the item 3,600 pounds seed cotton, 1,200 picked out and 2,400 pounds growing in the field, cultivated this year by Moses and Martha P. Sparks. The affidavit made by the applicant stated that the property all belonged to her, and that she did not personally owe anybody, except the creditors whose names appeared on the schedule of creditors, and whose post offices were correctly given. Also, affidavit of M. J. Sparks that he had given notice in writing personally to all but one of these creditors, and the written statement of the ordinary that notice was published, and written notice mailed to the other creditor, as required by law. Also, an amendment to the petition for homestead, in which it was stated that the minor children, notwithstanding they lived with petitioner and her husband, are indigent, and dependent upon petitioner for support, by reason of the physical weakness of her husband, which renders him almost unable to do physical labor, and such labor is nearly all that he can do; that all the property mentioned in the schedule belongs to petitioner, and not to her husband. This amendment was made the day that the application was granted, November 12, 1894. Mrs. Sparks testified that the cotton levied upon was part of the 3,600 pounds of cotton mentioned in the schedule.

Oscar Reese, for plaintiff in error.

PER OURIAM. Judgment reversed.

(99 Ga. 631)

**BUTLER v. FARLEY.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**CERTIORARI — NOTICE — SERVICE — TRIAL — POSTPONEMENT.**

1. The mere fact that a written notice of the sanction of a writ of certiorari, and of the time and place of hearing the same, was mailed to an attorney for the defendant in certiorari, without proof that the notice was actually received by him, is not sufficient evidence to show service of such notice.

2. There was no abuse of discretion in refusing to postpone the trial of a certiorari case in order to allow counsel for the plaintiff in certiorari to produce evidence that a notice of the kind above indicated, and sent by mail, in fact reached the hands of the attorney of the defendant in certiorari.

(Syllabus by the Court.)

Error from superior court, Monroe county; M. W. Beck, Judge.

Execution issued on the application of L. F. Farley against one Sanders was levied on the property to which Frank Butler interposed a

claim. There was a judgment for plaintiff in justice court, and claimant brought certiorari to the superior court, where the writ was dismissed, and he brings error. Affirmed.

The following is the official report:

In the case of Farley, plaintiff in *fi. fa.*, v. Sanders, defendant, and Butler, claimant, there being a verdict against the claimant by a jury in a justice's court, claimant carried the cause by certiorari to the superior court. Upon the certiorari being called, counsel for plaintiff in *fi. fa.* moved to dismiss the same, upon the ground that it did not properly appear that there had been notice of the sanction of the writ and place of hearing 10 days before the hearing; that the method of service was by posting said notice, and there was no proof of its receipt; and said counsel also insisted that the fact of service should appear in the record, and did not so appear. Counsel for plaintiff in certiorari offered to make affidavit that he had served Samuel Hale, of Milner, Ga., as is required by law, as Hale was the leading counsel for plaintiff in *fi. fa.* in the trial court, by posting a notice, a copy of which he could and would produce, and that he had heard that Hale had received the same. The method of serving Hale was by mailing the notice to him. There was no proof that Hale had received this notice. Counsel for plaintiff in certiorari offered to procure an affidavit from Hale that he had received the notice, but the court refused to continue the case for that purpose. The motion to dismiss was sustained, to which ruling plaintiff in certiorari excepted, alleging that said decision was contrary to law, inasmuch as a substantial compliance with section 4059 of the Code is sufficient. Further, because the statute does not require that said notice should be incorporated in the record of the certiorari, but there is neither statute nor rule of court which prescribes that there shall be any particular sort of evidence of the service of the notice, but that it can be done by service by a proper officer, or affidavit of service by a private person, or the admission of counsel for parties in open court that service had been made. Further, that if counsel who had control of the case in procuring the decision desired to be reversed is served with the written notice, such notice will bind all associate counsel, or counsel subsequently employed, and the party to the record.

Persons & Persons, for plaintiff in error.  
Hammond & Cleveland, for defendant in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 633)

ZELLNER et al. v. MOBLEY et al.

(Supreme Court of Georgia. Nov. 2, 1896.)

REVIEW ON APPEAL—GRANT OF NEW TRIAL.

The present case falls within the well-established rule that the discretion of the trial judge in granting a first new trial upon gener-

al grounds, where a question of fact is involved, will not be controlled by this court.

(Syllabus by the Court.)

Error from superior court, Monroe county;  
M. W. Beck, Judge.

Action by B. H. Zellner and others, executors, against Stephen D. Mobley and others. Verdict for plaintiffs. From an order granting a new trial, they bring error. Affirmed.

A. M. Speer, B. S. Willingham, and Willingham & Smith, for plaintiffs in error. R. L. Berner, for defendants in error.

PER CURIAM. Judgment affirmed.

(119 N. C. 693)

ROCKY MOUNT MILLS v. WILMINGTON  
& W. R. CO. et al.

(Supreme Court of North Carolina. Nov. 10, 1896.)

CARRIERS—ASSOCIATED FREIGHT ALLOWANCE—JOINT LIABILITY OF MEMBERS—DELAY IN TRANSPORTATION—MEASURE OF DAMAGES—PROVINCE OF JURY—APPEARANCE.

1. Two defendant railroad corporations entered into a traffic arrangement, and associated themselves as a "fast freight line." Plaintiff contracted with the general agent of such associated line for the shipment of freight over the line. *Held*, that the companies were jointly liable under the contract for damages resulting from delay in the transportation of the freight irrespective of the portion of the line on which such delay occurred.

2. The plaintiff, engaged in building a mill, contracted with defendants for the shipment of mill machinery from the factory to the mill. The shipment was delayed through the negligence of the defendants, by reason of which workmen employed by the plaintiff were forced to lie idle, though under pay. *Held*, that the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to the workmen, and such other costs and expenses incurred by plaintiff in consequence of the delay.

3. In an action against two railroad companies for damages for delay in the transportation of freight, it appeared that the contract of shipment was made with an associated fast freight line, composed of the two defendant companies. The court submitted to the jury the issue whether, under the contract of association, the roads over which freight was carried were responsible for the entire obligation of the contract of carriage. *Held*, that the error, if any, was cured by verdict for the plaintiff.

4. A defendant brought into court on attachment process subsequently filed a general appearance and answered. *Held*, that a motion to dismiss the attachment on the ground that it would not lie under the statute was properly refused as immaterial.

Appeal from superior court, Edgecombe county; Hoke, Judge.

Action by the Rocky Mount Mills against the Wilmington & Weldon Railroad Company and the Pennsylvania Railroad Company to recover damages for delays in the transportation of freight. There was a judgment for plaintiff, and defendants appeal. Affirmed.

John L. Bridgers, for appellants. Jacob Battle and Brown & Connor, for appellee.

FAIRCLOTH, C. J. The defendants are duly-organized companies engaged in the business of common carriers with their several connecting lines, with all the responsibilities and immunities attaching to the business of such carriers. While we do not find it necessary to enter into the vast field of authorities and decisions defining the duties and relations of such carriers among themselves and to the public, a few general principles may be stated without citing authorities. Common carriers are required to carry freight safely over their own lines, and make prompt delivery to the nearest connecting line, when the consignee lives beyond the terminus of their own line; and when this is done, in the absence of any other agreement, their duties are performed, and they are not responsible for any loss or damage unless it occurs while the goods are in their possession, and under the control of themselves or their agents and servants. A common carrier has power to enter into contracts, and may stipulate with his customers, imposing a limitation on his common-law liability, in regard to rates, distance, time, and place of delivery, and the nature of the articles to be carried, whether perishable or not, unusual hazards and the like, provided always that the limitations are just and reasonable in the eye of the law; and such contracts will be enforced. One well-settled rule of law is that no such company can stipulate for exemption from the consequences of its own negligence or that of its agents or servants. A just regard for the rights of individuals and public policy will not permit it. The business of transporting passengers and freight in our state is important, and for the mutual benefit of carrier and shipper, and must be conducted under reasonable regulations. The court cannot assume that either party in such business intends to contract contrary to law and such reasonable regulations as the public interests require. An instance of an unreasonable stipulation is pointed out in *Branch v. Railroad*, 88 N. C. 573, where the clause in the bill of lading was that the goods will be shipped "at the convenience of the company," which was held not to protect against an unreasonable delay. The bill of lading filed in the record contains both the receipt and the contract. It is not denied that all the parties had power to enter into the contract, and the terms of the contract are not in dispute. It is agreed that the bill contains the contract. The meaning and effect of the contract on the rights of the parties are the questions presented.

The defendant Pennsylvania Railroad Company was brought into court by attachment process, and subsequently entered a general appearance, and filed an answer to the complaint, and then moved to dismiss the attachment on the ground that an attachment would not lie under our statute. We think his honor rightly held that the motion to dismiss the attachment was immaterial, as the

defendant was then otherwise in court. So that matter is out of the way. It appears that the defendant Wilmington & Weldon Railroad Company is one of several connecting lines running south, and doing business under the name of the Atlantic Coast Line, and that the defendant Pennsylvania Railroad Company is a system with several lines running northeast. The machinery was received at Lowell, Mass., and its destination was Rocky Mount, N. C., a point on the Wilmington & Weldon Railroad Company's line, and these systems connect somewhere between Lowell and Rocky Mount. The contract was between the plaintiff and the Atlantic Coast Despatch All-Rail Fast Freight Line, operating over the Pennsylvania Railroad and the Atlantic Coast Line and connections. This agreement is signed by T. M. Emerson, traffic manager Atlantic Coast Line, Wilmington, N. C., and by Charles F. Nye, northeastern freight agent, Boston, Mass., and by other agents of other roads included in said systems. The machinery received was marked, consigned, and destined to the plaintiff at Rocky Mount, N. C. It is not denied that the defendants collected the whole freight at the point of delivery, and that the same is divided among the several lines in these systems in proportion to the number of miles on each road over which the goods are carried. Upon these facts the plaintiff argues that the defendants and their connecting roads have agreed among themselves to conduct business through their systems under the name and style of the Atlantic Coast Despatch; that they have so advertised to the public, and have so contracted with him, and charge higher rates as a consideration for the fast service they profess to give; and that each road which is a member of the Coast Despatch Line is liable for the negligence of the other roads. The defendants admit what appears in the bill and receipt, and that they do business under the name and style indicated, but insist that the Coast Despatch is simply the name under which the defendants have agreed to operate their business; that they are thereby a simple association for the convenience of the public, and not bound for each other's negligence on the several roads; and that in fact it is agreed in the conditions attached to their contract that neither company shall be liable for loss or damage not occurring on its own road. This action is for damage resulting from delay in the transportation, and not for loss or damage to the articles shipped. The plaintiff argues that there is no stipulation in the conditions against damage for delay, and that, as to that matter, there is no contract, and that he is remitted to his common-law right against carriers for unreasonable delay. We are not disposed to put the case upon that technical ground, as we are satisfied the parties desire the opinion of the court on the main question. The machinery was on the road from Lowell to Rocky Mount 25

days, and, allowing the time claimed during inauguration week, there is still 16 or 17 days, which is conceded to be an unusual length of time for passage between the points. So there was inexcusable delay somewhere along the line. In the view we take, however, the particular place is an immaterial matter. Upon examination and reflection, we are of opinion that the defendants and their connecting lines are jointly liable, each for the others, on the contract before us, and that they are also entitled to the same immunity and privileges as if the contract had been made by the individual company sought to be charged under said contract; that is to say, that they are engaged in business as partners under the name of the Atlantic Coast Despatch. They are still common carriers, none the less so because they have certain stipulations. Having jointly agreed to conduct the "all-rail fast freight line" business under the name above stated between the terminal points of their connections north and south, and having so informed the public, and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business, and such character cannot be thrown aside by any declarations in the contract in relation to the consequences or liabilities attaching thereto. The Coast Despatch is one of the contracting parties, and, if it represents anybody, it must represent the defendants as two of its members. The fact that T. M. Emerson, traffic manager, is an agent of one of the defendants, and W. H. Joice, general freight agent, is an agent of the other, and so also of the whole list of agents at different localities, can make no difference. Why are they conducting business under the name of the Coast Despatch, instead of their own companies? The argument is that they are doing so for mutual convenience. In some respect that is plain, but suppose the plaintiff should have to go to Pittsburg or other distant place to enforce his remedy. The convenience to him is not perceived. The receiving agent, Nye, at Lowell, appearing on the bill of lading as "northeastern freight agent" only, we must assume he represents the Despatch Line, composed of defendants and others. Taking notice, as we are at liberty to do, that the numerous transportation lines in our country, connecting with each other, constituting continuous lines between remote localities, are important factors in the commercial life of the country, we can readily see that, if the shipper should have to go to a distant state, and find, as best he can, the negligent party, and enforce his remedy against him there, then the expense and trouble would in many cases be ruinous. On the contrary, the carrier's remedy in a case like the present would be easy and speedy. The whole matter is this: The defendants and their associates have engaged in a public business, in the manner described, for mutual benefit and convenience, and attempt to avoid the legal con-

sequences by adopting some fancy name, and by stipulating for limitations on the liabilities incurred in the exercise of their privileges in such business. We find no case on all fours with the present, but the discussions in the following cases support the principle and conclusion at which we have arrived: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 183; *Bradford v. Railroad Co.*, 62 Am. Dec. 411; *Clyde v. Hubbard*, 88 Pa. St. 358; *3 Wood, Ry. Law*, p. 1922; *Phillips v. Railroad Co.*, 78 N. C. 294, 298; *Hart v. Railroad Co.*, 59 Am. Dec. 447, 450, note.

The second assignment of error was that the court should have construed the contract, and not submitted it to the jury. If so, the verdict cures it, according to our view of the case. The other requests and exceptions are dependent on the view of the court on the principal question. As to damages, we think his honor instructed the jury according to the rule prescribed by this court. *Foard v. Railroad Co.*, 8 Jones (N. C.) 235; *Roberts v. Cole*, 82 N. C. 292.

Affirmed.

(119 N. C. 161)

FERREE et al. v. COOK.

(Supreme Court of North Carolina. Nov. 10, 1896.)

FRAUDULENT CONVEYANCES—BURDEN OF PROOF—BONA FIDE PREFERENCES—GRANTEE'S KNOWLEDGE OF FRAUD—CONVEYANCES AS SECURITY—REVIEW ON APPEAL—ERRORS CURED—INSTRUCTIONS.

1. The burden is on a party alleging, as a defense to an action of claim and delivery, that the bill of sale under which plaintiff claims is fraudulent, to establish the fraud, unless the instrument is void on its face, or enough appears therein to create a presumption of fraud.

2. A finding by the jury that a bill of sale under which plaintiff claimed was not fraudulent will not be disturbed, unless based on improper evidence, or erroneous instructions.

3. Error in refusing to allow a witness to state that the person who executed the bill of sale under which plaintiff claimed told witness that he was insolvent, is cured by plaintiff's subsequent admission that such person was insolvent.

4. An instruction that if plaintiffs and the person under whom they claimed title agreed on the sum of \$4,000 as the consideration of the transfer of certain personal property to plaintiffs, and subsequently other property was inserted in the bill of sale without change of consideration, the instrument would be fraudulent, was properly refused; it appearing that plaintiffs were sureties for the grantor for more than \$4,000, the estimated value of the property which he first agreed to sell them, and that said grantor afterwards agreed that, if plaintiffs would undertake to pay other debts for which they were his sureties, he would sell them the other property, subsequently inserted in the bill of sale.

5. An insolvent debtor may in good faith prefer one or more creditors, though such preference does not leave sufficient property to pay his other creditors.

6. A conveyance by an insolvent debtor to one of his creditors, in payment of a debt, for the purpose of securing a benefit to himself, or of defrauding the other creditors, will be upheld, unless the grantee participated in such purpose, or knew of it at the time.

Appeal from superior court, Guilford county; Boykin, Judge.

Claim and delivery by John H. Ferree and another against John W. Cook. Judgment for plaintiffs, and defendant appeals. Affirmed.

The trial court explained the contentions of the parties to the jury, and, among others, instructed them as follows: "That an insolvent debtor had the right to pay one or more of his creditors, though it resulted in not having enough property left to pay his other creditors, but the transaction must be bona fide, without intent to hinder, delay, or defraud his other creditors, or any one of them, and without purpose to secure a benefit to himself; and although a debtor did sell his property to a creditor, as a payment of his debt, in order to secure a benefit to himself, or with the intent to hinder, delay, or defraud other creditors, still the law will uphold the contract, unless the creditor participated in his purpose, or knew of his intent at the time. That a conveyance of property, absolute upon its face, but intended as a security for a liability, is fraudulent and void as to creditors. It being admitted that L. F. Ross was insolvent at the time of the execution of the bill of sale, the jury should inquire—First, if he intended by said transfer of his property to the plaintiffs to hinder, delay, or defraud any of his creditors, or to secure a benefit to himself; second, if he did so intend, did the plaintiffs participate in his purpose, or know of his intent; third, was the alleged consideration for the transfer of said property reasonably fair and just; fourth, whether the bill of sale was executed, in whole or in part, as a security or as an absolute sale of the property. If the jury finds that L. F. Ross conveyed the property to the plaintiffs with the intent to hinder, delay, or defraud any of his creditors, or to secure a benefit to himself, and shall also find that the plaintiffs participated in his purpose and knew of his intent, then the conveyance was fraudulent and void, and the plaintiffs cannot recover, and are not the owners of the property; or if the jury shall find that the bill of sale was executed in whole or in part as a security, and not as an absolute sale of the property, then the same is in law fraudulent and void, and the plaintiffs are not the owners of the property, and are not entitled to recover. But if the jury shall find that L. F. Ross conveyed the property in good faith, for a reasonable, fair consideration, without any intent to secure a benefit to himself, or to hinder, delay or defraud any of his creditors, or if he did so with such intent and purpose, if the plaintiffs did not participate in such purpose or know of such intent, then the plaintiffs are entitled to recover, and are the owners of the property, unless the conveyance and transfer of the property was made, in whole or any part thereof, as a security. If the conveyance and transfer of the property was made, in whole or in part, as a security, then the same is void and fraudulent as to creditors, and the plaintiffs are not the owners of, and are not entitled to recover, the same."

Dillard & King, R. M. Douglass, and Shepherd & Busbee, for appellant. J. T. Morehead, for appellees.

FURCHES, J. This is an action for the possession of personal property, and comes to this court on the appeal of defendant. Plaintiffs claimed title under a bill of sale bearing date August 15, 1893, which defendant alleged was fraudulent as to creditors under whom he claimed, being intended to hinder and delay the creditors of L. F. Ross from collecting their debts, and, further, that this transaction between L. F. Ross and the plaintiffs was not an absolute sale, but in fact an assignment to secure plaintiffs as his sureties, and was therefore a fraud on the registration law, and void on that account. It is not contended by the defendant that the bill of sale contains such evidence of fraud on its face that it was the duty of the court to declare it void, as a matter of law. Nor is it contended that sufficient appears on its face to create a presumption of fraud, which must be rebutted by the plaintiffs. *Cheatham v. Hawkins*, 76 N. C. 336; *Id.*, 80 N. C. 161; *Booth v. Carstarphen*, 107 N. C. 402, 12 S. E. 375; *Cowan v. Phillips* (at this term) 25 S. E. 711. This being so, it devolved on the defendant to establish the fraud; and this was a question of fact for the jury, and the jury has passed upon it, and found there was no fraud. This ends the case, unless this finding was based upon improper evidence, or erroneous instructions from the court.

There is but one exception to evidence assigned as error, and that is that the defendant was not allowed to prove that "Ross told witness [Newell] that he was insolvent." This exception was virtually abandoned on the argument, and it was admitted on the trial that he was insolvent. So we see no ground upon which it should be sustained.

The defendant's only other exception is that the court declined to give his fifth and seventh prayers for instruction, which are as follows: (5) "If the jury shall find as a fact that the plaintiffs and L. F. Ross agreed upon the sum of \$4,000 as the consideration for the transfer of the buggies, carts, wagons, and harness, and that subsequently other property—mules and wagons and harness, and hosiery mill stock, and notes—were inserted in the bill of sale, without change of consideration, such insertion of property, being without consideration, was fraudulent, and hence the plaintiffs would not be entitled to recover." (7) "The plaintiffs having testified that the hosiery mill stock was inserted in the bill of sale as a security, the same was fraudulent, and the jury will answer the first issue, 'No.'" This case discloses the fact that the plaintiffs, Ferree and R. B. Ross, were the sureties of L. F. Ross for considerable amounts over and above \$4,000, the estimated value of the property L. F. Ross at first agreed to sell them; that he afterwards agreed with the plaintiffs that if they would agree to pay other debts for which they were his sureties, and to assume a liability of his to one Gwyn, he

would sell them other property, which was then inserted in the bill of sale. The evidence in the case tends to establish this state of facts, and, in our opinion, justified the court in declining to give the defendant's fifth prayer.

We fail to find that the seventh prayer is sustained in fact. There may be sufficient evidence for the defendant to argue that the hoisery mill stock was inserted as a security. But we do not find that the plaintiffs testified that it was. This being so, the defendant's exception to the court's refusing to give this prayer must fail.

Whatever might be our opinion if we were sitting as a jury, we find no error of law committed by the court on the trial. The defendant's prayers for instruction and the judge's charge (which the reporter will set out in full) show that the defendant has no cause to complain of the court in this trial. Failing to find error, the judgment is affirmed.

(119 N. C. 107)

**STAINBACK v. HARRIS et al.**

(Supreme Court of North Carolina. Nov. 10, 1896.)

**APPEAL—FAILURE TO HAVE RECORD PRINTED—DISMISSAL—REINSTATEMENT.**

Judgment was filed in the trial court August 24, 1896, and an appeal bond was filed August 31st. The transcript was not directed to be made out till October 1st, and on October 6th, appellant's counsel directed the clerk of the trial court to send the transcript up on October 10th, by express. The case was docketed in the supreme court on October 12th, and, having been reached the following day, was dismissed for a failure to have the record printed. *Held*, that the facts did not justify a reinstatement.

Action by W. T. Stainback against G. J. Harris and others. From a judgment in favor of plaintiff, defendants appealed, and the appeal was dismissed. Motion to reinstate. Denied.

L. C. Edwards and J. B. Batchelor, for appellants. T. T. Hicks and T. M. Pittman, for appellee.

**CLARK, J.** Motion on five days' notice, under rule 30 (22 S. E. viii.), to reinstate this appeal, which was dismissed for failure to print. It appears that the judgment was filed below August 24, 1896, and the appellant filed his appeal bond August 31st. The appellant avers that he directed the clerk to send up the transcript forthwith, but does not specify at what time. The clerk of the court below certifies that the appellant's counsel did not send the fees for making up the transcript to him until October 1st, and then for the first time directed the transcript to be made out, and that on October 6th the said counsel directed him to send the transcript up on October 10th by express, which he did. To these statements of the clerk there is no denial. It also appears that in the same express package there came the transcripts in two other cases. All three cases were delivered to the clerk of this court on Monday, October 12th, by whom they were docketed sim-

ultaneously. When the three cases were called, the other two, by the care of the appellants therein, were properly printed, and were argued (one of them on October 13th, the same day this case was called); but in this case, the record not having been printed, the court would not hear the appeal, and the appellee was compelled either to continue or move to dismiss. He took the latter course, as was his right.

The appellant has shown no good cause for reinstatement. He does not deny the clerk's averment that the transcript was not directed to be sent up till October 1st (though the judgment had been filed August 24th), and that thereafter he directed it to be sent up on October 10th, which was done. Other cases, sent up in the same package, were printed and heard, and there is no reason shown why that was not done in this case. If a party will delay sending up his transcript to the last minute, he should either send it up with the requisite parts of the record printed, or arrange to have it promptly done here. It is no excuse for an appellant that he delays docketing his appeal till the time left between the docketing and calling the case for argument is perhaps a very brief one in which to print the record. In *Avery v. Pritchard*, 106 N. C. 344, 11 S. E. 231, the transcript was docketed November 30th, and the appeal was dismissed for failure to print when reached, December 2d; and in *Stephens v. Koonce*, 106 N. C. 255, 10 S. E. 996, the transcript was docketed March 12th, and the appeal was dismissed for failure to print when reached, March 13th. Printing the record on appeal is not a professional duty, and the neglect to have it done is the fault of the appellant himself. *Dunn v. Underwood*, 116 N. C. 525, 20 S. E. 965, and cases there cited.

Every presumption is in favor of the correctness of the result of the trial below. When a party is sufficiently dissatisfied to desire it reviewed on appeal, he should pursue the orderly steps requisite for that purpose. If he does not think the matter of sufficient importance to require that much attention, and this neglect on his part must either impose six months' delay on the appellee or a dismissal of the appeal on himself, he must not grumble that the penalty falls upon the one who alone could have prevented the default. Motion denied.

(119 N. C. 323)

**STATE v. LEACH.**

(Supreme Court of North Carolina. Nov. 10, 1896.)

**ROBBERY—SUFFICIENCY OF EVIDENCE.**

On a trial for robbery, H. testified that he had shown his money in a barroom where defendant was; that, when he went to go home, defendant and another followed him; that defendant pretended to help him on his horse, and put his hand in his pocket; that he accused defendant of trying to rob him; that he then rode his horse towards home; that one-half a mile from town he was struck from behind and rendered unconscious; that when he regained consciousness his money was gone. There was evidence that, across fields, it was nearer from the barroom to the place where he was

robbed than by the road; that defendant started in such direction when H. started home; that the next morning, tracks were found in the road where H. was robbed that defendant's shoes fitted. Held, that the evidence supported a verdict of guilty.

Appeal from superior court, Chatham county; McIver, Judge.

Haywood Leach was convicted of robbery, and appeals. Affirmed.

H. H. Henderson testified: That he lives about seven miles north of Pittsboro. Was in Pittsboro September 25th, and frequently during the day in the barroom of A. P. Terry, and was drinking some, but was not drunk. Took four drinks during the day. Came to Pittsboro about 9 in the morning. Knows what happened, and was able to attend to his business. Left the barroom about 8, or a little before. That he had about \$40 or \$45 in his pocket, in greenbacks, and a few dollars in silver. Pulled this money out of his pocket while in the barroom, and had it out several times during the day. Defendant was present when he had the money out, and knew he had it, and saw it. That he came to town on horseback, and left his horse hitched behind the store of O. S. Poe & Son, about 75 or 80 yards from the barroom. When he left the barroom for his horse, it being about dark, the defendant and another party (Will Baldwin) followed him to his horse. That he did not need their assistance, and did not ask them to go with him. He had a bundle of socks and a bundle of shoes in his arms. They followed him to his horse. Baldwin held the horse by the bridle. Defendant Leach pretended to assist him on his horse, and after he was on the horse the defendant, with his hands still on him, attempted to take the money from his pocket. The money was in a left-hand front pants pocket, and the defendant saw him put it there before he left the barroom. That he said to him: "Never mind my pocket, I will attend to my pocket-book myself. Take your hand out of my pocket. You are trying to take my money,"—and defendant replied, "I will see you later." He then rode off in a walk, and did not see him any more. The road towards his home was west about one-fourth mile, and then turned at right angles north. He rode along in a walk till he reached the corner at Hal London's, which was the corner of the right angle, and rode down the north road about one-fourth mile, and as he was in a few yards of the Taylor place he was struck from behind and knocked from his horse. Remembered no more until about daybreak next morning, when he was aroused by the mail rider and others, who came out from town for him, to wit, Mr. Clark, Mr. Hill, and Aaron Degraffenreidt. His money was gone, and the shoes and socks and his knife were lying by him in the road.

T. B. Fowler testified: That he lived in Pittsboro, and saw Henderson in town on the day he was struck,—Friday, September 25th.

Saw him late in the evening. He was drinking, but not drunk. He was well acquainted with the road leading out to Henderson's home, and it runs west, after leaving Poe's store, about one-fourth mile, and then turns north at right angles. That by leaving Poe's store, where Henderson's horse was hitched, and going through the field to the point where Henderson was struck, is about one-fourth mile nearer than going around the road. That the way to go through the field, and a direct line to the said point after leaving Poe's store, is to go up by the post office, and down the alley at Exline's Hotel, out by the old schoolhouse in the field, or go down by Lineberry's house, at the corner of the block, and go up to the schoolhouse, meeting the alley from Exline's, and that the distance from Poe's store to the schoolhouse is the same either way. The schoolhouse is at the opposite corner of the block from Poe's store,—a few yards beyond. The direct way from the schoolhouse to the point on the main road (the Snow Camp road) is through an old field, crossing a creek, and some old straw fields,—some cultivated land. He went out this way the morning after the robbery, and just after he crossed the creek he found tracks alongside an old hedge, and followed these tracks, and they went directly to a large tree on the road, or a few yards above, where Henderson was found next morning after the robbery. Tracks made by a number 10 shoe on left foot, which was run down at the heel. Right foot apparently straight. After describing the route through an old field, the witness stated that he followed the tracks, and that they left an old, dim path soon after crossing the creek, and that by going that way from Poe's store it was about a quarter of a mile nearer than by going around the road. He lost the tracks when he got into the road, but leaving the place where Henderson was found, where there was a large quantity of blood on the ground, he found the same tracks going away, but crossing the fence between the points where they came into the road and where the blood was found. They came into the path of the tracks going out about 50 yards from the road, and in coming this way they passed through an open field, and were made by some one while running. All these tracks were evidently made the day or night before, and were nearly fresh. On the following day (Haywood having been arrested and placed in jail that evening), the day of his first search, he, in company with others, took the shoes found on the defendant when arrested, and carried them to these tracks, and tried them in those which were the plainest, and they fit exactly, and the run-down shoe settled exactly in the track of that foot. That, besides the run-down part of it, the left shoe had a broken place in the sole, near the toe, and on the right side. That he noticed this in the track,—peculiarity in the track,—and when the shoe was placed in it he found that this peculiar rough place, which he had no

ticed in the track, fit exactly. On the right-hand track, at the heel, he observed a rise in the middle of the track,—a small mound,—as if the dirt in the middle of the heel had been pressed down even with the remainder of the bottom of the heel. When he saw the right shoe of defendant at the trial he noticed that there was a smooth hole in the middle of the right heel, as if it had been burned by a hot iron. When placed in the track, this cavity in the heel fit the mound of the track. Witness was convinced that the shoe made the track. The shoe was half soled, and the track showed it was made by a shoe which had been half soled. "I went and got defendant's shoes. He did not object to giving them up. He was in jail."

F. C. Poe testified that he is a member of the firm of O. S. Poe & Son. Saw Henderson on September 25th. He was frequently in his store, and was in there just as he was closing his store. He was not drunk, but had been drinking. Saw him have a roll of money, and he paid him some just as he was leaving his store. Knows the point where Henderson is said to have been found. Saw a large quantity of blood there on the ground. Went with witness Fowler, and saw track, as testified to by Fowler. This witness testified substantially as did Fowler.

Will Baldwin testified: That he was with defendant on the night of the 25th September. Went with him to Henderson's horse. Defendant had his arm partly around Henderson when he got on his horse, and after he got on the horse he heard Henderson say to him: "Take your hand out of my pocket, you damned thief. You are trying to steal my money. I know what you are doing." Defendant replied, "I am not trying to take your money." I did not hear defendant say, "I will see you later." Think I could have heard it if it had been said. Henderson rode off, and he and some other colored boys, who had come up, started over to Sheriff Brewer's corn-shucking. That Brewer's was directly east from the store. That Henderson rode off on the road going directly west, and the post office was north. That they said to defendant, "Come on; let's go on over to the shucking," and he replied, "I am not going now; I may come later." That defendant immediately left them, and went towards the post office, and to the corn-shucking. That they all left where the horse was hitched as soon as Henderson left, and defendant left the witness as soon as he reached the corner of the store. That he knows where the old schoolhouse is, as testified to by Fowler, and to go there from Poe's store it is the same distance to go down by Lineberry's, or to go up by the post office and down the alley at Exline's Hotel. Did not see defendant any more until late that night, when he came over to the corn-shucking, and that the distance from the store, where they parted, to the point where the robbery was said to have been committed, is about one-fourth mile, and that the distance to Sheriff Brewer's from the store is nearly half a mile, mak-

ing the distance from the place of the robbery to Brewer's nearly a mile, one direction from the store; the other, the other direction.

A. P. Terry testified: That he is the keeper of the barroom in Pittsboro, and knows Henderson. That he was in his barroom several times during the day of September 25, 1896. Was drinking a little, but not drunk. Had some money, in greenbacks, and had it out several times, treating different parties. He last saw him between 7 and 8 o'clock at night, and when he left he was not drunk. Witness states that he was at his barroom very early next morning, and that defendant, Leach, came down there very early, and that his pants legs were nearly covered with "beggar lice." The witness Fowler had already testified that, in going through the old field described by him, his clothing became nearly covered with beggar lice, and that in following the tracks described he went through these old fields.

A. B. Clark testifies: That he lived in Pittsboro, and that early in the morning of September 25th he was informed that Henderson was seriously injured, and was found in an unconscious condition on the Snow Camp road, leading north from Hal London's. That he went there in a hack to see him, and found him lying on the side of the road a few yards below the Taylor place, and just beyond the oak tree testified to by Fowler, and that there was a large quantity of blood in the road. Henderson was on the other side of the road, lying coiled up, with the back of his head badly bruised in two places, and bleeding. The rim of his hat, which was lying near by, was cut. Two small holes or torn places through the hat at the edge of the rim, as if made by some stroke. Henderson was barely conscious. Witness and others picked him up, placed him in the hack, and brought him to his hotel, where he remained till the day of the trial. That the bruises or wounds were just below the right ear,—a little towards the middle of the back of the head. That he found the articles,—shoes and socks,—and also found his pocketknife and a half-pint bottle nearly full of whisky lying side by side, as if drawn out of the pocket together, and that he was informed by the mail rider that Henderson was out there, and of his condition.

The Attorney General and Shepherd & Busbee, for the State.

FURCHES, J. The defendant was indicted for highway robbery. Verdict of guilty, and judgment thereon, from which he appealed. The defendant introduced no evidence on the trial, nor did he except to any introduced by the state, nor did he except to any ruling of the court. But after the verdict had been rendered he moved for a new trial "on the ground that the testimony did not warrant the verdict." If this motion is to be taken to mean that there was no evidence, or not sufficient evidence, to authorize the submission of the case to the jury, it was made too late. State v. Kiger, 115 N.

C. 748, 20 S. E. 456; *State v. Keath*, 83 N. C. 626; *State v. Hart*, 116 N. C. 976, 20 S. E. 1014. But, as this ruling is regarded as somewhat technical, we have carefully examined the whole of the testimony in the case, and consider it not only sufficient to authorize its submission to the jury, but, if believed,—and that was a question for the jury,—we do not see how they could have found otherwise than they did. There is no error, and the judgment is affirmed.

(119 N. C. 130)

### CHRISTMAS v. HAYWOOD.

(Supreme Court of North Carolina. Nov. 10, 1896.)

#### MORTGAGE—FORECLOSURE—DEFENSES—TRIAL.

1. An answer to a complaint in an action to foreclose a mortgage, pleading an agreement of the mortgagee to receive a portion of the mortgaged premises in payment, and an offer to comply with the agreement by the mortgagor, does not state any defense where it is admitted that the premises are subject to other incumbrances.

2. It is not error to exclude evidence of a defense which is not pleaded.

Appeal from superior court, Wake county; McIver, Judge.

Action of foreclosure by Mary M. Christmas, executrix of T. B. Bridgers, against Joseph A. Haywood and others. Judgment for plaintiff, and defendant Haywood appeals. Affirmed.

S. G. Ryan and Armistead Jones, for appellant. Battle & Mordecai and Argo & Snow, for appellee.

**MONTGOMERY, J.** This was an action for the foreclosure of a mortgage. The debt was a balance of purchase money due by the defendant to the plaintiff, as executrix of Thomas B. Bridgers, for the land conveyed in the mortgage. There were other mortgage and also judgment creditors of the defendant of subsequent date and lien to the mortgage of the plaintiff's testator, and they were made parties to the suit. The defendant, in his answer, sets up an agreement, in writing, which was signed by the testator, in which he agreed to receive, upon a final settlement of the debt due upon the land purchase (numerous payments having been made prior to the agreement), so much of the land, at the price per acre originally agreed to be paid by the defendant for the same, as would be equal to the balance of the debt; and he averred that he had offered to the plaintiff to carry out the agreement, and that he was, at the time of filing the complaint, ready and willing to do so. This feature of the case can be eliminated from the controversy, for the reason that no proof whatever was offered on the trial about the matter; and, further, because in the answer it is admitted, and in the verdict of the jury it is established, that the land which is conveyed in the mortgage is incumbered by numerous judgment and mortgage liens. The defendant

therefore could not get the benefit of the agreement, because he could not convey to the devisees under the will of the testator a good and unincumbered title to any part of the land. The persons entitled under the will would have the right to demand that the land which the defendant might convey under the agreement in satisfaction of the debt should be free from incumbrances, and that the title should be good. That is the true construction of the agreement. The first exception of the defendant is the refusal of the judge to submit two issues tendered by him, viz.: What is the present value of the land purchased by Haywood of Bridgers? What is the value of the land agreed by Bridgers to be taken back from Haywood? His honor properly refused the issues. They do not arise upon the pleadings. There is not a word in the complaint and answer which raises such. It cannot be error to refuse to submit issues not raised by the pleadings. *McElwee v. Blackwell*, 82 N. C. 345; *Miller v. Miller*, 89 N. C. 209; and the numerous cases cited in *Clark's Code*, § 393.

The second exception of the defendant is to the refusal of his honor to allow the question, "What was the value of the stone taken by Emery from your land, and carried to Bridgers' premises?" to be asked of the defendant, a witness on his own behalf. The ruling of his honor was on the ground that the question was a leading one. Emery, a witness for the defendant, had testified that he took rock from defendant's land, and hauled it to the testator, in his lifetime, to be used in building barns for the testator, and that the testator had said that he would make it all right with the defendant. Emery did not know the value of the rock. The question was undoubtedly a leading one. It assumed that Emery had taken rock from the defendant's land, and had carried it to that of the testator,—a controverted fact; and the judge had discretion to allow or not allow such a question to be asked. But, if it were otherwise, the defendant had no cause for complaint, because his honor, after all, permitted the defendant to testify that Emery had taken and carried rock from the defendant's premises, and that it was worth \$75 or \$100, and Emery had testified that he had carried the rock to the testator's land. The defendant therefore got the benefit of the subject-matter of the excluded question.

On the trial the judge allowed the defendant to offer proof of the value of certain rents for the years 1873 and 1874, which defendant averred that the testator owed him, and which he claimed as a credit on, or a counterclaim to, the plaintiff's debt. This counterclaim as it appears in the answer, was not sufficiently pleaded to allow the proof offered to be given in; but, as the judge allowed such a course, he also permitted the plaintiff to plead the statute of limitations to it. The defendant offered to show by parol testimony that the rents were due in 1873 and

1874, and that the testator agreed to account for them at the time of the agreement heretofore referred to, to wit, on the 18th of February, 1893. The plaintiff objected to the testimony on the ground that it appeared that the alleged claim for rent was barred by the statute of limitations at the time of the alleged declaration of the testator, and that parol evidence was not competent to show an acknowledgment or promise whereby to repel the statute. The objection was sustained, and the defendant excepted. There was no error in this ruling. The claim thus attempted to be used being barred by the statute, all the proof offered before the declaration concerning it by the testator could only be received upon a promise or acknowledgment in writing, signed by the party to be charged thereby. Code, § 172.

The defendant was asked by his counsel "if there was a gin and engine on the land when he bought it, and if they were there now." The plaintiff objected, and the objection was sustained. The question was irrelevant. There was no averment in the answer that the testator had converted the engine or gin of the defendant. There was no issue about it. Proof without allegation will not be allowed. It is a well-settled legal principle, repeatedly recognized by this court, that a recovery cannot be had without corresponding allegations. *Smith v. Eastern Bldg. & Loan Ass'n*, 116 N. C. 109, 21 S. E. 33. There is no error.

(119 N. C. §14)

#### STATE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 10, 1896.)

#### SUNDAY LAWS—RUNNING RAILROAD TRAINS—INTERSTATE COMMERCE.

1. Code, § 1973, making it a misdemeanor to run railroad trains (with certain exceptions) between certain hours on Sunday, is not unconstitutional as applied to trains carrying freight between points in different states.

2. A freight train, which had been unavoidably delayed beyond its schedule time, was run from one station to another, 10 miles distant, after 9 o'clock on Sunday morning, contrary to the provisions of statute, because of a lack of water or coal for the engine at the first station and of subsistence for the train crew. *Held*, that such facts did not constitute a defense to a prosecution for a violation of the law.

Appeal from superior court, Guilford county; Coble, Judge.

The Southern Railway Company was convicted of a violation of the statute prohibiting the running of trains on Sunday, and appeals. *Affirmed*.

F. H. Busbee, for appellant. The Attorney General and Shepherd & Busbee, for the State.

AVERY, J. The statute (Code, § 1973) under which the indictment is drawn is not unconstitutional. Although it affects interstate commerce to some extent, there is

nothing in its provisions which suggests a purpose on the part of the legislature to interfere with such traffic, or indicative of any other intent than to prescribe, in the honest exercise of the police power, a rule of civil conduct for persons within her territorial jurisdiction. Such a law is valid, and must be obeyed, unless and until congress shall have passed some statute which supersedes that act by prescribing regulations for the running of trains on the Sabbath on all railway lines engaged in interstate commerce. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086. While the state may not interfere with transportation into or through its territory "beyond what is absolutely necessary for its self-protection," it is authorized, in the exercise of the police power, to provide for maintaining domestic order, and for protecting the health, morals, and security of the people. *Railway Co. v. Husen*, 95 U. S. 470, 473. Congress is unquestionably empowered, whenever it may see fit to do so, to supersede, by express enactment on this subject, all conflicting state legislation. But until its powers are asserted and exercised, the statute under which the indictment is drawn may be enforced, and will constitute one of the many illustrations of the principle that the states have the power, at least in the absence of any action by congress, to pass laws necessary to preserve the health and morals of their people, though their enforcement may involve some slight delay or disturbance of the transportation of goods or persons through their borders. *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 463, 6 Sup. Ct. 1114; *Hennington v. Georgia*, 163 U. S. 314, 16 Sup. Ct. 1091; *Smith v. Alabama*, 124 U. S. 465, 474, 479, 482, 8 Sup. Ct. 564, 571; *Bagg v. Railroad Co.*, 109 N. C. 231, 238, 239, 14 S. E. 79, 82.

The statute (Code, § 1973) declares the running of any such train as that in question is admitted to have been, after 9 o'clock on Sunday morning, to be a misdemeanor. It is not denied that the train arrived at Greensboro at 10:25 a. m. on Sunday. The state therefore established prima facie the guilt of the defendant. If the defense relied upon was that it was necessary to run after the hour fixed as the limit by statute in order to preserve the health or save the lives of the crew employed on the train, or relieve them from severe suffering, it was incumbent on the defendant to show to the satisfaction of the jury that the act was done under the stress of such necessity, in order to excuse it as not in violation of the spirit, though in conflict with the letter, of the law. *State v. Brown*, 109 N. C. 807, 13 S. E. 940; *State v. McBrayer*, 98 N. C. 619, 2 S. E. 755. The evidence is not sufficient, in any aspect of it, to excuse the running of the train after 9 o'clock. Admitting that it was impossible to procure water at the tank at Jamestown (though the fact shown was not that the tank

could not have been filled by pumping, but that it was empty), or supplies of food for the crew, non constat but what both food and water could have been obtained in sufficient quantity at any town or station on the road west of Jamestown. In fact the testimony tends rather to show that those who directed the movements of the train had abundant reason for anticipating further delays, and ought, therefore, to have ordered it to lie over sooner. The authorities of the road ought to have been aware that in such a busy time when so many trains were in motion, they ought, in the exercise of ordinary care, to have ordered the train to move onto the siding in time to have avoided any risk of violating the law. The proof offered falls very far short of excusing the act denounced as a violation of law by showing that it could not have been obeyed by the exercise of due precaution, without imminent risk of endangering the lives or health of the crew on board the train. For the reasons given, the judgment of the court below is affirmed.

(119 N. C. 180)

**CAUSEY v. EMPIRE PLAID MILLS.**

(Supreme Court of North Carolina. Nov. 10, 1896.)

**FIXTURES—EVIDENCE.**

In an action for a machine claimed by defendant to be a fixture, and as such to have passed with the mill of a certain company bought by defendant, plaintiff, asserting that defendant had notice of his claim, should be allowed to give evidence "that the machine was put in the mill for temporary use, with a view to sell the same to the company if they should be pleased with it, and, if not, to be removed at his pleasure."

Appeal from superior court, Guilford county; Boykin, Judge.

Action by O. S. Causey against the Empire Plaid Mills to recover a machine which was in a mill bought by defendant, and which defendant claimed was a fixture; plaintiff asserting that defendant had notice of his claim that it was personal property belonging to him. Judgment for defendant. Plaintiff appeals. Reversed.

L. M. Scott and Shaw & Scales, for appellant. Winston & Fuller, for appellee.

**FAIRCLOTH, C. J.** We were favored with an argument whether the "inspecting machine" became a fixture to the plaid mills building. The question when personal property becomes a fixture by reason of its connection or attachment to realty arises under varying circumstances, and, as a general rule, depends upon the relation and agreement or intention of the parties at the time of the transaction, and sometimes the rights of others, becoming interested, affect the solution of the question. Some of these relations were pointed out in *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64. But we are met with a question of evidence, and the ruling of the court entitles the plaintiff to a

new trial. The plaintiff offered to prove "that the machine was put in the mill for temporary use, with a view to sell the same to the company if they should be pleased with it, and, if not, to be removed at his pleasure." This offer was excluded by the court, and the plaintiff excepted. This proposition embraced the agreement, if there was any, and the intention of the parties, and is a material fact in the transaction. Such evidence has been held competent. *Foot v. Gooch*, 96 N. C. 265, 1 S. E. 523; *Freeman v. Leonard*, 99 N. C. 274, 6 S. E. 259. We think it better to let this case go back, and be further investigated, when all competent evidence will be admitted, when the true relations of the parties and circumstances may be made to appear, than to mark out any principle governing the case in its present aspects. Error.

(119 N. C. 797)

**STATE et al. v. NELSON.**

(Supreme Court of North Carolina. Nov. 10, 1896.)

**BASTARDY—DEFAULT IN PAYMENT OF FINE AND ALLOWANCE—COMMITMENT—JUSTICE OF PEACE—JURISDICTION.**

1. Under Code, § 38, which provides that in bastardy cases, "when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such father shall by law be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding 12 months, as the court may deem proper," a justice of the peace, in the exercise of the police power, may sentence defendant to imprisonment exceeding 30 days, to which period, in criminal cases, his jurisdiction is limited by Const. art. 4, § 27.

2. Such judgment must fix the limit of imprisonment with a view to securing the payment of the costs, fine, and allowance; and, where defendant was in default only for a fine of \$10, and an allowance to the mother of \$50, a sentence to imprisonment at hard labor for 12 months was excessive, defendant's wages having been fixed at \$10 a month.

Appeal from superior court, Wake county; Boykin, Judge.

This was a warrant against Edgar Nelson for bastardy. The defendant, on being brought before the court, pleaded guilty to the charge, and thereupon a judgment was entered up against him, from which said judgment the defendant took no appeal, and thereupon he was committed to the workhouse of Wake county, to work on the public roads, according to the said judgment. On the 15th day of July, 1896, the defendant filed a petition before his honor, Judge Boykin, for a writ of recordari, to be directed to W. M. Russ, J. P., requiring him to certify the record in this case to the superior court. This order of the superior court having been complied with by Justice Russ, his honor, Judge Boykin, on July 17, 1896, after an inspection of the record and argument of counsel for the petitioner and for the state, adjudged that the imprisonment of the said Nelson was illegal, and in contravention of article 4, § 27, of the constitution.

Judgment accordingly. The state and Hattie Williams appealed. The state and Hattie Williams allege that the order of his honor, Judge Boykin, was illegal, in that: (1) His honor should have remanded the prisoner before Justice Russ, and directed him to have entered up the proper judgment according to law. (2) For the reason that the order from the justice of the peace imprisoning the defendant for 12 months, under section 38 of the Code, was not a punishment, but an exercise of a police power, and was, therefore, legal, and not in excess of the jurisdiction of the magistrate. Modified and affirmed.

The Attorney General and Harris & Johnson, for appellants. W. L. Watson and A. B. Andrews, Jr., for appellee.

**EVERY, J.** It seems to have been definitely settled by the adjudications of this court: (1) That the act of 1879 (Code, § 35) made the begetting of a bastard child a criminal offense, cognizable for 12 months after it is committed exclusively before a justice of the peace, and punishable by fine of \$10. *Myers v. Stafford*, 114 N. C. 234, 19 S. E. 764; *State v. Burton*, 113 N. C. 655, 18 S. E. 657; *State v. Wynne*, 116 N. C. 981, 21 S. E. 35; *State v. Ostwalt*, 118 N. C. 1208, 24 S. E. 680. (2) That the same act confers upon the court before whom the offender may be tried the incidental authority to enforce the police regulation as provided by law. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511; *State v. Wynne*, 116 N. C., at page 983, and 21 S. E., at page 36. (3) That a judgment for fine and costs, or for an allowance for the mother of the bastard, is not a debt arising out of contract, to which the protection afforded by the inhibition of the constitution (article 1, § 16) extended, but is rendered as a means of enforcing a legal obligation and duty imposed by the legislature under the police power of the state upon one who is responsible for bringing into existence a bastard child that may become a burden to society. *State v. Cannady*, 78 N. C. 539; *State v. Parsons*, supra; *State v. Manuel*, 4 Dev. & B. 20.

It is conceded that in the exercise of the criminal jurisdiction of a justice of the peace, with which the law clothes the mayor by virtue of his office, he had no authority to sentence the defendant to imprisonment for 12 months as a punishment, because he could not, under the constitution (article 4, § 27), take cognizance of any offense the punishment whereof could exceed a fine of \$50 or imprisonment for 30 days; and for the further reason that the legislature had not attempted to exceed its authority, but had limited the punishment for bastardy to a fine of \$10. But the act of 1879 (Code, § 35) provides not only that upon conviction or submission the defendant shall be fined not exceeding the sum of \$10, but that "the court shall make an allowance to the woman not exceeding the sum of fifty

dollars to be paid in such installments as the judge or justice shall see fit, and he shall give bond to indemnify the county, as provided in section thirty-two, and in default of such payment he shall be committed to prison." In section 38 of the Code, under the authority of which the judgment of the court was rendered, it is provided that "in all cases arising under this chapter [5] when the putative father shall be charged with costs or the payment of money for the support of a bastard child and such father shall by law be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time not exceeding 12 months as the court may deem proper," with a proviso that, instead of being committed to prison, the putative father may, at his discretion, bind himself as an apprentice "for such time and at such price as the court may direct," "instead of being committed to prison or to the house of correction." In *State v. Yandle* (at this term) 25 S. E. 796, it was held that, in order to provide for the payment of a judgment for fine and costs, rightfully pronounced against one convicted of crime, the defendant, as incident to such judgment, may be required by order of the board of commissioners of the county wherein he is convicted to work on the public streets, public highways, or public works. Code, § 3448; *Myers v. Stafford*, supra. But it is insisted that this is not a judgment for fine and costs alone, but also for an allowance; and that a judgment for the imprisonment of the defendant for 12 months on default of paying the fine, costs, and allowance, under section 38 of the Code, is in violation of section 27, art. 4, of the constitution, which fixes the limit to the punishment that a justice of the peace may impose. The question to be decided, therefore, is whether it is competent for the legislature to authorize a justice of the peace, instead of a county commissioner, to order one convicted of bastardy, and who is unable to pay the fine, costs, and allowance, to work upon the public roads, not as a punishment for the offense, nor as an incarceration for a debt contracted by him, but in the enforcement of a duty or obligation he owes to society to protect the state, or the county, one of its governmental subdivisions, against the probable consequences of his own conduct. *State v. Yandle*, supra. When the defendant committed the offense of begetting the bastard child, he acted in contemplation of the fact that the law authorized a justice of the peace to impose as a punishment a fine of not exceeding \$10, as well as to fix the allowance for the mother so that it should not exceed \$50. Had he paid the allowance, he could, nevertheless, on failure to pay the judgment for fine and costs, have been required, as in other criminal cases, to work upon the public highways for a time prescribed by the commissioners (presumably with a view to the pay-

ment of the amount due). If the legislature was authorized, as an incident to the judgment, and in the exercise of its general police power, to provide for the protection of the public by compelling the defendant to work out the costs and fine, why was it not competent to clothe the justice of the peace or the judge imposing the sentence, where it should appear that the person convicted would not pay fine, costs, and allowance for the support of a bastard, with power to fix the time of confinement at hard labor, with a view to discharging the amount which he is under obligation to pay, for the protection of the public? The alternative offered the defendant who is unable to pay the money of being apprenticed "for such time and at such price as the court may direct" is plainly indicative of the legislative intent that, whether the court should be called upon to fix a time for the work on a highway or to determine the limit of the apprenticeship, the period should be prescribed upon the idea that it ought to be long enough for the criminal to earn by his labor a sum sufficient to pay the amount rightfully claimed by the state, in order to protect the public against the probable consequences of his infringement of the law.

While it seems to be settled that it is competent for the legislature, in the exercise of its general police power, to protect the public by permitting either county commissioners or justices of the peace to fix such limit of confinement at hard labor as will enable a defendant to pay a fine due to the state or costs to its officers, or an allowance made to support a child that without it might become a charge to the public, it must be admitted that imprisonment for a term longer than was necessary to pay fine, costs, and allowance by laboring at the wages per month mentioned in the order (\$10) savors rather of the nature of punishment than a purpose to protect the public against costs. It may be that a term of hard labor could lawfully exceed the precise number of days or months necessary at a known compensation to discharge what is due to the state and the mother, because some allowance might be made for contingencies, such as loss of time. But it seems in this case that the time is far beyond the period requisite to earn the fine of \$10, the allowance of \$50, and the costs. Conceding, therefore, that imprisonment under the police regulation for the purpose of protecting the public is not within the constitutional inhibition against imprisonment for debt, nor a violation of section 27, art. 4, of the organic law, it is nevertheless clear that not only must a statute, purporting to have been passed under the police power, upon its face grant the authority to imprison for police purposes (as section 38 of the Code does), but that the officer, who is the donee of the power, must keep within the provisions of the law, and avoid the error in punishing the defendant beyond what is reasonably necessary in order to compel the discharge of his duty to the public.

There was error in the ruling of the court  
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below that the judgment of the justice of the peace was in violation of section 27, art. 4, of the constitution, except in so far as the term of hard labor was fixed so as grossly to exceed the period necessary for earning the sum due as costs, fine, and allowance. The case should have been remanded to the mayor, who tried it originally, to modify his judgment so as to correct this error. The declaration in the judgment of the mayor that the defendant was in contempt of court was merely surplusage, since it was followed by the recital that the court was acting by virtue of the authority vested in it by section 38 of the Code, which has been already quoted. If the imprisonment would have been illegal, therefore, had it been imposed as a punishment either for contempt or for the criminal offense of begetting a bastard child, it was, in fact, unauthorized by law, when the court expressly declared that its action was taken in pursuance of the provisions of section 38 of the Code, and was careful not to transcend the limit of the power therein conferred upon it. For the reasons given, the judgment ought to be so modified as to remand the case to the mayor, with instructions to proceed to judgment, and to alter the judgment already entered by him so as to fix the limit of imprisonment with a view, not to the punishment of the defendant, but to securing the payment of the costs, fine, and allowance. Judgment modified and affirmed.

(119 N. C. 193)

### BRYAN v. BULLOCK.

(Supreme Court of North Carolina. Nov. 17, 1896.)

#### PARTNERSHIP—EVIDENCE—SUFFICIENCY—SUBMISSION.

1. S. was engaged in buying trees from divers persons, and working out cross-ties, and selling the same to defendant, as he had done to other persons. Defendant paid the sellers of the trees, instead of paying directly to S., by accepting S.'s drafts on him; and the sellers protected themselves by retaining title till the trees were paid for, or they had received satisfactory drafts for them. *Held*, that the evidence was too slight, on the issue of a partnership between S. and defendant, to take the case to the jury.

2. To require its submission to the jury, the evidence must be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing it. *Young v. Railroad Co.*, 21 S. E. 77, 116 N. C. 936, followed.

Appeal from superior court, Granville county; McIver, Judge.

Action by Henry Bryan against John Bullock and Richard T. Smith, to recover from defendants, as partners, the price of certain railroad ties. From a judgment dismissing the action as to defendant Bullock, plaintiff appeals. Affirmed.

Edwards & Royster and Graham & Graham, for appellant. Winston, Fuller & Biggs and T. T. & A. A. Hicks, for appellee.

FAIROLOTH, C. J. We think his honor properly declined to submit the evidence to the

jury on the allegation of a partnership between R. T. Smith and the defendant, which is the principal question. In the absence of a special contract, the usual test of one's being a partner is his participation in the profits of the business, as such, involving a common liability for losses. *Mauney v. Colt*, 86 N. C. 463. A perusal of the whole evidence fails to disclose any of the usual tests of partnership, there being no such special agreement, and does not support the plaintiff's contention, to be inferred from the acts of the defendant, who never held himself out as a partner of Smith, but expressly denies such relationship. The evidence shows that Smith was engaged in the business of buying timber trees from divers persons, and working out cross-ties, and selling the same to the defendant, as he had done to Cooper and other persons, and marking the cross-ties accordingly when delivered to the railroad companies. The defendant agreed to pay and did pay the vendors of the trees, instead of paying directly to Smith, by accepting Smith's drafts on him in favor of the bank and others. The sellers protected themselves by retaining title until the cross-ties were paid for, or until they received satisfactory drafts or promises for the same. While there are some items of the evidence that would not be inconsistent with a partnership relation, yet they are too slight to be sent to the jury on the main question, as pointed out in *Young v. Railroad Co.*, 116 N. C. 936, 21 S. E. 177.

Affirmed.

(119 N. C. 187)

SMITH v. FRAZIER et al.

(Supreme Court of North Carolina. Nov. 17, 1896.)

EQUITY—SALE OF LANDS—COMMISSIONERS—COMPENSATION.

Commissioners appointed to sell lands under an order of the court are not entitled to a commission on the sale, but they will be allowed what is, under all the circumstances, a reasonable compensation for services, time, and expenses.

Appeal from superior court, Granville county; Coble, Judge.

Action by L. B. Smith, executrix, etc., against A. D. Frazier and another, to foreclose a bond for title. From an order allowing commissioners appointed to sell the lands in controversy a commission of 5 per cent., plaintiff appeals. Reversed.

W. B. Shaw and Shepherd & Busbee, for appellant. Edwards & Royster, for appellees.

FAIRCLOTH, C. J. The object of this action was to foreclose a bond for title to land purchased by the defendants, and for a judgment in favor of the plaintiff for the balance of the purchase money. At July term, 1895, the cause was tried, and the plaintiff recovered judgment, and the land was ordered to be sold by two commissioners then appointed, with a further order that the proceeds be applied first

to the costs and expenses of the sale, including 5 per cent. commissions on the sale, and the balance in payment of the judgment. Accordingly, the commissioners advertised to sell the land, and, pending the advertisement, the parties settled the matter. It was made to appear to the court at January term, 1896, that the plaintiff sold the land to the defendants for \$2,400, with the sanction of the commissioners after they had duly advertised to sell the land; and they reported that the price was a full and fair one, and recommended the confirmation of the sale. No sale was made under the advertisement, and the sale (as above stated) was confirmed. It was further ordered that the commissioners be allowed 5 per cent. upon the purchase price, to be retained out of the purchase money as aforesaid. The plaintiff appealed from so much of the order as allows 5 per cent. commissions to the commissioners, and this is the only question for us to consider.

At common law, no commissions were allowed, and that rule has been followed by our court, both at law and in the court of equity. By statutes, executors and administrators and sheriffs are allowed commissions under the circumstances mentioned in the statutes; but there is no such statute in relation to trustees and commissioners, in a state of facts like the present. In an early case the rule established was a just allowance for time, labor, services, and expenses, under all the circumstances that may be shown before a master, and that rule has been since observed. *Boyd v. Hawkins*, 2 Dev. Eq. 386; *Dawson v. Grafflin*, 84 N. C. 100. In a recent case the same principle is repeated. *Pass v. Brooks*, 118 N. C. 397, 24 S. E. 736; Code, § 1910, applies to partition proceeding. The order allowing 5 per cent. commissions on the purchase price is reversed, with direction to the superior court to allow a just and reasonable compensation for labor, services, time, and expenses, under all the circumstances, actually rendered by the commissioners. Reversed.

(119 N. C. 178)

FOUSHEE et al. v. BECKWITH et al.

(Supreme Court of North Carolina. Nov. 17, 1896.)

REFERENCE—PRACTICE—REMANDING CASE TO REFEREE.

Where the referee fails to find the facts, failure of the trial court to remand the case to the referee for such purpose is error.

Appeal from superior court, Chatham county; Graham, Judge.

Proceedings by W. A. Foushee and others, administrators, against W. C. Beckwith and others, for settlement of the estate of Needham Beckwith, deceased. From the judgment, plaintiffs appeal. Error.

Womack & Hayes, for appellants. H. A. London, for appellees.

FURCHES, J. This case comes to us "in such questionable shape" that we have to re-

turn it without deciding any of the questions intended to be presented. A very large volume of evidence is sent to us, accompanied by a report of the clerk, acting as referee, in which he finds several evidentiary facts, but without finding a single fact as a conclusion arising from the evidence. Neither did his honor below find any facts. Nor do we say that it was his duty to do so, as they had not been found by the referee. Had this been done, it would have been his duty to review the findings of the referee upon such matters as were pointed out to him by proper exceptions, and to make such findings as he deemed proper; and if the facts had been first found by the referee, and the judge had made no findings, the law would have presumed that he had adopted the findings of the referee. *McEwen v. Louchelm*, 115 N. C. 348, 20 S. E. 519; *Hunter v. Kelly*, 92 N. C. 285; *Barbee v. Green*, Id. 471. If the facts had been found by the judge, or found by the referee, and the judge had adopted such finding, in express terms, or by presumption of the law, this court would have been bound by such findings. This court cannot find the facts (*Hunter v. Kelly*, supra), and it was a useless expense to send this mass of testimony to us. All that it was necessary to send to this court was what was sufficient to present the exceptions taken to the evidence, and these questions, like the others intended to be presented, should have been passed upon by the referee, and then by the judge before they came to this court. The judge below should have remanded the case to the referee, that he might review and find the facts. And, as he failed to do this, we must do so. *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622. There is error in the court's not remanding the case to the referee to find the facts, and it is now so ordered by this court. Error. Remanded.

(119 N. C. 182)

**BALLARD v. TRAVELERS' INS. CO.**  
(Supreme Court of North Carolina. Nov. 17, 1896.)

**CONTRACTS—CONSTRUCTION.**

A principal telegraphing its agent, who had left its employ with his accounts unsettled, to come to its place of business at its expense, is not liable to the agent for the expenses of the trip, where the agent refuses to discuss the business matters between them.

Appeal from superior court, Durham county; Coble, Judge.

Action by V. Ballard, trustee, against the Travelers' Insurance Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Boone & Bryant, for appellant. Winston & Fuller, for appellee.

**MONTGOMERY, J.** The plaintiff owned the claim upon which the action was brought, as assignee of J. R. Lindsay, who had been an agent of the defendant company. The assignor claimed that he went

to Hartford, Conn., after he had ceased to be agent, at the request of the defendant, and that it agreed and promised to pay him the expenses of his trip,—\$90. Lindsay left the employment of the defendant in May or June, 1895, with matters connected with the agency unsettled. In August, the defendant, from Hartford, telegraphed to Lindsay, in Yorkville, S. C., that he might come on to Hartford, where the defendant did its insurance business, at its expense. Lindsay, upon receiving the telegram, and in consequence of it, went to Hartford, and after his arrival received from defendant company a letter as follows: "Hartford, Conn., September 4th, 1895. J. R. Lindsay, Esq., the Heublein, Hartford, Conn.—Dear Sir: You were invited, by letter of August 27th, to come to this office for the purpose of adjusting your account. Having before us all the records, correspondence, and papers affecting the same, we cannot do this business at your hotel. The first thing to do is to adjust the account. When that is done, the bill for your expenses here will be paid, or credit to your account, as the case may be. Your proposition for a lump settlement, regardless of the accounts, was declined. You then asked for a counter proposition, which I said I would make to-day, after going over the accounts, and ascertaining the facts. I have been at work all the morning to that end. Now you ask that a proposition be sent to your rooms at your hotel. This I decline to do, and further decline to pay your expenses in coming here, unless the purpose of your visit can be accomplished. You brought with you no statement of your account showing the disbursements made by you of moneys advanced, and no statement of your business showing any balance due you by this company as you claim. Your various reports have to be examined and agreed upon before any final settlement can be agreed upon. This is the first thing in order. Yours, truly, J. G. Batterson, President." After the plaintiff's assignor, Lindsay, received the letter, he made no answer, and nothing further was done. His honor, by consent of parties, found the facts, and, upon them, held that the defendant was liable, and gave judgment for the plaintiff assignee. In this, we think, there was error.

We are of the opinion that the reasonable construction of the meaning of the telegram is that the expenses of Lindsay's trip to Hartford would be paid if, upon his arrival, he should, at a proper place in the city, and at a proper time, and in the usual business way, discuss the subject-matter of business interests to both. The unanswered letter of the defendant shows what the nature of the business was, and the law implied an agreement on the part of Lindsay that he would upon his arrival at Hartford, in a business-like manner, meet the defendant at its place of business, and discuss the matters between them. The telegram could not be

construed, when taken in connection with the unanswered letter, to mean that Lindsay should come to Hartford, leave without a reasonable effort to adjust the matters between them, and then make the defendant company pay the expenses of his trip. We think, upon the facts found by his honor, that the plaintiff was not entitled to recover. Reversed.

(119 N. C. 196)

**JACKSON et al. v. BURNETT.**

(Supreme Court of North Carolina. Nov. 17, 1896.)

**ATTACHMENT—DISCHARGE—POSSESSION OF PROPERTY.**

1. Code, § 373, providing that where the attachment is discharged the attached property shall be delivered to defendant, does not entitle defendant to the property where he has transferred his interest to plaintiff pending the attachment.

2. On the discharge of an attachment, plaintiff is entitled to have an issue to try his title to the property, on a claim that, pending the attachment, defendant has transferred his interest to him.

Appeal from superior court, Granville county; Coble, Judge.

Action by Jackson, Oglesby & Co. against J. R. Burnett. From a judgment, on discharge of an attachment, that the attached property be restored to defendant, plaintiffs appeal. Reversed.

A. J. Feild, for appellants. John W. Hays, for appellee.

**MONTGOMERY, J.** The plaintiffs recovered judgment for their debt against the defendant in a justice's court, without objection. The defendant's attorney in that court entered a special appearance for the purpose of moving to vacate the warrant of attachment for the reason that the affidavit made by the plaintiffs was insufficient in law, which was allowed, and the motion was made. An order vacating the attachment was granted, but the justice refused to adjudge, upon the motion of defendant's counsel, that the attached property should be restored to the defendant. From this refusal the defendant appealed to the superior court. In that court the motion made by defendant's counsel in the justice's court was renewed. It was resisted by the plaintiffs on the ground that the defendant was not the owner of, and entitled to the possession of, the property, and that he had transferred the same to the plaintiffs after the attachment had been levied. The plaintiffs offered to show the transfer of the property to them, by witnesses and by documentary evidence also, and asked for a jury to determine, by a proper issue, the title to the property. His honor refused to hear the evidence himself, and find the facts, or to submit issues to the jury, but, upon the record, allowed the motion of defendant, and gave judgment that the property be restored to the defendant.

Questions of fact arising in proceedings that

are ancillary to the main action are heard and found by the judge, and his findings are conclusive, where there is any evidence to support them. Issues of fact raised by the pleadings are to be tried by the jury. There was before his honor no question of fact arising upon the attachment proceedings, nor was there any issue of fact raised by the pleadings in the main action. The attachment had been vacated by the justice without objection of the plaintiffs, and the plaintiffs had procured judgment on their debt without appeal by the defendant. There was before the superior court only the question of the restitution of the attached property. We think his honor erred in not submitting to the jury, upon proper issues, the question of the ownership of the property. Ordinarily the order for a writ of restitution is a part of the judgment, in cases where a party is put out of the possession of his property, and the proceedings are adjudged void. And section 373 of the Code provides that, in cases where an order has been made for the discharge of the attachment, the attached property shall be delivered to the defendant. But we think that the statute was not intended to apply to cases where there had been a sale or transfer of the defendant's interest in the property since the levying of the attachment. There was nothing to prohibit the defendant from selling or transferring his interest in the attached property after the attachment was levied. The plaintiffs claimed title to the property by transfer from the defendant, and offered to show the same by witnesses, and also by documentary evidence. If the defendant had sold his interest in the property to the plaintiffs, it would be a wrong to allow him to get possession of it through an order of the court. The property ought to have been delivered to its true owner. "When an attachment has been dissolved by reason of a judgment in favor of the defendant, or otherwise, the special property of the officer in the attached effects is at an end; and he is bound to restore them to the defendant, if he is still the owner of them, or, if not, to the owner." *Drake, Attachm. § 426.* To the same effect is the decision in *Gates v. Fitzpatrick*, 64 Mo. 185. The plaintiffs and the defendant were before the court, and the plaintiffs claimed title to the attached property by virtue of a purchase or transfer from the defendant made after the attachment was levied, and we think that an issue to try the title should have been submitted to the jury. A stranger to the proceedings could have intervened and set up title to the property, and it would seem that the plaintiffs, on the question of restitution, would be entitled to at least an equal right. Error.

(119 N. C. 336)

**STATE v. WOODWARD.**

(Supreme Court of North Carolina. Nov. 17, 1896.)

**FORCEFUL TRESPASS—SUFFICIENCY OF EVIDENCE.**

In a prosecution for forcible trespass, it appeared that the owner of land leased to defend-

ant put a mill thereon, with defendant's consent, under a contract that defendant was to furnish him with logs to saw at a specified price per 1,000. On a certain morning, when the owner arrived at the mill, defendant and four others were engaged in tearing it down, and the owner then forbade him doing so. Defendant ordered the men helping him to "go on," which they did, and the owner went away. There was evidence that defendant, when asked why he did not let the owner know that he was going to tear down the mill, said: "It would not have done"; the owner "was in possession, and would have been bad to get out." *Held*, that whether defendant was guilty was a question for the jury.

Appeal from superior court, Duplin county; Coble, Judge.

D. I. Woodward was convicted of forcible trespass, and appeals. *Affirmed*.

Stevens & Beasley, for appellant. The Attorney General, for the State.

FURCHES, J. The defendant is indicted for forcible trespass, in tearing down and moving the prosecutor's steam sawmill. The mill was standing on land upon which the defendant had a lease. But it was put there with the consent of the defendant, and under a contract between him and the prosecutor that he (the defendant) was to log the mill, and the prosecutor was to saw the logs at specified prices. The prosecutor had quit sawing on Thursday before the mill was torn down (Wednesday morning following), and was not present when the defendant and his force entered and commenced tearing down the mill. But the prosecutor came while the work of tearing down the mill was going on, and forbade defendant's "touching another splinter." And the only recognition the defendant gave this order of the prosecutor was to order the hands at work tearing down the mill to "go on," which they did, tearing up the foundation upon which the mill and engine rested, after the prosecutor got there and forbade the tearing down his mill. The defendant had four hands besides himself (three colored men and one white man) engaged in tearing down the mill when the prosecutor got there. The prosecutor said he left while the work was going on, because he was unable to do anything more, owing to the number of persons engaged in tearing down the mill; that he was not afraid of their doing him personal injury. There was evidence that the defendant started out to get up hands at 2 o'clock in the morning to take down the prosecutor's mill, and that defendant had not demanded possession, or notified the prosecutor to move the mill, nor had the defendant given the prosecutor notice of his purpose to tear down and move the prosecutor's mill. And one Blanchard, a witness for the state, testified that he asked the defendant why he did not let Swinson, the prosecutor "know he was going to move the mill from the shelter," when defendant replied: "It would not have done. Henry [meaning the prosecutor, Swinson] had possession, and would have been bad to get out."

The court charged the jury fully, and, in our

opinion, fairly, the law bearing upon the facts in the case. The charge left it to the jury to find from the evidence whether the defendant or the prosecutor, Swinson, was in possession when the defendant entered and tore down the mill, and instructed them that, if the defendant was in possession, he should be acquitted. He then charged the jury that, if they found that the possession of the mill was in Swinson, they would then find from the evidence whether the defendant had committed the offense of forcible trespass; that, to constitute this offense, "there must be such force as is calculated to provoke resistance. \* \* \* The gist of the offense of forcible trespass is the high-handed invasion of the possession of another, he being present forbidding the same. If the mill was in the possession of the prosecuting witness, and if the defendant invaded the possession of the prosecuting witness in a high-handed way, and if, while the defendant was tearing down the mill, and before he was through tearing it down, the prosecuting witness came and forbade the defendant, and the defendant, notwithstanding, continued to tear down the mill, and did it in a high-handed way, and used such force as was calculated and tended to provoke resistance and to excite the fears of the owner, and if the evidence in the case satisfied the jury of these facts beyond a reasonable doubt, then they will find the defendant guilty; and, if not, they will acquit the defendant." We can see no ground for the defendant's objecting to this charge. *State v. Davis*, 100 N. C. 810, 13 S. E. 883; *State v. Wilson*, 94 N. C. 839; *State v. Gray*, 109 N. C. 792, 14 S. E. 55; *State v. McAdden*, 71 N. C. 207.

There are but two exceptions: First, that the evidence did not warrant the charge given, and the second is that there was no evidence of force, fear, intimidation, or any show of either. Neither one of these exceptions can be sustained.

There is no exception to the charge, and the only question raised by the exceptions is as to whether there was any evidence, or any such evidence as authorized the court to submit the case to the jury. And as to this it seems to us there can be no doubt. It is admitted that the prosecuting witness was the owner of the mill. And, while it was on land that defendant held under the lease, it was admitted that it was put there with the consent of the defendant, and under a contract that the defendant was to furnish the prosecutor with logs, which the prosecuting witness was to saw for the defendant at a specified price per 1,000. This at least made the prosecutor a tenant at will, and entitled him to the possession until the tenancy was terminated by notice to quit, which defendant admitted he had never given the prosecutor. But, more than this, when asked by the witness Blanchard why he did not let the prosecutor know that he was going to tear down the mill, "he said it would not have done, as Henry [the prosecutor] was in possession, and would have been bad to get

out." So it seems that there was evidence tending to show, if not absolutely establishing the fact, that the prosecuting witness was in possession. It may be, as this evidence was not contradicted, that the court would have been authorized to have instructed the jury that, if they believed this evidence, the prosecutor was in possession. But, be this as it may, the judge submitted the question of possession to the jury, and left it to them to say whether the defendant or the prosecutor was in possession, and they said the prosecutor was. It is sometimes not easy to draw the line of demarkation between what are criminal trespasses and what are only civil trespasses. It is said that, to make a forcible trespass (criminal and indictible), "there must be actual violence used, or such demonstration of force as was calculated to intimidate, or tend to a breach of the peace. It is not necessary that the party be actually put in fear." *State v. Davis*, supra. This may be done by demonstration of force, as by the use of weapons, or by numbers, as three or more. *State v. Davis*, supra. The party must be present, forbidding, or rather objecting to, the unlawful acts. But it is not necessary that he should be present all the time. It is sufficient if he is present before the trespass is completed. *State v. Gray* and *State v. McAdden*, supra. The reason of this is that the gist of the offense is that it tends to a breach of the peace, and it would be as likely to produce bad blood and a breach of the peace for the prosecutor to go upon the defendant, engaged in the act of tearing down his mill, as it would have done if he had been present when it was commenced. And we find evidence in this case at least tending to show all these requirements: The presence of the prosecutor before the work of tearing down the mill was completed, forbidding the defendant; the defendant's refusing to desist, "telling his hands to go on" with the work; the number required by the law to constitute a multitude,—four in number, besides the defendant. What could the prosecutor do but to leave the defendant and his hands engaged in their work of destruction? And yet the defendant says there was no evidence to go to the jury that he is guilty of the offense of forcible trespass. We do not see the matter as the defendant sees it, and in our opinion there is such evidence as made it the duty of the court to submit the case to the jury, and to authorize a verdict of guilty. Judgment affirmed.

(119 N. C. 278)

**BRESEE et al. v. STANLY.**

(Supreme Court of North Carolina. Nov. 17, 1896.)

**INFANCY—MINOR'S NOTE—RATIFICATION.**

In an action on a note made by defendant while a minor, he testified that after his majority he said to the plaintiff's agent that it was a just debt, and he would pay it "if I ever got so that I could without inconvenience to myself"; that the agent then asked him if he could not fix some time at which he would pay it, and he replied that he would not promise to pay the

note in one year, nor in ten years, nor at any time. *Held*, that the evidence did not show ratification.

Appeal from superior court, Lenoir county; Starbuck, Judge.

Action by O. F. Bresee & Sons against N. D. Stanly on a promissory note. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

George Rountree, for appellants.

AVERY, J. The defendant was sued on a note for \$130, and it was admitted that he was not 21 years of age when he executed it. The plaintiff contends that the defendant ratified and affirmed the contract after his majority, even if his own testimony as to what he said to the plaintiffs' agents is to be taken as true. He testified as follows: "I said it was a just debt, and I would pay it if I ever got so that I could without inconvenience to myself. Mr. Perry, plaintiffs' agent, then asked me if I could not fix some time at which I would pay the note. I replied that I would not promise to pay the note in one year, nor in ten years, nor at any time." This promise, so carefully hedged about with saving conditions, recalled to the minds of some members of the court the story of a settlement of accounts in Iredell county, which it is thought may with propriety be preserved as history in the judicial annals of the state. Mr. James solicited his debtor, Huggins, to close an old open account by note. Huggins agreed to do so, provided he should be allowed to draft the instrument, and accordingly presented the creditor the following: "I, John Huggins, agree to pay James James one hundred and fifty dollars whenever convenient; but it is understood that Huggins is not to be pushed. Witness my hand and seal, this the — day of —. John Huggins. [Seal.]" But viewing his statement in its legal aspect, in order to amount to a ratification of a voidable agreement entered into by an infant, a promise made after arriving at his majority must be unconditional, "express, voluntary, and with a full knowledge" that he is not bound by law to pay the original obligation. *Alexander v. Hutcheson*, 2 Hawks, 535; *Dunlap v. Hales*, 2 Jones (N. C.) 381. A case directly in point is that of *Dunlap v. Hales*, supra, where the infant, on arriving at full age, was sued on a note given for slaves, and wrote a letter in which he first proposed to surrender the slaves, and then added: "If they will not accept of the above offer, I will have to pay them, I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part." A different principle is applicable to executed contracts, as to which ratification may be inferred from circumstances (*State v. Rousseau*, 94 N. C. 355); but the promise must always be express and unconditional, in order to impart validity to such agreements as that sued on here. There is no error.

(119 N. C. 356)

## STATE v. SMITH.

(Supreme Court of North Carolina. Nov. 17, 1896.)

## PERJURY—DENIAL OF PARTNERSHIP—DEFENSE—ESTOPPEL.

1. On a trial for perjury, charged to have been committed in a civil case by defendant swearing that he had never been a member of a certain firm, defendant may show, as a matter of defense, that there was no such firm.

2. The fact that some of the state's witnesses testified that defendant had told them that he was a member of the firm, as was sought to be shown in the civil case, did not estop defendant from showing that he was not a member, and that his statement to the witnesses was not correct.

Appeal from criminal court, Robeson county; Meares, Judge.

John G. Smith was convicted of perjury, and appeals. Reversed.

John D. Shaw & Son, for appellant. The Attorney General and McNeill & McLean, for the State.

FAIRCLOTH, C. J. The defendant is indicted for perjury committed on the trial of a civil action, wherein S. P. McNair was plaintiff, and John G. Smith and W. B. Smith, partners doing business under the firm name of W. B. Smith & Co., were defendants, by falsely asserting on oath that he (the defendant) had never been a member of the firm of W. B. Smith & Co., knowing the same to be false, etc. The defendant testified on trial on the present action that he had never been a member of the firm of W. B. Smith & Co., and that he so testified at the former trial. A number of other witnesses were examined for the defendant and the state, and a verdict of guilty was rendered. His honor instructed the jury that the state must satisfy them beyond a reasonable doubt that the defendant was a member of the said firm, and charged them as he understood the rule of evidence in a civil action. His honor then referred to the bill of indictment, and told the jury: "And the defendant cannot show that as a fact there was no such co-partnership at the time, by way of defense. But, nevertheless, it is incumbent upon the prosecution to satisfy the jury beyond a reasonable doubt that the defendant was a member of the firm of W. B. Smith & Co. at the time that the alleged false oath was taken." Defendant excepted. In the first sentence of the above quotation there is error. Whether the defendant was a member of the firm was a material question, and much of the evidence on both sides was directed to it. The state was allowed to show the affirmative, and we can conceive of no reason why the defendant should not be allowed to show the negative, and know of no authority denying the privilege of doing so. The effect of the charge was to withdraw from the jury the defendant's evidence on that material question. Some of the state's witnesses testified that the defendant had told them he was a member of the firm of W. B. Smith & Co. Assuming that he had so told the wit-

nesses, he was still at liberty to show on the trial that he was not a member, and that his statement to the witnesses was not correct. To refuse this privilege would be to establish a very high grade of estoppel in criminal proceedings. Error.

(119 N. C. 336)

## MCNEILL et al. v. McDUFFIE.

(Supreme Court of North Carolina. Nov. 17, 1896.)

## COURT—VALIDITY OF TERM—STATUTES—REPEAL BY IMPLICATION.

1. Under Acts 1895, c. 86, providing that a superior court be held in C. county "on the sixth Monday after the first Monday in March, to continue for two weeks," the judge may appear on any day within the prescribed time, the court not having been previously adjourned, and that part of the term actually held will be as valid as though court were opened on the day fixed by statute.

2. Acts 1895, c. 281, providing that a superior court be held in R. county "on the sixth Monday after the first Monday in March," is not so irreconcilably in conflict with chapter 86, ratified previously in the session, and providing for holding a superior court in C. county on the same date, "to continue for two weeks," as to repeal it,—both counties being in the same judicial district,—since the judge, after opening court in R. county on the day fixed by statute, could lawfully hold court in C. county before the end of the two weeks, the term not having been previously adjourned by the sheriff.

Appeal from superior court, Cumberland county; Green, Judge.

Claim and delivery by McNeill & Hall against John R. McDuffie. Judgment for plaintiffs, and defendant appeals. Affirmed.

N. W. Ray, for appellant. Geo. M. Rose, for appellees.

CLARK, J. Chapter 86, Acts 1895, provides for a superior court to be held in Cumberland county "on the sixth Monday after the first Monday in March, to continue for two weeks." By chapter 281 of the same Acts, but ratified later in the session, it is enacted that a superior court be held in Richmond county "on the sixth Monday after the first Monday in March," Cumberland and Richmond counties being in the same judicial district. It is clear that the two courts cannot be readily opened on the same day by the same judge. But it does not follow necessarily that one act repeals the other. There is no express repeal, and the courts lean strongly against repeals by implication. There is an apparent conflict, but non constat that the judge might not hold both courts, beginning his session (as he did) in Cumberland after dispatching the business before him in Richmond. If he had been detained by illness, or any other cause, so that he could not appear till the second Monday at Cumberland,—that term being authorized for two weeks, and not having been adjourned on the fourth day by the sheriff,—the court would have been valid, and, by fiction of law, all its judgments would have dated as of the "sixth Monday after the first Monday in

March," no matter on what day the court actually opened, or any particular judgment was entered. *Norwood v. Thorp*, 64 N. C. 682. It can make no difference what was the cause of the judge's absence,—whether illness, or attending to official duties elsewhere. The material and only essential facts are that the judge designated by law to hold the court appeared within the time prescribed and held it, the court not having been previously adjourned (in consequence, doubtless, of directions given to the sheriff by the judge). His honor was authorized by statute to hold the superior court of Cumberland for two weeks, beginning on the sixth Monday, and the part of the term he actually held is not invalidated because (from whatever cause is immaterial) he did not open the court upon the first day of the prescribed term. The judge properly directed the clerk to follow the customary formula, describing the court as begun and opened on the first day thereof, as specified in the statute. *Norwood v. Thorp*, 64 N. C., on page 685. We have the authority of Sir Boyle Roche that "no man can be in two places at the same time, barring he is a bird"; and certainly the judge could not open court in both counties at the same hour, but it is not physically impossible that he might do so on the same day, if at different hours, adjourning one of the courts to a later day in the term. At any rate, the conflict is not such that the court is compelled to hold one act as being necessarily a repeal of the other, and, such being the case, we must sustain both statutes. *Wortham v. Basket*, 99 N. C. 70, 5 S. E. 401. His honor below had no difficulty in doing so, for he in fact held both courts, and, if he found it possible in fact, we ought not to find it impossible in law. The conflict is more seeming than real, not being irreconcilable, but it is an awkward inconvenience, caused by legislative inadvertence, and will doubtless be corrected at the next session of the general assembly. No error.

(119 N. C. 202)

**SHATTUCK v. CAULEY et al.**

(Supreme Court of North Carolina. Nov. 17, 1896.)

**ESTOPPEL IN PAIS.**

A grantee holding under a deed, the record of which has been destroyed, is, as against a subsequent mortgagee, estopped to assert his title, where he aided the mortgagor, his grantor, to secure the loan, without disclosing to the mortgagee his title.

Appeal from superior court, Lenoir county; Starbuck, Judge.

Action by A. R. Shattuck against Thomas Cauley and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Allen & Dortch, for appellants. Geo. Rountree, for appellee.

MONTGOMERY, J. This action was brought to subject the land described in the complaint

to sale for the purpose of having the proceeds applied to the payment of a debt due to the plaintiff, and secured by a deed of trust executed by Thomas Cauley and his wife, two of the defendants, on the 3d day of May, 1890, and registered duly in the office of the register of deeds of Lenoir county. The defendant Franklin Cauley, brother of the defendant Thomas, upon the trial set up title to the property, and resisted the plaintiff's claim to have the property sold for the payment of the debt of Thomas. The jury found that at the time of the execution of the deed of trust the defendant Franklin was the owner of the land, but in response to the second issue submitted to them, to wit, "Is the defendant Franklin Cauley, by his conduct prior to the execution of the deed of trust to the plaintiff Shattuck, estopped, as to said plaintiff, to deny that Thomas Cauley was the owner of the land at the time the deed of trust was executed?" their answer was, "Yes." The defendants requested the court to instruct the jury that there was no evidence to support a finding in favor of the plaintiff on the second issue, and that they be instructed to answer that issue, "No." Upon his honor's refusal to so charge, the defendants noted an exception. It was alleged in the complaint, and admitted on the trial, that the defendant Franklin had conveyed the land to Thomas by deed in 1872, and that the deed was registered in that year, and was on record in Lenoir county when this action was tried. Upon the trial there was testimony tending to show that before and at the time the plaintiff loaned the money to Thomas, and took the security therefor by way of the deed of trust, the plaintiff had examined the records of Lenoir county thoroughly to see the nature of the title of Thomas to the land; that he found no deed from any one to Franklin, and no deed indicating that the land belonged to any one but Thomas. In addition, Thomas Cauley, a witness for plaintiff, testified as follows: "I am a defendant in this action. I was in possession of the land 21 or 22 years. I rented it out one year before I moved on it. I was holding the land under a deed from Franklin Cauley. I sold it as administrator of my brother, who was killed in the war, to make assets to pay his debts, and got Franklin Cauley to buy it in for me, and I made a deed for it to him as administrator, and he deeded it back to me in 1872, and I was holding under this deed. [This deed was put in evidence.] I gave in the land for taxation as mine, and paid the taxes on it. Franklin Cauley never gave it in, nor paid taxes on it. I was turned out of possession by the court under the judgment in the action brought by Franklin Cauley against me. Franklin Cauley was never in possession of the lands until said judgment. Franklin Cauley went with me to Mr. A. J. Loftin's office, when I went to borrow money from the plaintiff mortgage company. I told Mr. Loftin how much money I wanted. He [Loftin] demanded to know how much the land was worth. He said he would let me have one-third of the value of the land. Franklin Cauley knew what I was doing, and helped me, in the presence of

Mr. Loftin and in his office, to value the land. He [Franklin Cauley] said the land was worth \$1,200; that he would be willing to give that much for it if he had the money. I never paid any rent for the lands to Franklin Cauley, and he never exercised any ownership over the lands."

We are of the opinion that his honor committed no error in refusing to give the instruction asked by the defendants as to the second issue. The defendant Franklin was estopped by his conduct just prior to and at the time of the loan of money on the land by the plaintiff to Thomas. He claimed on the trial title to the land by a deed from Thomas to himself, dated and registered in 1875, and that the book in which the deed was registered was burned in 1879, and the jury found that he was the owner of the land under that deed. But, according to the testimony of Thomas, he not only allowed, in his presence, Thomas to borrow the money of the plaintiff, and to execute to the plaintiff the deed of trust upon the land to secure the loan, but he actually aided him in procuring the loan. He valued the property, and said to the plaintiff that he would be willing to give \$1,200 for the land, if he had the money. By this conduct the defendant Franklin not only aided and assisted Thomas to make the loan, but he deliberately and willfully used language that was calculated, and must have been intended, to make the plaintiff believe that he had no title to the property, and that his brother Thomas was the owner of it. The plaintiff had no notice of the deed from Thomas to Franklin, either actual or constructive. Franklin and the justice of the peace who wrote the deed were probably the only persons who knew of its execution, and so far as the testimony shows they were the only persons who knew of it. It is true that Franklin testified that the agent of the plaintiffs knew of the destroyed deed, but the agent denied it. The principles of law applicable here were announced by this court in the cases of *Mason v. Williams*, 66 N. C. 564, and *Morris v. Herndon*, 113 N. C. 238, 18 S. E. 203. The other defendants, Rouse and Mitchell, moved for judgment upon the verdict upon the ground that they (mortgage creditors of Franklin by deed of a subsequent date to the deed of trust from Thomas to the plaintiff) were not bound by the estoppel against Franklin, but the exception to his honor's ruling was abandoned in this court. No error.

(119 N. C. 262)

DURHAM v. JONES et al.

(Supreme Court of North Carolina. Nov. 17, 1896.)

MALICIOUS PROSECUTION—INSTRUCTIONS—  
PROBABLE CAUSE.

In an action against a firm for malicious prosecution, it appeared that plaintiff was arrested on complaint of one of the partners, and on preliminary examination was discharged. The complaint, which was made a part of the warrant, set forth that defendant did unlawfully, etc., by false representations, obtain ice from the firm, with intent to defraud, "saying he would retain a certain part of the proceeds of

the sale of said ice" after the firm had been paid "in full," whereas he intended to convert the proceeds to his own use, having beforehand made an arrangement with a person named to ship the ice to his ice house, and to pay him out "of the proceeds of said ice, or with the ice itself," an account defendant owed him, and that the said arrangement was carried into effect. *Held*, that under Code, § 1014 (Laws 1871-72, c. 145, § 2), which extends the scope of the statute relating to embezzlement so as to bring within its terms an agent or employé who shall fraudulently convert to his own use chattels which shall come into his possession, and provides that "he shall be deemed guilty of a felony, and punished as in cases of larceny," it was error to restrict defendants to showing probable cause that plaintiff was guilty of cheating by false pretenses, and to refuse to charge that if the facts were as alleged in the complaint, and either of defendants had knowledge of them at the time said warrant was procured, defendants had probable cause to institute said prosecution.

Appeal from superior court, Durham county; Coble, Judge.

Action by J. S. Durham against Jones & Powell for malicious prosecution in causing plaintiff to be arrested and taken before a justice of the peace, by whom, on preliminary examination, plaintiff was discharged. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J. S. Manning, Guthrie & Guthrie, and F. H. Busbee, for appellants. Boone, Merritt & Bryant and Fred. A. Green, for appellee.

AVERY, J. Embezzlement has been called a statutory larceny, because of the fact that the earlier English statutes were thought to be but declaratory of the common law that certain acts therein mentioned were punishable as larceny. 2 Bish. Cr. Law, §§ 319, 320, 327, subd. 1. The last act passed in this state (Code, § 1014; Laws 1871-72, c. 145, § 2) extends the scope of the law so as to bring within its terms an agent, servant, or employé "of any corporation, person or partnership" who should "embezzle or fraudulently convert to his own use \* \* \* any money, goods or other chattels \* \* \* which shall come into his possession or under his care," and by providing that "he shall be deemed guilty of a felony, and punished as in cases of larceny." 2 Whart. Cr. Law, § 1917, d. The use of the word "embezzlement" in this statute is but another mode of describing the fraudulent misappropriation of the goods of the employer to the employé's or agent's own use. 2 Bish. Cr. Law, § 325, subds. 1, 2. The warrant upon which the plaintiff was arrested referred to the affidavit or complaint of J. A. Jones, one of the defendant firm, and thereby made it a part of the process. The complaint sets forth, among other things, that "J. S. Durham did, unlawfully and willfully, knowingly and designedly, by means of false representations, obtain ice from J. A. Jones and A. M. Powell, trading as Jones & Powell, with intent to cheat and defraud Jones & Powell of said ice, saying he would re-

tain a certain part of the proceeds of the sale of said ice, after said Jones & Powell had been paid in full, whereas he intended to convert the whole of the proceeds of sale of said ice to his own use, or to appropriate the ice itself, having beforehand made an arrangement with one W. T. Saunders to ship said ice to his ice house, and to pay him out of the proceeds of said ice, or with the ice itself, an account said Durham owed said Saunders; that the ice was to be sold from the ice house of said Saunders; and that said Durham was to purchase from him so much as not to include the money owed said Saunders, and the said arrangement was carried into effect contrary," etc. It is proper to premise, that the law does not intend or require that a justice of the peace shall describe a criminal offense in a warrant, issued for the purpose of preliminary examination, with the same legal accuracy as is necessary in an indictment. But the complaint does aver (1) that there was such an agreement as constituted the plaintiff the agent of Jones & Powell to sell ice for them, paying them a certain proportion of the proceeds of sale, and taking the residue as his compensation for selling; (2) that he then entertained the fraudulent purpose of converting the whole of the ice, or the proceeds of its sale, to his own use, by applying it in discharge of his own debt; (3) that he carried the said arrangement to so misappropriate the proceeds of sale into effect. In words that could not have been misunderstood, the warrant put the defendant on notice that he was charged with agreeing to constitute, and constituting, himself an agent for Jones & Powell, and with fraudulently misappropriating the goods and money of these defendants that came into his hands in that capacity. There was also testimony that tended to prove the agency as well as the wrongful misappropriation.

In view of the nature of the charge in the warrant and the evidence offered in support of it, the court erred in restricting the defendants to showing probable cause that the plaintiff was guilty of cheating by false pretenses, and in refusing to charge as requested in instruction No. 7 in the prayer of the defendants, to wit, that "if the jury believe from the evidence that the plaintiff agreed with the defendant J. A. Jones, as a member of the firm of Jones & Powell, that, if the defendant firm would ship him a car load of ice, he would sell the ice by retail for cash, and out of the first moneys received set apart a sufficient amount to pay Jones & Powell for said ice and as their money, and the said Jones & Powell shipped the plaintiff, Durham, a car load of ice; and if the jury believe from the evidence that the plaintiff, Durham, received the said ice under said agreement, and sold the same, and failed to set apart the first moneys received therefor for said Jones & Powell, and to pay them for said ice; and if the jury believe

from the evidence that, at the time of said contract with Jones & Powell for said ice, the plaintiff Durham, had made an arrangement with one Saunders to put said ice in his ice house, and, being indebted to said Saunders, had agreed with him that he could have a certain amount of said ice to pay his debt, and delivered to said Saunders such amount of said ice; and if the jury believe that either Jones or Powell had knowledge of these facts and circumstances at the time said warrant was procured,—then the defendants had probable cause to institute said prosecution, and the jury will answer the first issue, 'No.'"

It is clear that no question could have been raised about the form of the warrant if the justice of the peace had required the plaintiff (the defendant in the warrant) to give bond for his appearance at the superior court, whether the solicitor deemed it best to draw an indictment for cheating by false pretenses or embezzlement. It is not material to pursue the inquiry whether there was testimony sufficient, if true, to show probable ground for believing that the plaintiff was guilty of cheating by false pretenses. The testimony of Powell and Strong was in support of the complaint, and tended to show the agency of the plaintiff, and the fraudulent misappropriation of goods and money that passed into his hands in that capacity. If the testimony of Jones, which is embodied, in substance, in the prayer for instruction, was believed by the jury, then their finding, thrown into the shape of a special verdict, would have been that the plaintiff was the agent of the defendants for the purpose mentioned, and converted to his own use money and chattels that passed into his hands as agent, and the jury might have drawn the inference, and found, that it was done with a felonious and fraudulent intent.

We have forbore to discuss the case in the light of the decision in *Oakley v. Tate*, 118 N. C. 366, 24 S. E. 806, wherein Chief Justice Faircloth, for the court, announced the general principle that a complainant could not be "held responsible for an error committed by a justice." It is not necessary to determine how far, if at all, that principle applies to the case before us. Conceding that, when the fact that the plaintiff was discharged by the justice for want of sufficient proof was shown, the burden was cast upon the defendants to rebut a prima facie case, it is manifest that it was competent for them to relieve themselves of that burden by showing that there was probable cause as to an offense charged in the warrant. It was therefore for the jury to determine, under proper instructions, whether there was probable cause for believing that any criminal offense, coming within the terms of the complaint or charge, had been committed by the plaintiff. The court misled the jury in restricting their inquiry to

the question whether probable cause had been shown as to the charge of cheating by false pretenses, and erred when, in effect, that inquiry was answered for them in the charge. In refusing to instruct the jury as requested, and substituting the charge given, there was error which entitles the defendants to a new trial.

CLARK, J., did not sit on the hearing of this case.

(119 N. C. 274)

**TAYLOR et al. v. ERVIN.**

(Supreme Court of North Carolina. Nov. 17, 1896.)

**COURTS—DURATION OF TERM—SUNDAY—RECEPTION OF VERDICT—JUDGMENT—VALIDITY.**

1. Under Code, § 910, and statutes amendatory thereof, which provide for courts to begin on a Monday named, and to last for one week, the term embraces the following Sunday, unless the term is sooner adjourned.

2. Where Sunday is a day of the current term, the reception of a verdict on that day is legal.

3. A valid judgment may be entered up at once on a verdict received on Sunday.

Appeal from superior court, Onslow county; Starbuck, Judge.

Action by S. B. Taylor and others against E. K. Ervin, in ejectment. A verdict for plaintiffs was returned and received between the hours of 2 a. m. and 3 a. m. on Sunday, and it and the judgment rendered thereon were entered on the records as having been returned and rendered on Saturday. Defendant afterwards moved that the case be replaced on the docket for trial, on the ground that the verdict and judgment were void. From an order that the cause be replaced on the docket for trial, plaintiffs appeal. Reversed.

R. O. Burton, for appellants.

CLARK, J. The Code, § 910, and the act substituted for it (Acts 1885, c. 180), and the several amendatory statutes, provide for courts to begin on a certain Monday named, and to last for one "week" (or two or three weeks, as the case may be). Of course, in such cases the term, if for one week, beginning on Monday, embraces the following Sunday, unless the court is sooner adjourned. If for two weeks, it embraces two Sundays, unless adjourned earlier, as is usual. In the present case the term prescribed for Onslow superior court began on the ninth Monday after the first Monday in September (which was the first Monday in November), "to continue in session one week \* \* \* unless the business shall be sooner disposed of." The term legally expired, therefore, at midnight, Sunday, unless, in point of fact, the court had adjourned earlier; and the reception of the verdict on Sunday was legal, as has been repeatedly held. *State v. Ricketts*, 74 N. C. 187; *State v. McGimsey*, 8 N. C. 377; *State v. Howard*, 82 N. C. 623; *White v. Morris*, 107 N. C. 92, 12 S. E. 80; *State v. Penley*, 107

N. C. 808, 12 S. E. 455; *Shearman v. State*, 1 Tex. App. 215; *McKinney v. State*, 8 Tex. App. 626, 645; *Com. v. Marrow*, 3 Brewst. 402; *Reld v. State*, 53 Ala. 402. As stated by Ashe, J., in *State v. Howard*, supra: "Sunday, according to the usage and practice of our courts, is not a juridical day. \* \* \* But it has been held that in special cases, ex necessitate, the court might sit on Sunday. The holding court on the Sabbath is not forbidden by the common law, or any statute in this state, but it has been the long-settled and almost universal practice, when a term continues so long that a Sunday intervenes, to adjourn over until Monday, and long practice makes the law of a court; a law which has its origin and observance in a deference to the settled religious habits and sentiments of a large majority of our citizens; a law whose violation is not excused, except in case of necessity." To reduce the cases of necessity, the statute law (now Code, § 1229) has for long provided that, if a trial for felony is in progress, the judge may continue the term; and a more recent statute (Act 1893, c. 226) has provided that in certain contingencies the judge may continue the court for the conclusion of the trial of a civil action. The term here did not fall within these statutes, and in fact was not continued by the judge; but Sunday was a part of the week belonging to that term, and as the court justly points out in *State v. Ricketts*, supra, the receiving on Sunday of the verdict of a jury which is confined, or whose fatiguing deliberation, if the verdict is not received before the expiration of the term, might become valueless, "is a work of necessity, within the common and the legal meaning of the word, and may be justified on religious and moral grounds." It is certainly better that, when the 12 men who are sequestered from the world in the consideration of a secular issue, have come to a conclusion, the simple announcement of that conclusion should be received, and the jurors released, than that the term should be continued over another day, to their discomfort, when the pronouncement by them of one or two words, in criminal cases, or the handing in a paper they have already agreed to and signed, in civil cases, would set them free. At any rate, there is no law against extending this humanity to a jury. The verdict being valid, the judge might well have directed thereupon the entry of the word "judgt," which might afterwards be drawn out in full, as was pointed out in *Davis v. Shaver*, 61 N. C. 18, and *Jacobs v. Burgwyn*, 63 N. C. 193, which are cited and approved in *Ferrell v. Hales* (at this term) 25 S. E. 821. But if, in fact, the judge signed the ordinary judgment in ejectment upon the receipt of the verdict, it was not invalid. It has not infrequently happened that the highest judgment known to the law—sentence of death—has been pronounced on Sunday, when the verdict was not rendered till that day. While it seems to be held

everywhere that receiving a verdict on Sunday is valid, in some of the states which have changed the common law by Sunday legislation it has been held that a judgment entered on Sunday is void. *Shearman v. State and Reid v. State*, supra. Even in states of that class a judgment on Sunday is held valid when the statute, like our Code, § 412, contemplates judgment to be entered up at once on the verdict unless otherwise directed by the judge. 1 Freem. Judgm. § 138; *Thompson v. Church*, 13 Neb. 287, 13 N. W. 626; *Wearne v. Smith*, 32 Wis. 412. But even if, under our statutes, a formal judgment signed on Sunday had been invalid, the verdict being valid the judge should simply have entered judgment nunc pro tunc. *Ferrell v. Hales*, supra. In holding either verdict or judgment void, there was error. Error. Reversed.

(119 N. C. 230)

**BAKER v. ROBBINS et al.**

(Supreme Court of North Carolina. Nov. 17, 1896.)

**MECHANICS' LIENS—PROPERTY SUBJECT.**

The owner and mortgagor of a steam sawmill and boiler had repairs made on the boiler without the knowledge or consent of the mortgagee. Held, that the person making the repairs was not entitled to a lien as against the interest of the mortgagee, in the absence of ratification by him of the acts of the owner and the claimant of the lien.

Appeal from superior court, Duplin county; Coble, Judge.

Action by Jacob Baker against P. D. Robbins and A. F. Williams, administrator of Harper Williams, deceased, to establish and enforce a mechanic's lien. From a judgment in favor of plaintiff, defendant Williams appeals. Modified.

Simmons & Ward, for appellant. Stevens & Beasley, for appellee.

**FURCHES, J.** This is an action of debt, and to enforce a mechanic's lien. The defendant Robbins was the owner of a steam sawmill and boiler, upon which defendant Williams' intestate held a mortgage. The defendant Robbins, being in possession of the mill, without the knowledge or consent of his co-defendant, employed the plaintiff to patch and repair the boiler, which he did, according to the finding of the jury, to the amount of \$43.84. The plaintiff afterwards filed his lien for this work on the mill, engine, and boiler, which is admitted to be in time and regular in form. There is no complaint of anything that occurred during the trial, but defendant Williams objects to the judgment of the court, and we are of the opinion that the objection is well taken. It is not alleged that plaintiff had any contract with defendant Williams or his intestate to do this work, or that they knew he was doing the same; and the jury find that the defendant Robbins is indebted to plaintiff for the work, and that defendant Williams

is not. The defendant Williams has, since this work was done, by action and claim and delivery, recovered possession of this mill, and now has the same in possession, and is preparing to sell the same under his mortgage to satisfy his debt.

There is no question but that plaintiff's lien is good against any interest the defendant Robbins may have in the mill; but it is contended by the plaintiff that it is good against the defendant Williams, as well as against Robbins, and *Phil. Mech. Liens*, 818, and *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, are cited in support of this contention. The citation from Phillips does seem to support this contention, and cites the case of *Watts v. Sweeney*, supra, as authority for the position. We have examined *Watts v. Sweeney*, and, whether it is correctly decided or not, it is clearly distinguishable from the case under consideration. *Watts v. Sweeney* is a case where an engine was sent to the defendant's shops for repair, and it is held that defendant had a common-law right to retain possession until the repairs were paid for. And, by a statute of Indiana, the defendant, after a certain time, had a right to sell the engine to make his debt. The statute created no lien, but only authorized the sale to enforce the lien. This common-law right to retain property is well-recognized law, given to common carriers, innkeepers, shopkeepers, and others. But no common-law rights came to the assistance of the plaintiff in this case. Whatever rights he has are created by the statute. He had no possession, and therefore no right to retain possession. This he does not claim, but insists that, by virtue of the statute, he has a lien on this mill, superior to that of the mortgage of defendant Williams. This case falls under the doctrine laid down by the court in *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70, where it is held that the lien of a mortgage is superior to a subsequent lien created by statute; and this is so in this state, except where it is provided otherwise by the statute. Statutory liens may, and often do, take effect from the date of their creation, and not from the filing of the lien. But in this case it is not a question of priority of lien so far as the defendant Williams is concerned, but the question is as to whether there is any lien as against him. There is no debt or liability against him. The plaintiff claims none. He did not even have knowledge of the fact that the plaintiff was doing the work. He has never, by word or act, approved or ratified the acts of the plaintiff and the defendant Robbins. He has not received a dollar on his mortgage since the work was done.

The law seems to be settled in this state that there must be a debt due from the owner of the property before there can be a lien. The debt is the principal, the basis, the foundation upon which the lien depends. The lien is but the incident, and cannot exist

without the principal. *Bailey v. Rutjes*, 86 N. C. 517; *Boone v. Chatfield*, 118 N. C. 916, 24 S. E. 745. Under our statute, giving subcontractors liens, the debt may not be due directly from the owner of the property to the subcontractor, but he must be indebted to the original contractor at the time of filing the lien or notice thereof, or there can be no lien. *Clark v. Edwards* (at this term) 25 S. E. 794. The judgment of the court must be reformed so as to declare no debt or lien against the defendant Williams, but to be a lien on the defendant Robbins' equity of redemption in the property covered by the notice of lien filed by the plaintiff. When thus modified, it is affirmed.

(119 N. C. 311)

SMITH et al. v. SMITH et al.

(Supreme Court of North Carolina. Nov. 11, 1896.)

STIPULATIONS—SERVICE—CASE ON APPEAL.

1. A stipulation that appellants are "to serve the case on" respondent by a certain time does not waive service in a legal manner.

2. That one of respondents' counsel, on being asked to accept service of the case on appeal, stated that he had no authority to do so, and to mail the case to the other counsel, is not a waiver of legal service, so as to authorize service by mail.

3. Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not estop respondent to deny the legality of the service, as, if the case had been promptly returned, it would have been too late for legal service.

4. The court will not recognize verbal stipulations between counsel, which are denied.

Action by D. F. Smith and others against M. C. Smith and others. Motion of defendants for writ of certiorari. Denied.

John D. Bellamy and Shepherd & Busbee, for the motion. J. B. Schulken and MacRae & Day, opposed.

CLARK, J. This case differs widely from *Willis v. Railway Co.* (at this term) 25 S. E. 790. There the agreement, which was admitted, was that the papers "should be sent" to the appellee's counsel. They were accordingly sent to him by express, and there was ample time, if he had promptly notified the appellant's counsel that he had not intended to waive service, for the case to have been served by an officer. This court held that, upon the admitted agreement, the appellant's counsel had reasonable ground to understand that service had been waived, and, besides, the appellee's counsel, under such circumstances, by delaying several days after he received notice that the papers were in the express office for him, and till too late for legal service, to notify appellee's counsel of the mistake, was estopped from insisting that the case could not be legally served after the time limited. In the present case, the agreement, which is in writing, provides: "Next term of Brunswick court fixed for settlement of the case on ap-

peal, appellants to serve case on the plaintiff, at least, a week before said court." This, certainly, extended the time of service, which is not denied; but, so far from waiving service, it contemplates service, which means, of course, legal service. No other agreement is averred, but the appellants rely upon an affidavit that Mr. Cutlar, on the last day (Saturday) upon which the case could have been served, asked Mr. Rountree, in Wilmington, to accept service, who replied that he had no authority to do so, and to mail the papers to the other counsel in Whiteville, who, three days thereafter, notified the appellants' counsel that they would not accept service. As Mr. Rountree had no authority to accept service, he could not reasonably have been understood as waiving service; and Mr. Cutlar should at once have had the case legally served, especially as the agreed time for service was about to expire. Nor is there any estoppel upon the appellees' counsel by their failure to promptly return the case, for, if returned by the next mail, the time for service would have expired, and their conduct could not have misled the appellants' counsel to their detriment. In these two essential particulars the case differs from *Willis v. Railway Co.* Affidavits are filed by the appellees' counsel, reciting, among other things, that the appellants' counsel had given them notice that "no favors would be given or received"; that Mr. Cutlar had since stated to them that his real reason for sending the case by mail was that he did not know that the law required service by an officer, and expressly denying any written or verbal agreement to waive the service, or for service other than by an officer, having been made between counsel. Indeed, the appellants seem to rely greatly upon "the liberal practice heretofore prevailing among the members of the bar in the southeastern part of the state." Pearson, C. J., in *Wilson v. Hutchinson*, 74 N. C. 432, gave notice to the bar that this plea would not avail against the express terms of the law, and this has been since cited and approved. This court could not constitute itself a tribunal to decide the limits (sure to be controverted) of the "liberal practice heretofore obtaining in this district"; nor, if such custom were admitted, could it avail to nullify the statute. All that the court can do when the parties have stipulated to disregard the statute is to construe the meaning of the agreement if in writing, or even if verbal, provided it is admitted. *Mitchell v. Haggard*, 106 N. C. 173, 10 S. E. 856. If an alleged verbal agreement of counsel is denied (as in this case), the court has uniformly refused the invidious task of weighing the affidavits of counsel. *Sondley v. City of Asheville*, 112 N. C. 694, 17 S. E. 534; *Le Duc v. Moore*, 113 N. C. 275, 18 S. E. 70; *Graham v. Edwards*, 114 N. C. 220, 19 S. E. 150; *Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15. Rule 39 of this court (22 S. E. v.), which has long been in force, is as follows: "The court will not recognize any

agreement of counsel in any case unless the same shall appear in the record, or in writing filed in the cause in this court." Gentlemen of the bar are the sole judges of the courtesies they shall extend to each other, and it is best every way that they should be. Like Gallo we "will not judge of such matters." The court will only administer legal rights. Certiorari denied.

(119 N. C. 314)

SMITH et al. v. SMITH et al.

(Supreme Court of North Carolina. Nov. 17, 1896.)

CASE ON APPEAL—SERVICE.

Under Code Civ. Proc. § 550, providing that the case on appeal shall be served on respondent, without specifying the manner of service, service must be by an officer; service by mail is insufficient.

Appeal from superior court, Columbus county; Green, Judge.

Action by D. T. Smith and others against M. C. Smith and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

John D. Bellamy, Jr., and Shepherd & Busbee, for appellants. J. B. Schulken and MacRae & Day, for appellees.

CLARK, J. The application of the appellants heretofore made for a certiorari to have the case settled by the judge having been denied, they now move to have their case on appeal treated as the proper case on appeal, although service thereof has not been accepted, nor has it been served by an officer, claiming that placing the statement of the case in the mail in time to reach the appellees was due service. They admit that to do so would be to overrule numerous decisions of this court, which they ask us to review for that purpose.

The original Code of Civil Procedure (section 80) provided for service of papers in a cause either personally or by filing in the clerk's office, and section 301 (the original of the present section 550) provided for service of the case and counter case on appeal, "in the manner provided by section 80;" and the same was true of section 349 (now 597), as to serving notices. The inconveniences and manifest evils which arose from thus filing papers which opposite counsel might not see, or might overlook till too late, culminated (after some unpleasant incidents) in a repeal of section 80, and the simple provision in sections 550 and 597 that the statement of the case, on appeal and all notices "shall be served" on respondent, etc. Where no other mode of service is provided for, the court held that service must be made by an officer, unless service is accepted according to section 228, for service of summons. Allen v. Strickland, 100 N. C. 225, 6 S. E. 780. That case, it is true, was as to the attempted service of a notice by mail; but the principle applies to all legal papers as to which "service" is prescribed, without indicating any deviation from the ordinary manner of service; and the Code

of Civil Procedure (section 597) provides for service of "notices and other papers" in the same manner. Allen v. Strickland has since been followed by Clark v. Manufacturing Co., 110 N. C. 111, 14 S. E. 518, and State v. Johnson, 109 N. C. 852, 13 S. E. 843 (as to service of notice of appeal when taken out of court), the court saying: "The requirement of service by an officer is not only statutory, but reasonable, as it prevents disputes like this, as to whether there has been service or not;" also in State v. Price, 110 N. C. 590, 15 S. E. 116 (as to the service of the case on appeal), which is followed in Herbin v. Wagoner, 113 N. C. 656, 24 S. E. 490; Forte v. Boone, 114 N. C. 176, 19 S. E. 632; Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170; McNeill v. Railroad Co., 117 N. C. 642, 23 S. E. 288; Roberts v. Partridge, 118 N. C. 355, 24 S. E. 15; and there are others. Aside from the construction of the statute being so thoroughly settled, if it were res integra it could not be held otherwise. With the policy of the statute in requiring service, if not accepted, to be made by an officer, we have nothing to do; but it admits of more than a doubt if the substitution of service by counsel or parties, and proved by their oaths, would not lead to the greater evil of counter affidavits as to service being made in time, if at all. The former provision as to service by filing in the clerk's office was so prolific of evil as to cause its repeal. At present any hardship is averted by acceptance of service, or, if that is refused, service by an officer, which modes avoid the unpleasantness which might otherwise occur more or less frequently to the profession, and to the courts, of settling such matters upon the controverted affidavits of counsel. Service of all papers by our statutes (except in cases where service by publication is authorized) must be by an officer, or acceptance of service, except only subpoenas, as to which service may be made by one not an officer; but even then the service must be "by one not a party to the action," and the return sworn to. Code Civ. Proc. § 597(4).

The counsel moves, in the absence of a case on appeal, to dismiss the action because the complaint fails to state a cause of action. It is true that this motion can be made in this court for the first time (rule 27, 22 S. E. viii.); but the objection to the complaint is not well taken. Paragraph 8 is sufficient as an allegation of fraud and undue influence. There being no case on appeal, and no errors appearing upon the face of the record proper, the judgment is affirmed.

(119 N. C. 174)

WYCHE et al. v. ROSS.

(Supreme Court of North Carolina. Nov. 17, 1896.)

JUDGMENT—SETTING ASIDE DEFAULT—DISCRETION—COVENANT—DAMAGES.

1. Refusal to set aside a default is a matter of discretion.

2. Where an administrator who has suffered a default is removed, her successor is not entitled,

as a matter of right, to have the default set aside.

3. It is not an abuse of discretion to refuse to set aside, at the instance of the administrator *de bonis non*, a default by the administrator, to permit a technical defense to be pleaded.

4. In an action on a covenant of quiet enjoyment, it is proper to refuse to allow defendant a credit for rent, where plaintiff does not claim interest on the purchase price.

Appeal from superior court, Granville county; Coble, Judge.

Action by John Wyche and others against W. E. Ross, administrator. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

T. T. Hicks, for appellant. Winston, Fuller & Biggs, for appellees.

FURCHES, J. In 1885 the plaintiff Wyche bought a tract of land from Charles Ross, for which he paid \$500, and Ross conveyed to him by deed with a covenant of warranty of quiet enjoyment. In 1896 one Davis and others recovered said land of the plaintiff Wyche upon a title paramount to that of the grantor, Charles Ross. But by a compromise the land was sold by a commissioner, under order of court, and was bought by the plaintiff Marsh at the price of \$576, and this sale was reported to the court and confirmed. By the terms of the compromise the plaintiff Wyche was to get one-fourth of the price the land brought at said sale. After this judgment and sale the plaintiff commenced this action against Amanda Ross, the administratrix *c. t. a.* of Charles Ross, the grantor, he having died before the commencement of this action. At the return term of this action the defendant entered no appearance, and judgment was taken against her by plaintiff, and a writ of inquiry as to the amount of damages ordered. Between that term of the court and the next, the defendant W. E. Ross procured the removal of the said Amanda, and he was appointed the administrator *d. b. n. c. t. a.* of the said Charles Ross, and at this term of the court filed an affidavit asking the court to allow him to be made a party defendant, to set aside the judgment by default, and allow him to file an answer and defend the action. The court allowed this motion, to the extent of making the defendant Charles a party defendant in the place and stead of the said Amanda, who had been removed, and allowed him to file his answer, and to make any defense he could as to the measure of damages, but refused to set aside the judgment by default theretofore rendered. To this ruling refusing to set aside the judgment taken by default, the defendant complains and excepts, and this was the principal question discussed before this court.

We are unable to see that we can correct the mistake of the court in refusing this motion, if any has been made, and we do not say that there has been. This motion involved a discretionary power of the court

below, which this court will not review unless it clearly appears that there has been an abuse of discretion in the matter appealed from. *Freem. Judgm.* (3d Ed.) § 541; *Bank v. Foote*, 77 N. C. 181. With the view of ascertaining this fact,—whether there has been such abuse of discretion in the court's refusing the defendant's motion to set aside the judgment,—we have carefully examined the whole case, and fail to find that there has been. The two administrations of Amanda and of the defendant W. E. Ross are, in law, one administration. And we find that Amanda was legally served with process, and failed to appear and defend the action. And though it is alleged in defendant's affidavit that Amanda is not friendly towards defendant, and is friendly with plaintiff, and failed to defend on that account, the court fails to find this to be the fact, there being no other evidence to sustain this charge. We find that the defendant and the other heirs at law of Charles Ross, the grantor, were notified of the action of Davis and others against the plaintiff for possession, and asked to come in and assist in defending that action, which they declined to do. We find from the facts stated, and not denied, that Charles Ross (the ancestor of the defendant, and his testator) only had an estate in the land *pur autre vie*,—for the life of Mrs. Eliza Quarles,—which had terminated before the Davis suit was commenced; that one of the defenses set up by the defendant in his answer (which the judge did not allow to be filed) was the statute of limitations; that this plea is not generally considered a meritorious defense, or one that is calculated to move the court to act in a matter of discretion. But, as we consider this warranty to be one of quiet enjoyment, in our opinion it could not have availed the defendant if it had been pleaded in apt time, and when the defendant, as a matter of right, could have pleaded it.

Another ground of defense set up in this answer is that there had been no actual ouster of the plaintiff at the time this action was commenced. The plaintiff says there was what is equivalent to an actual ouster,—that there had been a recovery of the land, a sale ordered by the court, and a sale made under said order,—and cites *Muzzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927, and other cases, in support of this contention. But whether, if this had been pleaded as a defense when the defendant had the legal right to plead it, we do not feel called upon to decide; for, if we were to admit that it would defeat the plaintiff's action, it would only be for technical reasons, not in the least affecting the merits of the case, and, like the statute of limitations, not likely to induce the court, as a matter of discretion, to set aside a judgment regularly granted, in order that it might be pleaded. If parties wish to avail themselves of such defenses, they must put them in when they have the right to do so.

Having fully considered the whole case upon the motion to set aside the judgment, we see no error in the action of the court below,—certainly nothing we can review and correct if there has been a mistake.

Having disposed of the motion to set aside the judgment, we are called upon to consider another matter of which the defendant complains, and to which he excepted. On the trial the defendant was allowed the benefit of one-fourth of the price for which the land sold under the order of the court, which the plaintiff was to have under the terms of the order of sale, amounting to \$135.70. But, as the plaintiff claimed no interest on the money paid, the court did not allow the defendant to claim rents for the 2 or 2½ years that plaintiff had been in possession since the death of the life tenant, whose interest the defendant's ancestor had conveyed to the plaintiff. If the defendant had been allowed to do this, according to the evidence the rent would have only amounted to a few dollars more than the interest. But it seems to us that the action of the court in this respect is sustained by *Locke v. Alexander*, 1 Hawks, 417; *Williams v. Beaman*, 2 Dev. 483; and other cases that might be cited. And, upon a review of the whole case, it seems to us that the defendant has had the opportunity to present whatever defense he had, upon the merits of the case, and that substantial justice has been done according to law, and that the judgment must be affirmed. Affirmed.

(99 Ga. 613)

# SOUTHERN RY. CO. v. DAVIS et al.

(Supreme Court of Georgia. Oct. 26, 1896.)

## REVIEW ON CERTIORARI—CONFLICTING EVIDENCE —RULINGS ON EVIDENCE.

1. There being sufficient evidence to support a finding that the injury complained of was caused by the defendant's negligence, there was no error in overruling the certiorari which presented for review by the superior court the single question whether or not the verdict in the magistrate's court was contrary to law and the evidence.

2. The alleged error in admitting evidence could not be considered by the superior court, for the reason that the petition for certiorari did not state what, if any, objection was made when the evidence in question was offered.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Davis & Son sued the Southern Railway Company on account of the loss of three hogs, and obtained a verdict, which was sustained on certiorari, and defendant brings error. Affirmed.

The following is the official report:

It appears that on November 22, 1894, plaintiffs shipped a car load of hogs from Philadelphia, Tenn., to Dalton, Ga., under a special contract containing the following, among other, agreements by the shipper: "In consideration of transporting the stock at a reduced rate, and furnishing to the owner or his agent

free transportation on the train with the stock, I agree that said \* \* \* railway company is only bound to carry said live stock to its freight station at Dalton, and there have the same ready to be delivered and unloaded by the consignee, or upon his order, and \* \* \* shall not be held liable for any loss, injury, damage, or depreciation which the animals, or either of them, suffer in consequence of either of them being weak or escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness; \* \* \* and I expressly release said \* \* \* railway \* \* \* from all other damages incidental to the railroad or water transportation of said stock, which shall not be established by positive evidence to have been caused by the negligence of some officer or agent of said \* \* \* railway. \* \* \* And I further agree that I will load and unload or transfer said stock at my own risk and expense, and that in the event of accidents and delays, from any cause whatever, I will at my own expense feed, water, and take care of said stock, or cause the same to be done for me. \* \* \*" One of plaintiffs testified: "I superintended the loading of the hogs. The car was in good condition, and the hogs were well and properly loaded, and not overcrowded. The car left Philadelphia between 9 and 10 o'clock in the morning. I did not accompany them to Cleveland, but came to Cleveland on a passenger train that passed Philadelphia in the evening, and reached Cleveland between seven and eight o'clock at night. From there to Dalton I came on the train with the hogs. It is 30 miles from Dalton to Cleveland, and 75 miles from Dalton to Philadelphia. When I arrived at Cleveland I found the hogs in the car on a side track. I went to the agent there to know why they had not gone forward, and when they would go. He told me that it was impossible for them to go until he could make up a train. I waited around the depot until the train was made up. The train left Cleveland between 11 and 12 o'clock, and reached Dalton between 4 and 5 o'clock, or about daylight. The hogs could have been brought by way of Ooltewah, without stopping them in Cleveland, and got here before night. The conductor in charge of the train tried to get me to relieve him from placing the car in Dalton, where it could be unloaded, claiming that he was behind time. I told him that I wanted him to place the car, as I expected my hands to be there to unload it when it arrived in Dalton. When the train arrived there I got off and went immediately home. I did not go and show the conductor where to leave the car. It was placed on the side track next to the stock pen, but lacked about half a car length of being placed opposite the chute of the pen, so the hogs could be unloaded. After staying at home between a half and three-quarters of an hour, I got the hands and went to the pen to unload the hogs; got some pinch bars, and shoved the car up opposite the

chute. This took over an hour. When we got the hogs unloaded two of them were dead, and one other died shortly after we got it out of the car [giving their weight and value]. When I arrived at Cleveland it was dark. I examined the car the best I could by striking matches and looking into it. Did not use a lantern. No accident happened to the train, but we waited a while after reaching Cohutta for a train from Chattanooga, which brought the hogs on to Dalton. The train from Cleveland to Cohutta stopped at Cohutta. While the car was at Cleveland I did not ask for the hogs to be unloaded. I have had a great deal of experience in shipping hogs. Have been in the business 18 years. A freight train, if not delayed, ought to cover the distance from Philadelphia to Dalton in about five hours. These were large, fat hogs, and in my opinion the delay at Cleveland caused them to smother. Such hogs are more likely to smother while standing still than while the train is in motion." Defendant introduced a yard clerk at Cleveland, who testified that "our records show" that the car in question reached Cleveland from Philadelphia at 4:30 p. m. There is a stock pen at Cleveland for the purpose of unloading and watering and feeding stock. The car left on the first train that left Cleveland for Dalton.

Maddox & Starr, for plaintiff in error. R. J. & J. McCamy, for defendants in error.

PER CURIAM. Judgment affirmed.

(99 Ga. 616)

#### CURETON v. CLOPTON.

(Supreme Court of Georgia. Oct. 26, 1896.)

APPEAL.—CONFLICTING EVIDENCE—NEWLY-DISCOVERED EVIDENCE.

The evidence, though decidedly conflicting, warranted the verdict. Some of the alleged newly-discovered evidence was evidently within the knowledge of the defendant at the time of the trial, and all of it might have been obtained before that time by the exercise of proper diligence. As a whole, it would not, probably, change the result.

(Syllabus by the Court.)

Error from superior court, Dade county; T. W. Milner, Judge.

Action by R. W. Clopton against George M. Cureton. Judgment for plaintiff. Defendant brings error. Affirmed.

B. T. Brock, T. J. Lumpkin, and McCutchen & Shumate, for plaintiff in error. W. N. & J. P. Jackaway, for defendant in error.

PER CURIAM. Judgment affirmed.

(33 Va. 634)

GUGGENHEIMER et al. v. MARTIN et al.  
(Supreme Court of Appeals of Virginia. Oct. 5, 1896.)

SUBROGATION—FIRM AND PRIVATE DEBTS.

L., a member of a firm which had made a general assignment, executed a deed of trust

on his individual property to secure T. as indorser on four firm notes, and on the same day gave a second deed of trust to secure his individual creditors, such deed embracing the property conveyed to secure T., and certain collaterals theretofore assigned to T. to indemnify him as indorser aforesaid, and to secure a note which the firm owed him. The assets of the firm were distributed pro rata on its debts, including the note to T. and the four notes which he had indorsed, and L.'s private assets were insufficient to pay his individual debts and the partnership debts remaining unpaid after exhausting the firm assets. Held, that the partnership creditors were not entitled to be subrogated to the rights of T. in the residue of the individual assets conveyed by L. to secure T. after the latter should obtain full satisfaction of his claim, to the extent that such claim was paid out of the firm assets. *Rixey v. Pearre*, 15 S. E. 498, 89 Va. 113, followed.

Appeal from circuit court, Albermarle county; Daniel A. Grimsby, Judge.

Bill by Guggenheimer & Co. and others against John S. Martin & Co. and others to be subrogated to the rights of said Martin & Co. in a certain fund. From a decree for defendants, complainants appeal. Affirmed.

J. Thompson Brown, for appellants. Micajah Woods and George Perkins, for appellees.

BUCHANAN, J. On the 20th day of March in the year 1893 the firm of John S. Martin & Co. made a general assignment of their assets for the payment of its liabilities, without preference. On that day Jacob L. Moon, one of the members of that firm, executed a deed of trust upon a portion of his property to secure and indemnify Thomas S. Martin as indorser on four negotiable notes drawn by the firm, and discounted by the State Bank of Virginia. On the same day he (Moon) executed another deed of trust to secure the payment of his individual creditors upon certain property, in which were embraced the same property conveyed in the deed of trust to secure and indemnify Thomas S. Martin as indorser upon the notes held by the State Bank, and also a judgment and certain shares of stock which he had theretofore assigned Thomas S. Martin as collateral to secure and indemnify him as indorser upon the notes named, and to secure the payment of a negotiable note which John S. Martin & Co. owed him, but they were conveyed subject to the lien of Thomas S. Martin.

The assets of the firm were administered and distributed pro rata upon its debts, including the negotiable note which it owed Thomas S. Martin, and the four negotiable notes upon which he was indorser. The assets of J. L. Moon are insufficient to pay his individual debts and the residue of the social debts remaining unpaid after exhausting the social assets.

The appellants, who are creditors of John S. Martin & Co., claim that the social creditors are entitled to be subrogated to the rights of Thomas S. Martin in the balance of the proceeds of the items of the individual assets conveyed and assigned by Jacob L. Moon to secure Thomas S. Martin, after the said Martin shall have obtained full satisfaction of the

debt due him, and has been fully indemnified as to the notes upon which he was indorser, to the extent that those claims were paid out of the social assets of John S. Martin & Co. The circuit court was of opinion that they were not entitled to substitution as claimed, and so decreed. From that decree this appeal was taken.

The ground upon which the appellants based their right to substitution is that where one creditor holds a security upon two funds or estates, with liberty to resort to either for the payment of his debt, and another creditor holds a junior security upon one of these funds only, equity will compel the creditor who has two funds to exhaust the fund upon which he alone has security, before coming upon the latter fund, and, if the creditor who has a lien upon the two funds exhausts the only fund upon which the other creditor has a lien, the latter is entitled to be subrogated to the lien of the former upon the other fund, or to any balance thereof remaining after full payment of the prior lien, of which the senior creditor might and ought to have availed himself.

The same question involved in this case arose and was decided by this court in the case of *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498.

That case was carefully considered, and the conclusion reached that, in order for a creditor who had a lien upon one fund to be entitled to substitution to the right of a creditor who had a lien upon that and another fund, it was a necessary condition, among other things, that both funds upon which the prior creditor's claim was secured should be the property of the same debtor, and that this condition does not exist where the assets of a partnership constitute one of the funds, and the individual property of a member of the partnership constitutes the other fund, unless that partner has in equity become entitled to the partnership assets, and become primarily liable for the partnership debts; and under the facts of that case, which are identical with the facts of this case in all material points, so far as they affect the question under consideration, it was held that the partnership creditors who only had a lien upon the one fund were not entitled to be substituted to the rights of the creditor who had a lien upon the two funds.

That decision is conclusive of this case, and the decree appealed from must therefore be affirmed.

(93 Va. 615)

#### ALLEGHANY COUNTY v. PARRISH.

(Supreme Court of Appeals of Virginia. Oct. 1, 1896.)

COUNTIES—LANDS FOR BUILDING—RESTRICTED USES—CONTRACTS—ULTRA VIRES—LIMITATIONS—ADVERSE POSSESSION.

1. Under Code 1819 (1 Rev. Code, p. 250, c. 71, § 16), which provided that land acquired upon which to erect the courthouse and other public buildings of a county should be held

for the use of the county, "and for no other use whatever," such use was subject to the restrictions imposed, whether the land was acquired by gift or by purchase.

2. Under Code 1849, p. 255, c. 50, § 1, which provided that the fee simple of land occupied by the county buildings should be in the county, and that the county court "may purchase so much land as with what it may have had, will make two acres, whereof what may be necessary shall be occupied by the court house, clerk's office and jail, and the residue planted with trees, and kept as a place for the people of the county to meet and confer together," the uses to which the court was required to put the lot exhausted all the purposes for which it could be lawfully used.

3. Act April, 1879 (Acts 1878-79, p. 300, c. 58, § 7), which provided that the board of supervisors should have power "to sell or exchange the corporate property of the county, and to make such orders concerning such corporate property as now exists, or as may hereafter be acquired, as they may deem expedient," did not change the uses which might be made of the courthouse square, as restricted by the Codes of 1819 and 1849.

4. Where orders made by the county court and by the board of supervisors as to the use of county property are beyond the scope of their powers and in violation of their duties, the county is not estopped from denying their authority as its agents.

5. The defense of adverse possession cannot be set up to establish title where the relation of vendor and vendee exists between the parties.

Appeal from circuit court, Alleghany county; William McLaughlin, Judge.

Bill by R. L. Parrish against the county of Alleghany to enjoin an action in ejectment, and to compel the county to convey to him the land occupied by him. From a decree in favor of plaintiff, defendant appeals. Reversed.

G. A. Rivercomb and A. C. Braxton, for appellant. Elder & Elder, for appellee.

BUCHANAN, J. In the year 1853 the county court of Alleghany county gave Andrew Damron and William Skeen leave to build law offices on the courthouse square of the county, upon the condition that the buildings should only be used as law offices, and that when they ceased to be so used all the rights and privileges granted should cease.

Under this agreement they erected law offices upon the courthouse square. In the year 1858 the county court entered an order directing the clerk of the court to convey to them "the right to build and enjoy the use of the land on which said buildings were erected and to sell and convey the same so long as the offices erected by them are used as law offices, by yielding and paying annually (each) as a ground rent the sum of one dollar."

The deeds provided for in this order were never executed.

In the year 1874 Mr. Damron sold and conveyed to the appellee his law office, with all the rights and privileges which he had acquired by virtue of the above-mentioned order of the county court.

In the year 1885 the board of supervisors of the county gave the appellee leave to build in addition to the law office which he had pur-

chased from Mr. Damron, upon the same terms and under the same restrictions as the office to which the addition was to be made was held. The addition provided for was erected, and the appellee continued to occupy and use both as law offices until the year 1893, when the board of supervisors demanded possession of the land upon which they were erected. The appellee refused to surrender the possession of the land, and in March, 1894, the appellant brought an action of ejectment to recover it. The appellee thereupon instituted his suit in chancery to enjoin the prosecution of the action of ejectment, and to compel the county to convey to him the land upon which his offices were located, so as to quiet and confirm his title, and authorize him and his assigns to hold, occupy, and use the land on which his offices were built so long as he or his assigns shall use said offices for a law office, reserving to the county the ground rent provided for.

The appellant demurred to and answered the bill. The defense set up was that the orders of the county court and board of supervisors relied on as contracts by the appellee were ultra vires and void, and that the appellee acquired no rights under them which could not be revoked by the county authorities.

Upon the hearing of the cause the circuit court was of opinion that the appellee was entitled to a specific execution of the contracts sued on, and so decreed. From that decree this appeal was taken.

There is no claim that the county court or board of supervisors had any other authority to dispose of or make contracts with reference to the courthouse square or lot than such as was given by the general law when the respective orders were made.

By the Code of 1819, which was in force when the county of Alleghany was formed, and when it acquired the courthouse lot or square of three-fourths of an acre, it was made the duty of every county court to cause to be erected and kept in repair (or, where the same had been erected, to maintain and keep in repair) a courthouse, a county jail, whipping post, pillory, and stocks; and, where land had not been already provided and appropriated for that purpose, the court was authorized to purchase two acres of land upon which to erect said public buildings for the use of their county, "and for no other use whatsoever." 1 Rev. Code, p. 250, c. 71, § 18.

By deed executed in the year 1831 the courthouse lot, which had theretofore been acquired from James Merry as a seat for the public buildings of the county of Alleghany, and upon which the courthouse and the jail of the county had been erected, was conveyed to the acting justices of the peace of Alleghany county, to be held by them and their successors in office.

It was contended in argument by appellee that the courthouse lot had been acquired by gift, and not by purchase, and, inasmuch as the donor had not seen proper to impose any restric-

tions on his gift, the management and control of it were left to the discretion of the justices, and not governed by that restriction in the Code of 1819, which provided that land acquired upon which to erect the courthouse and other buildings named should be held for "the use of the county or corporation, and for no other use whatsoever." It may be true that the land was acquired by gift, and not by purchase, in the popular meaning of that word, but whether that be true or not is immaterial in this case. The land was acquired and conveyed for "a seat for the public buildings of the county of Alleghany." When it was acquired, the county court had no general power to acquire lands, but a special power for special purposes only; and, having acquired it for a special purpose, it must, of necessity, be confined in its use of the land to the purposes for which authority to acquire was given, and subject to the restrictions imposed. 2 Dill. Mun. Corp. (4th Ed.) § 563; Cabell, J., in *Bolling v. Mayor, etc.*, 8 Leigh, 283.

The Code of 1849, which was in force when the orders of the county court upon which the appellee relies were made, required that "there shall be provided by the court of every county, and by the council of each town, wherein there is a corporation court, a court house, clerk's office and jail, the cost whereof and of the land on which they may be, and of keeping the same in good order, shall be chargeable to the county or corporation, and may be levied for by such court or council. The fee simple of the land shall be in the county or corporation, and the court thereof may purchase so much land as, with what it may before have had, will make two acres, whereof what may be necessary shall be occupied with the court house, clerk's office and jail, and the residue planted with trees and kept as a place for the people of the county to meet and confer together." Code 1849, p. 255, c. 50, § 1.

By this provision of the Code the county courts were not only not expressly nor impliedly authorized to make contracts by which other buildings than those specially named could be erected upon the courthouse lot or square, but it expressly provided the use to which the residue of the lot, not occupied by the courthouse, clerk's office, and jail, should be put. It required that so much thereof as might be necessary "shall be occupied with the court house, clerk's office and jail, and the residue planted with trees and kept as a place for the people of the county to meet and confer together." The lot, in so far as it was not occupied by the courthouse, clerk's office, and jail, was required to be planted with trees, and kept as a place for the people to meet and confer. Not a portion of the residue was to be so used, but the whole of it. The uses to which the court was required to put the lot exhausted all the purposes for which it could be lawfully used. And in so far as the court authorized or permitted it to be used for other purposes, to that extent did it fail to

perform the duty expressly imposed upon it by the statute.

By act of April, 1879 (which was in force in 1885, when the order of the board of supervisors was made giving the appellee the right to make an addition to his office) it was provided that the board of supervisors of each county should have power "to sell or exchange the corporate property of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings and to provide a suitable farm as a place of general reception for the poor of the county, and to make such orders concerning such corporate property as now exists or as hereafter may be acquired as they may deem expedient; provided that no sale of such corporate property shall be made except by public auction," after notice given, and subject to the approval and ratification of the county court. Acts 1878-79, p. 300, c. 58, § 7.

There was nothing in the statute quoted placing the corporate property of the county under the control and management of the board of supervisors which, in our opinion, changed the uses which might be made of the courthouse square. The provision quoted by the appellee to show that they had the power to make the order relied upon by him is as follows: "To make such orders as they may deem expedient concerning such corporate property as now exists or as may hereafter be acquired." This provision of the statute must be construed with that contained in section 1, c. 50, of the Code of 1849, quoted above, and in which no change has been made since its enactment, except that the power given to and the duties imposed upon the county court by it are now given to and imposed upon the board of supervisors. Code 1887, § 925. By it the board of supervisors were, in 1885, and are now, required, as was the county court, to plant with trees the residue of the courthouse lot not occupied with the courthouse, clerk's office, and jail, and to keep it as a place for the people of the county to meet and confer together. The duties imposed by this provision upon the board of supervisors are not discretionary, but mandatory. They cannot make such use of the courthouse square "as they may deem expedient," when the legislature has determined for what purposes, and for what purposes only, it shall be used; for, as we have seen above, using it for any other purpose than those provided for by the legislature withdraws it to that extent from the uses to which the legislature has expressly dedicated it.

The county is not, as is claimed, estopped from denying the authority of its agents to make the contracts sued on. The orders made by the county court and the board of supervisors, as we have seen, were not only beyond the scope of their powers, but in violation of their duties.

It is settled beyond controversy that the

agents, officers, or governing body of a municipal corporation or of a county cannot bind the corporation by a contract which is beyond the scope of its powers. The inhabitants of a municipal corporation are its corporators, and the officers are but the public agents of the corporation. Their duties and powers are prescribed by statute or by charter, which all persons not only may know, but are bound to know. It results from this doctrine that contracts not authorized by the charter or by statute, and which are, therefore, not within the scope of the powers of the corporation, are void, and in actions thereon the corporation may successfully set up as a defense its want of power.

The appellee also relies upon the statute of limitations to protect him in his possession of the property in controversy.

That was a legal defense, and the proper place to make it was in the action of ejectment. But no such defense can be made in any forum, legal or equitable, where the relation of vendor and vendee exists, and especially where, as in this case, the suit in which it is set up is based upon that relation.

It was said by Judge Riely, who delivered the opinion of the court in *Chapman v. Chapman*, 91 Va. 397, 400, 21 S. E. 814, following *Clarke v. McClure*, 10 Grat. 305: "Before adverse possession can arise between a vendor and his vendee, or between the grantee of the vendor and such vendee [or between the grantee of such vendee and his vendor], where the vendor has retained the title, and the statute of limitations commences to run, the vendee must have discovered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor or his grantee."

We are of opinion that the appellee acquired no rights under his alleged contracts, at least none which could not be revoked at any time by the board of supervisors, and that the circuit court erred in decreeing that he was entitled to have them specifically executed.

The decree appealed from must be reversed, the injunction dissolved, and the bill dismissed.

(33 Va. 641)

MICHIE et al. v. COCHRAN et al.

(Supreme Court of Appeals of Virginia. Oct. 5, 1896.)

APPEAL — CONFLICTING EVIDENCE — TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

1. A verdict on conflicting evidence will not be set aside on appeal where a new trial was refused.

2. An instruction that there "was some evidence tending to show" a certain material fact is not objectionable, as an opinion on the weight of the evidence.

Appeal from circuit court, Albemarle county; Daniel A. Grimsly, Judge.

Action by Elizabeth G. Michle and others against John L. Cochran and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Duke & Duke, for appellants. Geo. Perkins, for appellees.

RIELY, J. Two questions only are presented on this appeal: First, Did the court err in refusing to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence? And, second, did it err in its instruction to the jury? All the evidence in the case has been carefully examined and considered. It establishes that the land of the appellants is much injured, and that the injury is caused by a want of proper drainage. But upon the further question whether the insufficient drainage is the result of the failure to maintain a ditch eight feet wide and two feet deep, below the surface of the ground, exclusive of embankments, from the line of the appellants, on Meadow creek, to the head of Cochran's mill pond, in accordance with the contract of April 15, 1856, between W. T. Early and J. Augustus Michle, of the one part, and John Cochran, of the other part, the testimony is very contradictory and conflicting. It is not possible for us to deduce from it a satisfactory conclusion that is contrary to that reached by the jury, as manifested by their verdict. Certain it is that the jury had ample justification in the evidence for their verdict.

It is peculiarly the province of the jury to weigh the evidence submitted to it, and to determine from the evidence the facts which it proves; and the rule is well established by repeated decisions of this court that, when there is a conflict of evidence, this court will not set aside a verdict where the court which tried the cause and heard the witnesses concurs with the jury, and has refused a new trial. *Caldwell v. Craig*, 21 Grat. 136; *Brugh v. Shanks*, 5 Leigh, 598; *Grayson v. Com.*, 6 Grat. 724; and *Grayson v. Buchanan*, 88 Va. 255, 13 S. E. 457.

After the matters in issue had been submitted to the jury upon the evidence for their decision, the court, of its own motion, gave to the jury the following instruction: "If the jury believes from the evidence that, notwithstanding the fact the defendants have failed to keep open the ditch for the time alleged, yet if, from the filling up of the mill pond below the head of the old pond, or from other causes, the cutting or keeping open said ditch during such time would not have drained the lands of the plaintiffs, or enabled the plaintiffs to do so, then the jury ought not to find damages as resulting from said failure, there being some evidence tending to show that said pond has been filled up from causes beyond the control of said Cochran." It was earnestly argued by the

counsel for the appellants that the last clause of the instruction, "there being some evidence tending to show that said pond has been filled up from causes beyond the control of said Cochran," vitiated it. It was claimed that this statement by the court amounted to an expression of opinion as to the weight and effect of a part of the evidence, and was consequently an invasion of the province of the jury. But it does not bear such a construction, and it is not possible to see how it could have been so understood or interpreted by the jury. It merely states that there was some evidence tending to show that the pond had been filled up from causes beyond the control of Cochran; and, by the instruction, the jury was, in effect, told that if it believed from the evidence that the pond had been filled up from causes beyond the control of Cochran, and that, in consequence of the filling of the pond, the cutting or keeping open the ditch in accordance with the contract of April 15, 1856, would not have drained the lands of the plaintiffs, or enabled them to do so, then the jury ought not to find damages for the plaintiffs as the result of the failure to cut or keep open the ditch. By merely stating in its instruction that there "was some evidence tending to show" that the pond had been filled up from causes beyond the control of Cochran, the court did not express or indicate any opinion as to the sufficiency of the evidence to establish that fact. It did not thereby exceed its province, nor trench upon that of the jury. That the jurors are, under the law, the judges of the weight and effect of the evidence, and its sufficiency, is not an open question; but it is equally the province of the court, in giving an instruction, to judge whether there is any evidence on which to base it. If there be no evidence upon which to predicate it, it is error for the court to give it, and for that error its judgment would be reversed. *Railroad Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Borland v. Barrett*, 76 Va. 133; and *Rea's Adm'r v. Trotter*, 28 Grat. 585. While it is safest and best to give an instruction that is asked for, if it propound the law correctly, and there is evidence tending to make out the supposed case, of however little weight the evidence may appear to the court to be entitled, or however inadequate, in its opinion, to make out the case supposed (*Hopkins v. Richardson*, 9 Grat. 485, 496; *Farish v. Riegle*, 11 Grat. 719; *Early v. Garland's Lessee*, 13 Grat. 9; and *Honesty v. Com.*, 81 Va. 297), it is still, nevertheless, the duty of the court, before giving the instruction, to determine whether there is any evidence upon which it may be founded. This is, in effect, all that the court did. It merely expressed in the instruction itself what it was obliged to determine existed before it could properly give the instruction, —that there was some evidence tending to make out the case supposed.

Without going into a rehearsal of the testimony, it is sufficient to say that the record discloses that there was evidence before the jury tending to prove that the filling up of the mill pond was due to causes beyond the control of Cochran, and that, in consequence of the filling up of the pond, the cutting or keeping open the ditch in accordance with the contract of April 15, 1856, would not have drained the lands of the plaintiffs, or enabled them to do so. And, there being evidence tending to prove this, the court did not err in assigning, as a reason to justify its action in giving the instruction, that there was some evidence tending to prove that the pond was filled up by causes beyond the control of Cochran. Our conclusion is that the instruction is not subject to any legal exception. There is no error in the decree appealed from, and the same must be affirmed.

HARRISON, J., absent, on account of relation to parties.

#### KLINGE v. TRIPLETT et al.

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

#### JUDGMENT LIEN—SURRENDER OF UNRECORDED DEED—PRIORITY OF LIENS—PLEADING.

1. Property conveyed to an insolvent purchaser as trustee for his wife, the consideration being paid by the husband, becomes subject to the lien of a judgment against him, which is not divested by a return and cancellation of the deed, which is unrecorded.

2. An insolvent purchaser of property, who had paid a part of the price, and taken a deed to himself as trustee for his wife, in which a vendor's lien was reserved, not having recorded such deed, surrendered it, and caused another to be made by his vendor to a third person, who paid the remainder of the purchase money, as security for its repayment and for other indebtedness. *Held* that, as against a judgment creditor of the purchaser, the grantee became subrogated to the vendor's lien to the extent of the payment advanced, but that, as to the remaining indebtedness secured, his lien was subject to that of the judgment.

3. In an action by a judgment creditor to subject property to his judgment, on the ground that an unrecorded deed of the property to the debtor had been fraudulently surrendered and canceled, where the evidence showed that the deed was to the debtor as trustee for his wife, and the heirs of the wife, who was dead, were then made parties, and evidence taken as to such provision in the deed, a decree holding the provision fraudulent and void as against the complainant will not be reversed because the bill was not amended to charge the fraudulent character of the deed.

Appeal from circuit court, Rockingham county; William McLaughlin, Judge.

Action by Triplett and others against Klinge and others. From the decree, defendant Klinge appeals. Affirmed.

John E. Roller, for appellant. Ed. S. Conrad, for appellees.

RIBLY, J. It appears from the record that Samuel Zigler sold the house and lot

described in the bill to Joseph S. Miller, for the sum of \$450, and conveyed it to him as trustee for Emma S. Miller, his wife, on December 1, 1880; the vendor's lien for the purchase money being reserved on the face of the conveyance. The evidence shows that Mrs. Miller was wholly without means or property, and paid no part of the purchase money. It also shows that Miller himself paid off the bond for the first installment of the purchase money, but does not sustain the claim of the counsel for the appellant that he made such payment with the proceeds of property and labor which he was entitled to hold under the law as exempt from liability for his debts. Such statement appears in the answers of certain of the defendants, but it is affirmative matter, not responsive to any allegation of the bill, and is unsupported by any testimony. The bond for the other installment of the purchase money was paid by M. B. E. Klinge, the appellant, upon an agreement with Miller that the land should be conveyed to him to secure the amount so paid and other debts that Miller owed him. The judgment in favor of J. I. Triplett, the plaintiff in the bill, was confessed by John S. Miller on October 7, 1880, and docketed on October 8, 1880, and thereby became a lien from that time on any real estate which Miller then owned or to which he thereafter became possessed or entitled, even against a purchaser for value. It clearly appears from the testimony that Miller was insolvent at the time of the conveyance of the house and lot to him, as trustee for his wife. He could not, therefore, acquire the property, and settle it on his wife, free from liability for his debts. Such conveyance, in so far as it purported to vest in Mrs. Miller the equitable title or any interest in the property, was, as to the existing creditors of her husband, clearly void; and the house and lot became immediately liable to be subjected to the payment of the judgment of the plaintiff upon its conveyance to Miller by Zigler, subject, however, to the vendor's lien for the purchase money. Miller never recorded the deed made to him by Zigler for the house and lot, and, after the death of Mrs. Miller, returned the deed to Zigler, and had him convey on January 22, 1885, the property to the appellant. While the deed from Zigler to Klinge is an absolute conveyance, it is shown by the evidence that it was simply intended to be a mortgage, and to secure to Klinge the part of the purchase money for the house and lot which he had paid for Miller, and other debts from Miller to Klinge. The return to Zigler of the deed he had made to Miller, as trustee for his wife, in order that Zigler might convey the property to Klinge in accordance with the agreement between Miller and Klinge that, if the latter would pay off the bond for the last installment of the purchase money, the property should be conveyed to him

to secure the amount he should so pay and other indebtedness of Miller to him, could not divest the title that was in Miller under the deed, and invest Kline with a good title; yet, having paid off the said bond, he thereby became entitled, in equity, to the first lien upon the land for the purchase money so paid, but not for the other debts Miller owed him. Subject to such lien, the residue of the purchase money having been paid by Miller himself when he was insolvent, the plaintiff Triplett and the other creditors of Miller, who recovered judgments against Miller prior to the date of the deed from Zigler to Kline, were entitled to subject the house and lot to the payment of their judgments in the order of their priority; and the circuit court so decreed.

It was claimed by the appellant that Miller made the payment on the property, and paid for the improvements put upon it, with his (the appellant's) money, and that he was therefore entitled to hold the property under the deed from Zigler free from liability for the judgment of the plaintiff. It does not satisfactorily appear from what source Miller obtained the moneys he so used, though the evidence proves that he was in business with the appellant about that time, and tends to show that he received pecuniary assistance from him. It may be, as was claimed, that, upon a settlement of their business matters, Miller would have been found indebted to the appellant. Still, no trust relation is established, nor such use by Miller of moneys belonging to the appellant shown as would entitle the latter to claim the property itself, or give him a lien thereon for such indebtedness, superior to the judgments recovered against Miller prior to the conveyance from Zigler.

Among other reasons urged by the counsel for the appellant for the reversal of the decree was that, it appearing that the deed from Zigler to Miller was made to him as trustee for his wife, and not merely to himself, the court should not have decreed a sale of the land unless the conveyance in that form was impeached as fraudulent. The bill set forth that Miller bought the house and lot from Zigler, and received a deed for it, but never recorded it, and that Zigler afterwards conveyed the property to Kline. It charged that the failure of Miller to record his deed, and the subsequent conveyance of the house and lot to Kline, constituted a fraud upon the plaintiff, and prayed that the deeds from Zigler to Kline, and from Kline to Compton, trustee, be declared null and void, and the house and lot be subjected to the payment of his judgment. Upon its appearing that the deed from Zigler to Miller was made to him as trustee for his wife, the court caused her heirs to be made parties defendant, and the parties thereupon took their testimony upon the matters involved. It was proved, as hereinbefore stated, that Mrs. Miller had no estate of any kind, and paid no part of the purchase money for the property; and, although Miller had it conveyed to

him as trustee for her, he himself paid all of the purchase money, except the last payment, which was paid for him at his request by Kline. The issue of fraud was presented by the bill. All persons interested were made parties, and the testimony taken. To reverse the decree of the court below because the conveyance, in the particular form it was taken by Miller, as disclosed by the evidence, was not impeached as fraudulent by an amended bill, would be to do so for a bare formality, which in no wise affects the appellant.

The deed from Zigler to Miller, as trustee for his wife, not having been recorded, but returned and canceled, the trustee, G. F. Compton, in the deed of trust made to him by Kline, could not be affected with constructive notice of it. He averred in his answer that he did not have actual notice of the said conveyance, and claimed that he was a bona fide purchaser for value, without notice. There is no evidence to the contrary. He was not aware that Miller had any interest in the property, and his title is apparently good and unaffected by the lien of the judgments recovered against Miller; but, for some reason unexplained by the record, neither the commissioner who took the account of liens, nor the court, in its decree, took any notice of any right in the trustee or in the creditors secured in the deed of trust. They have not appealed, however, and do not complain of the decree appealed from, but acquiesce in it. Perhaps the debts so secured, though the record does not show it, have been discharged.

For the foregoing reasons, the decree of the circuit court must be affirmed.

(83 Va. 565)

#### FACKLER v. BERRY et al.

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

##### DEED—CONSTRUCTION—ESTATE CONVEYED.

A deed to a trustee, to hold as the "absolute" property of the grantor's wife, "that she may have a permanent home for her life, and his children by her a pittance after her death," conveys to the wife a fee simple, and not merely a life estate with remainder to the children.

Appeal from circuit court, Augusta county; William McLaughlin, Judge.

Bill by Ann Eliza Berry and others against F. P. Fackler. There was a decree for complainants, and defendant appeals. Reversed.

Michelberger, Elder & Elder, for appellant. Jas. Bumgardner, for appellees.

KEITH, P. Ann Eliza Berry and others filed their bill in the circuit court of Augusta county, alleging that they are the children of Michael and Elizabeth Fackler, deceased; that on October 5, 1852, Michael Fackler conveyed a tract of land in the county of Augusta, containing 19 acres, "to John B. Watts, trustee, to hold as the absolute property of his wife, Elizabeth Fackler, by whom he derived the premises, that she may have a permanent

home for her life, and his children by her a pittance after her death." Elizabeth Fackler on the 31st of July, 1888, conveyed this tract of land to her son F. P. Fackler, in fee simple, upon the consideration set out in the deed. The bill alleges that under the deed from Michael Fackler to John B. Watts, trustee, Elizabeth Fackler took only a life estate, with remainder to the children of herself and Michael Fackler, and that, therefore, the deed from Elizabeth Fackler to F. P. Fackler conveyed to him no greater interest than Elizabeth Fackler herself possessed, and that at her death the property vested in the children of Michael and Elizabeth Fackler, and is subject to be partitioned among them. The bill prays that F. P. Fackler and such others of the children of Michael and Elizabeth Fackler as had not been named plaintiffs to the bill be made parties defendant thereto (naming them); that the deed from Elizabeth Fackler to F. P. Fackler, in so far as it purports to convey anything more than the life estate of Elizabeth Fackler, may be declared null and void; that the property may be partitioned among those interested; and, if found to be incapable of partition in kind, that it be sold for the purpose of partition, and the proceeds of sale divided among those entitled. F. P. Fackler answered the bill, and the cause came on to be heard before the circuit court, which decreed that the deed from Elizabeth Fackler to F. P. Fackler should be declared null and void, and "of no effect, so far as the same is in conflict with the rights of the children and grandchild of Elizabeth Fackler"; and, it being conceded that the land was not susceptible of partition, commissioners were appointed to sell it. From this decree F. P. Fackler applied to one of the judges of this court for an appeal and supersedeas, which were awarded.

The only point necessary to be decided, though others were discussed at the bar, is, what estate vested in Elizabeth Fackler by the deed from Michael Fackler to John B. Watts, trustee, for her benefit? We must, of course, give effect to the intention of the grantor, which is to be ascertained from the language used, giving to the words the meaning commonly attributed to them. The grant is to the trustee, his heirs and assigns, to hold as the absolute property of Elizabeth Fackler. Language more expressive, apt, and suitable to the conveyance of a fee simple could not have been used. "Absolute" is defined to be "unrestricted; unlimited; complete." It is as though the grantor had said, "I give to my wife the unlimited, the unrestricted, the complete estate in the property hereby conveyed." Had the deed stopped here, we cannot suppose that any question would have been raised as to the interest vested in Mrs. Fackler; but it is contended that the residue of the clause, in which the grantor declares that he conveyed it as the absolute property of his wife, Elizabeth Fackler, "by whom he derived the premises, that she may have a permanent home for life, and his children by her a pittance after

her death," is effectual to reduce the estate in fee simple, which would otherwise have passed, to a life estate in Elizabeth Fackler, and to create a remainder in his children by her, after her death. Where an estate has been clearly vested by one portion of an instrument, it can only be divested by language equally free from doubt. See opinion of Buchanan, J., in *Gaskins v. Hunton* (Va.) 23 S. E., at page 885, and authorities cited. It is far from being clear that the language adverted to was designed by Michael Fackler to reduce the estate given his wife from a fee simple to a life interest. The most that can be said of the language relied upon to vest an interest in their children under the deed from Michael Fackler to Elizabeth, his wife, is that it indicates the motive which induced the execution of that instrument. He gives to his wife the absolute property, that "she may have a permanent home for life, and his children by her a pittance after her death." The word "that," in the sense here used, is equivalent to "in order that," "to the end that," and was never designed to vest any interest or estate in his children by her. There is a class of cases, beginning with *Wallace v. Dold*, 3 Leigh, 258, and running down to *Mosby v. Paul's Adm'r*, 88 Va. 533, 14 S. E. 336, in all of which the language used is far more apt and proper to create an interest in the children than that upon which we are commenting; but in each of those cases it was held that the mother took a fee simple, to the exclusion of any interest whatever in the children, who were named merely as indicating the motive or consideration for the gift. We are of opinion that the circuit court erred in decreeing that the children of Michael and Elizabeth Fackler had any interest under the deed of October 5, 1862, and in directing a sale of the property for partition among them. The decree must therefore be reversed, and this court will enter such decree as the circuit court of Augusta county should have rendered.

(93 Va. 569)

# VIRGINIA HOT SPRINGS CO. et al. v. HARRISON.

(Supreme Court of Appeals of Virginia. Sept. 24, 1896.)

## VENDOR AND PURCHASER — CONTRACT OF SALE — SPECIFIC PERFORMANCE.

After negotiations for the sale and purchase of a lot had been continued for some time by letter, the purchaser made an offer for a lot of certain dimensions, to which the owner answered by offering to accept the price for a lot of smaller size, provided they could agree on other points. The purchaser then wrote that he accepted the proposition on the terms and conditions stated in a former letter, and requested that a deed be executed and sent him. When the deed was received, it contained conditions to which the purchaser refused to accede. Held, that the letters did not constitute a contract which the purchaser could specifically enforce.

Appeal from circuit court, Bath county; William McLaughlin, Judge.

Action by R. J. Harrison against the Virginia Hot Springs Company and others. Decree for complainant, and defendants appeal. Reversed.

W. M. & J. T. McAllister and R. L. Parish, for appellants. J. W. Stephenson, for appellee.

KEITH, P. R. J. Harrison filed his bill in the circuit court of Bath county, praying for the specific performance of a contract for the purchase of a lot from the Hot Springs Company; making the company, H. T. Wickham, and Henry Taylor, Jr., trustees, parties defendant. The Hot Springs Company answered the bill, and from the pleadings and proofs the case appears to be as follows: The Virginia Hot Springs Company is the equitable owner of the Hot Springs property, situated in Bath county, Va., which it has greatly improved as a health and pleasure resort. The legal title thereto is in H. T. Wickham and Henry Taylor, Jr., as trustees. The property has in part been divided into lots, which have been offered for sale. In the autumn of 1894, R. J. Harrison, desiring to purchase one of these lots, commenced negotiations to that end with Decatur Axtell, the president of the Hot Springs Company; and on November 22d of that year Axtell wrote to Harrison a letter, filed as Exhibit A with the bill, which is as follows: "Richmond, Va., November 22, 1894. Mr. R. J. Harrison, Hot Springs, Va.—Dear Sir: Mr. Ingalls says he will give the \$72 rent if you will have the office built of pressed brick. He says it ought to be light colored, and very handsome. If you will make it of light-colored brick, and very handsome, I will undertake to get one-half rates, and you can depend on it, although I have not yet seen Mr. Ingalls about it. Mr. Ingalls also says that we can sell you the lot you describe to me for \$1,500; you to put up a brick store of two stories or more, and run it as a general store, including the drug business, as you please. You mentioned the other day about restrictions. We want to give you as few of them as possible. But you better read over our printed deed, and see if it is objectionable. I do not think it can be. We will have to add to it that you shall not put up any fences, outside privies, nor unsightly structures, and shall connect with the sewer system. I don't know of anything else. These restrictions are, of course, in the interest of lot purchasers as much as the company. I also mentioned to Mr. Ingalls your desire of being connected with the purchases of the company, but told him that you did not make this a condition. He has not replied about this, but, as I told you, I am satisfied that it is a matter that may well receive our attention. I am sure he won't make it a condition in selling of the lot, nor would I want to recommend it in that shape. I believe we have now a pretty definite understanding, and hope you will go ahead. I am very sure the business will be one that will give you the occupation you need, and first-

rate returns. Yours, respectfully, Decatur Axtell, Prest."

There seems to have been some verbal communication between the president of the Hot Springs Company and Harrison relative to these negotiations, but no writings passed between them, after the letter just copied, until February 22, 1895, when Decatur Axtell wrote to Harrison as follows: "Richmond, Va., Feb'y 22nd, 1895. R. J. Harrison, Esq., Hot Springs, Va.—Dear Sir: Mr. Ingalls and Mr. Osborn called my attention to my letter to Mr. Ingalls, of Nov. 17th, 1894, about your lot, in which I say: 'Mr. Harrison offers \$1,500 cash for a lot 125 feet front, about 60 feet deep, across the road leading to the stable from McClinton's and Pole's lots, coming up in the angle far enough so that there will be no one above him. He will undertake to put up a large (two or more stories, brick) general store at once. I told him I would recommend this, and I have no hesitation in doing so. It is an opportunity which we ought not to forego. He says he means business.' I got an immediate reply from Mr. Ingalls, by wire, saying, 'I am willing to let Harrison have the lot.' My attention is called to the difference in size of the lot, and that, while it was assented to at the time, it was done realizing that we were perhaps subjecting ourselves to some criticism on account of the prices which we asked McClinton and Dr. Pole for lots which bear no comparison whatever to this in size. Mr. Ingalls' and Mr. Osborn's ideas about this are certainly very forcible, and respond to opinions which I have already advanced to you. I shall see you to-morrow, and hope you shall be able to confine your lot to the original dimensions which I presented to Mr. Ingalls last November. It seems to me, it should be ample enough; for, if you really need more room, I will consider the terms for the same with you. Yours, respectfully, Decatur Axtell, President."

No written reply to this letter appears in the record, but on March 6, 1895, Harrison wrote as follows to Axtell: "Hot Springs, Bath county, Va., Mar. 6, 1895. Decatur Axtell, Esq.—Dear Sir: Referring to our conversation in regard to that lot opposite McClinton's store and Dr. Pole's cottage (office), upon which I desire to erect a store building, I am willing to give \$1,500 cash for it, if 140 feet fronting on the line of present roadway, and running back at right angles to meet that 20-foot roadway, alongside of the Hot Springs run, or creek, and that triangle at east end of lot to be left open. And ten foot common, or joint, alleyway alongside west end of the lot. Please give me an immediate answer. Yours, respectfully, R. J. Harrison."

On March 8, 1895, Axtell, in reply to Harrison's letter of the 6th, wrote as follows: "Richmond, Va., March 8th, 1895. Mr. R. J. Harrison, Hot Springs, Virginia—Dear Sir: My advices from Cincinnati are that if you want the lot as originally agreed upon,—125

feet frontage,—for \$1,500, it is all right. If this is satisfactory, we will take up the other points, and see if they can be agreed upon. If it is not satisfactory, we will, of course, consider that nothing has been said, and that it is all ended. Yours, respectfully, Decatur Axtell, Prest."

On March 11, 1895, Harrison replied as follows to Axtell's communication of March 8th: "Hot Springs, Va., March 11, 1895. Decatur Axtell, President V. H. S. Co.: Your letter of March 8th, '95, duly received. I accept the lot at Hot Springs, Virginia, fronting one hundred and twenty-five (125) feet on the line of the main avenue, and running back at right angles to within twenty (20) feet of the edge of the Hot Springs branch, on the terms and conditions mentioned in your letter to me Nov. 22nd, '94. Please prepare deed and send to me at once. Very respectfully, &c., R. J. Harrison."

When the case came on to be heard, the circuit court was of opinion that a contract upon the part of the Hot Springs Company for the sale of a lot to Harrison had been proven by the evidence, under circumstances that entitled the plaintiff to its specific execution, and entered a decree to that effect, from which the Hot Springs Company appealed.

A great many questions were discussed in the argument of this case, which, in the view we have taken of it, need not be considered. The vital issue to be determined at the very threshold of the investigation is whether or not the plaintiff and defendant have entered into the contract that is set out in the bill of complaint. In the letter of November 22, 1894, the president of the Hot Springs Company offers to sell the lot about which verbal negotiations had taken place between himself and the plaintiff for \$1,500, upon which a brick store, of two stories or more, was to be erected, in which a general store and drug business was to be conducted. From that letter it appears that in their conversations certain restrictions, which the Hot Springs Company thought proper to impose, had been discussed, and Harrison is advised to read over the forms of printed deeds in use by the Hot Springs Company. He was told, in addition, that he would be forbidden to erect fences, unsightly structures, and other objectionable buildings, and that he would be required to connect with the sewer system. In the letter from Axtell of February 22d, he refers to a communication received by him from Mr. Ingalls and Mr. Osborn, directors in the Hot Springs Company. From this letter it appears that Axtell had on the 17th of November, 1894, notified Mr. Ingalls that Harrison had offered \$1,500 in cash for a lot of 125 feet front and about 60 feet deep, and that Ingalls had, by wire, signified his acceptance of that offer. Axtell then goes on to say that his attention had been called to the difference in the size of the lot,

—evidently meaning that the lot described in his letter to Ingalls was larger than had been mentioned theretofore,—and continues: "I shall see you to-morrow, and I hope you shall be able to confine your lot to the original dimensions which I presented to Mr. Ingalls last November. It seems to me that it should be ample enough; for, if you really need more room, I will consider the terms with you." Not only is there no evidence in the record that up to this time the offer of November 22d had been accepted, but this letter of February 22d is proof to the contrary. The letter of March 6th, from Harrison to Axtell, seems to have been written in reply to that from Axtell to him of February 22d, and offers \$1,500 in cash for a lot with a frontage of 140 feet, and certain conditions which need not be specified. This letter was not only not an acceptance of any offer theretofore made by the Hot Springs Company, but, inasmuch as it introduced a new term, is to be considered as a rejection of the proposition theretofore made. The letter of March 8, 1895, from Axtell, renews the offer of the lot with a frontage of 125 feet for \$1,500, which is, of course, a rejection of the proffer of \$1,500 for a lot of 140 feet frontage. He then goes on to say: "If this is satisfactory we will take up the other points, and see if they can be agreed upon. If it is not satisfactory, we will, of course, consider that nothing has been said, and that it is all ended." Which is equivalent to saying that: "We will sell you a lot of 125 feet frontage for \$1,500, provided we can agree upon other points which must be considered between us; and, if we cannot reach a satisfactory conclusion upon those subjects which are to be discussed, we will consider that all is ended." Harrison replies to this: "Your letter of March 8th, '95, duly received. I accept the lot at Hot Springs, fronting 125 feet on the line of the main avenue, and running back at right angles to within twenty (20) feet of the edge of the Hot Springs branch, on the terms and conditions in your letter to me of Nov. 22, '94. Please prepare deed and send to me at once." A deed was prepared and sent to Harrison, which contained the "other points" which, by the letter of March 8th, were to be the subject of negotiation between the parties if the offer of the lot with the dimensions and at the price stated in that letter was accepted; but, when Harrison came to inspect the deed thus tendered, he found that it contained restrictions and conditions which, in his judgment, so far diminished the value of the property that he declined to accept it. He then determined to rely upon his contract, and to seek redress in the courts.

In 1 Chit. Cont. (11th Am. Ed.), it is said at page 15: "Where an agreement is sought to be established by means of letters, such letters will not constitute an agreement, unless the answer be a simple acceptance of

the proposal, without the introduction of any new term." And again: "If the original offer leave anything to be settled by future arrangement, it is merely a proposal to enter into an agreement. \* \* \* The agreement is not complete until there is upon the face of the correspondence a clear accession on both sides to one and the same set of terms." In 1 Pars. Cont. (6th Ed.) p. 476, it is said: "The assent must comprehend the whole of the proposition. It must be exactly equal to its extent and provisions, and it must not qualify them by any new matter." To the same effect are the decided cases. In *Edichal Bullion Co. v. Columbia Gold-Min. Co.*, 87 Va., at page 651, 13 S. El., at page 103, it is said, "A proposal to accept, or an acceptance, on terms varying from those offered, is a rejection of the offer," and "a subsequent acceptance upon the terms offered does not make a contract." In *Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U. S. 149, 7 Sup. Ct. 169, it is said: "As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party. The one may decline to accept, or the other may withdraw his offer, and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

Applying the principles thus enunciated, and which are too well settled to require any extended citation of authority, it appears that the letter from Harrison dated March 6, 1895, was a rejection of all offers previously made, and terminated the negotiation. The letter from Axtell of March 8th was a renewal of those negotiations, but not in a form which admitted of an unqualified acceptance, because, while the dimensions of the lot are stated, and the price which the company was ready to take for it is fixed, it declares that, before a contract could be consummated, other points were to be considered. All points thus reserved for future negotiation between the parties were presented in the deed which the company tendered, and which Harrison rejected. It is evident, therefore, that the appellant, through its president, and R. J. Harrison never agreed upon all the terms and conditions of a contract. There was never a time, upon the face of the correspondence, "when there was a clear accession on both sides to one and the same set of terms." It follows, therefore, that the contract as set out in the bill has

not been established by the proof, and that the circuit court erred in decreeing its specific performance, and its decree must therefore be reversed.

(93 Va. 605)

# SUPREME LODGE, KNIGHTS OF PYTHIAS, v. WELLER.

(Supreme Court of Appeals of Virginia. Oct. 1, 1896.)

## CORPORATIONS — AMENDMENT OF BY-LAWS AFTER EXPIRATION OF CHARTER—REINCORPORATION—PLEADING.

1. The Supreme Lodge, Knights of Pythias of the World, having been incorporated in 1870 under a law of congress limiting the life of corporations formed thereunder to 20 years, was dissolved by operation of law, and its corporate powers ceased, in 1890; and a by-law purporting to have been adopted in 1893, by which it was provided that the corporation should not be liable on certificates issued to members of the endowment rank in case of the suicide of the holder, was void, and did not affect existing contracts.

2. The act of congress of June 29, 1894, re-incorporating the Supreme Lodge, Knights of Pythias, did not operate to continue the old corporation, which ceased to exist by limitation in 1890, nor to validate corporate acts attempted to be performed after the expiration of its former charter.

3. A corporation is not exempted from a provision of the general law under which it is incorporated by reason of the fact that such provision is not embodied in its charter, nor by a subsequent repeal of the provision, unless the amendment clearly provides that it shall be retroactive.

4. A declaration in covenant against a corporation is not supported by proof of a contract made by another corporation, nor is such proof rendered admissible by evidence that defendant has assumed the obligation of the contract declared on, in the absence of an allegation of such fact.

Error to hustings court of Staunton; Charles Gratian, Judge.

Action by Maggie S. Weller, in her own right, and as guardian and next friend of her children, against the Supreme Lodge, Knights of Pythias, to recover on an endowment certificate. Judgment for plaintiff, and defendant brings error. Reversed.

Turk & Holt, for plaintiff in error. Chalkley & Nelson, for defendant in error.

HARRISON, J. In 1881 William H. Weller received from the Supreme Lodge, Knights of Pythias of the World, a certificate of membership for \$1,000 in the "endowment rank," which is in effect the insurance branch of the order. In 1885, upon his own application, he was transferred from the first to the fourth class of insured; surrendering his original certificate, and receiving in lieu thereof a new certificate or policy, which is the one sued upon in this action. He remained a member in good standing, continuing to pay his dues and assessments, from the time he became a member of the order until his death, which occurred September 11, 1893.

This action of covenant is brought by his widow, Maggie S. Weller, in her own right, and as guardian and next friend of her chil-

dren, against the Supreme Lodge, Knights of Pythias, to recover the amount of said policy; it being for her and their benefit, and payable to them. In addition to the general issue, the defendant society filed two special pleas, upon which issue was joined, which set forth, in substance, that the deceased had voluntarily taken his own life, and that, under a by-law of the association which constituted in part the contract of the assured with the defendant, his right to recover was forfeited.

Upon the trial the defendant society offered to prove that the assured did voluntarily destroy himself, but this evidence was rejected by the court for the reason that the matter sought to be proved did not constitute a defense, in the absence of a contract relieving the society from liability for death from suicide, and that the by-law set out with the defendant's plea, and relied on as showing such a contract, was void, in so far as it affected the deceased. This ruling was excepted to, and constitutes one of the assignments of error.

It appears from the record that the Supreme Lodge, Knights of Pythias of the World, was incorporated in the District of Columbia in the year 1870, under and in accordance with an act of congress entitled "An act to provide for the creation of corporations in the District of Columbia by general law," approved May 5, 1870.

This general law provided that the life of all corporations formed under it should be limited to 20 years.

The by-law relied on by the defendant to defeat the recovery in this case purports to have been adopted as an amendment to the existing laws at a regular meeting of the board held January 12 and 13, 1893,—more than two years after the time fixed by law when the life of the corporation should cease.

The record shows that a special committee on incorporation, appointed for the purpose, reported in September, 1894, to the society, that after a careful examination they had found that the charter granted the Supreme Lodge, Knights of Pythias of the World, had expired by limitation, and, deeming it of great importance that the order should be legally incorporated, they had procured from congress an act of incorporation dated June 29, 1894. This new act incorporated the order as the "Supreme Lodge, Knights of Pythias," leaving off the words "of the World."

It is contended by the defendant society that this act of incorporation was a mere continuation of the original charter; that the new charter of 1894 was not necessary, but was secured only out of abundant caution; and further that, even if the original charter expired in 1890, the society was a de facto corporation, continuing its regular business, and that the question of its legal existence was one that could only be raised by the power which created it, and not by a member, or any one claiming under him; that the provision in the new charter "that all claims, debts, accounts, things

in action or other matters of business of whatever nature now existing, for or against the present Supreme Lodge, Knights of Pythias, mentioned in section one of this act, shall survive, and succeed to and against the body corporate and politic hereby created," is a declaration of the existence of the corporation of 1890 by the power which created it. These contentions cannot be sustained.

When the limit of corporate power is fixed, the corporation is dissolved when the period of limitation is reached, with all the consequences of a dissolution by any other mode. In 5 Thomp. Corp. § 6851, the law is stated thus: "If the charter or governing statute of the corporation fixes a definite period of time at which its corporate life shall expire, when that period is reached the corporation is ipso facto dissolved, without any direct action to that end either on the part of the state or of its members; and no powers created by the charter or governing statute can thereafter be exercised, except such as are continued by force of the statute law for the purpose of winding up its affairs."

When the 20-year life of the charter of 1870 had expired, the corporation, as such, was dead, and it was absolutely without power to adopt the by-law relied on in this case. Nor did those who took charge of the affairs and assets of the corporation after its charter had expired have power to pass such a by-law.

The provision in the new charter already quoted binds the new society to pay all the liabilities of the old, in the most unqualified and unconditional way; but it does not, as claimed, revive the old corporation, or give any life to the by-law now relied on by the defendant.

Inasmuch as the new charter makes no allusion to this by-law, it is to be presumed that congress did not intend that the forfeiture contained in it should survive to the new corporation.

There was no error in the ruling of the lower court rejecting the evidence of suicide until the defendant had established a contract with the assured relieving it from liability for death from suicide; and it follows from what has been said that there was no error in holding further that the by-law set out in the defendant's special plea, and relied on as the evidence of such a contract, was void in so far as it affected the deceased.

The defendant society further insists that inasmuch as the 20-year limit to the corporation of 1870 was not embodied in its charter, but only found in the general law authorizing such charters to be created, and as congress in 1884 passed an amendment to said general law striking out the 20-year limit, the life of said corporation thereby became indefinite.

This position is not tenable. It is not necessary that the general law should be copied in the charter. It forms an essential part of

it, and all parties are bound by its terms, whether copied in the charter, or found only on the statute book. The amended act of 1884, striking out the 20-year limit, only applied to corporations thereafter chartered. It had no application to corporations in existence at the time it was passed. A statute does not have a retroactive effect, unless clearly expressed or necessarily implied.

As already shown, the new society undertook to pay the liabilities of the old, as one of the terms and conditions of its corporation; and this action of covenant is brought by the plaintiffs against the new society, and the policy or certificate issued to deceased in 1885 is declared on as having been issued by the defendant society, and the declaration contains no allegation that the liability had become that of the defendant.

Upon the trial the defendant moved the court to strike out the evidence of the plaintiffs, upon the ground that the declaration did not allege that the liability sought to be enforced had become the liability of the defendant society chartered in 1894. On the contrary, it appeared from the evidence produced by the plaintiffs that the obligation sued on was a covenant made by the corporation which expired in 1890. This motion was overruled by the court, and the ruling excepted to.

No question has been raised as to the form of action adopted in bringing this suit. Ordinarily assumpsit would seem to be the proper action, under the circumstances here disclosed, and it has not been without doubt that the conclusion has been reached to sustain the action of covenant in this case. The language used by the defendant in its charter, in acknowledging the liabilities of the old society as its own, would seem to be broad enough to justify the same form of action against the society taking upon itself the liability that could have been maintained against the society issuing the policy. It was, however, essential that the declaration should allege that the debt sued for had become that of the defendant. The evidence must be confined to the issues made by the pleadings. There was a variance between the allegations and the proof, and the defendant's motion to strike out the plaintiffs' evidence ought to have been sustained.

As this case must be sent back for a new trial, it becomes unnecessary, and would be improper, to pass upon other assignments of error that may not arise on the next trial, or might arise, if at all, in a different form.

For the error of the court in overruling the defendant's motion to strike out the plaintiffs' evidence because it did not correspond with the allegations of the declaration, its judgment must be reversed, the verdict set aside, and the cause remanded to the hustings court for a new trial to be had therein, with direction to grant leave to the plaintiffs to amend their declaration if they shall be so advised.

(93 Va. 667)

## PRISON ASS'N OF VIRGINIA v. ASHBY.

(Supreme Court of Appeals of Virginia. Oct. 5, 1896.)

## STATUTES—TITLES OF ACTS—CONSTITUTIONAL LAW—SUPREME COURT OF APPEALS—JURISDICTION.

1. Act Feb. 27, 1896, is entitled "An act in relation to commitments of minors to Prison Association of Virginia and their custody." Sections 1 and 2 provide that no person shall be committed to or detained in the prison association after he is 21 years old, under what circumstances minors may be committed to the association, and how and at whose expense they shall be conveyed to it. Section 3 provides that jurisdiction of all habeas corpus and other proceedings to test the right of said prison association to retain custody of such minors as shall be committed, etc., to its custody, shall be exclusively in the circuit court of Richmond. *Held*, that the subject of section 3 is embraced in the title of the act, within Const. art. 5, § 15.

2. Section 3, Act Feb. 27, 1896, is not unconstitutional because it takes away the jurisdiction of all the state courts, except that of the circuit court of Richmond, to award writs of habeas corpus where parties are alleged to be unlawfully detained in custody by the association.

3. Const. art. 6, § 2, providing that the supreme court of appeals shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition, does not confer jurisdiction on such court in cases of habeas corpus, etc., but simply invests such court with capacity to receive original jurisdiction in those cases in the event the legislature shall see fit to confer it.

Error to circuit court, Washington county; John P. Sheffey, Judge.

Petition by William Ashby for a writ of habeas corpus to obtain his discharge from the custody of the Prison Association of Virginia, to which he had been committed. There was a judgment granting the writ, and the prison association brings error. Reversed.

Fulkerson, Pag & Hurt and J. Randolph Tuck, Jr., for appellant. John J. Stuart, for appellee.

BUCHANAN, J. A number of interesting and important questions were raised and discussed in this case, but, in the view we take of it, the only question that it is necessary for us to decide is the constitutionality of an act of the general assembly approved February 27, 1896.

The first objection to the validity of section 3 of the act is that its title gives no intimation of the legislation contained in that section, and that it is therefore void, because not passed in conformity to section 15, art. 5, of the constitution.

The act is entitled "An act in relation to commitments of minors to Prison Association of Virginia and their custody." It contains four sections.

The first section provides that no person shall be committed to or detained in the prison association after he has reached the age of 21 years.

The second section provides under what circumstances minors may be committed to the association, and how and at whose expense they shall be conveyed to it.

Section three provides that "jurisdiction of all habeas corpus and other proceedings to test the right of said Prison Association of Virginia to retain custody of such minors as shall be committed, or surrendered or received into its custody shall be exclusively in the circuit court of Richmond."

The fourth section provides that all acts or parts of acts inconsistent with the act are repealed. Acts 1895-96, pp. 521, 522.

The rule or principle established by this court for determining whether the title of an act is sufficiently comprehensive to embrace the various provisions which are contained in it, under the requirement of section 15, art. 5, of the constitution, is this: That, although the act or statute authorizes things of a diverse nature to be done, the title will be sufficient, if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, are congruous, and have a natural connection with, or are germane to, the subject expressed in the title. *Brown's Case*, 91 Va. 762, 771, 772, 21 S. E. 357, 360, and cases cited; *Ingles v. Straus*, 91 Va. 209, 21 S. E. 490.

A provision in the act providing what court shall have jurisdiction to determine whether or not the minors committed to and held by the prison association are lawfully in its custody, has a natural connection with, and is germane to, the subject expressed in the title.

The title of the act is, in our opinion, sufficiently broad to cover all of its provisions.

It is also contended that taking away the jurisdiction of all the courts of the commonwealth, except that of the circuit court of the city of Richmond, to award writs of habeas corpus in cases where parties are alleged to be unlawfully detained in custody by the prison association, and compelling parents or guardians to travel "hundreds of miles to that court to sue out and prosecute this great, universal writ," is such an abridgment of the right as to render section 3 of that act unconstitutional.

In determining the constitutionality of a statute, the courts have nothing to do with the question whether or not the legislation contained in its provisions is wise and proper. The only question they have to deal with is one of power. The legislature of the state has plenary legislative power, except where it is restricted by the constitution of the state or of the United States.

If the statute whose validity is attacked is not in conflict with the state or federal constitution, the courts have no power to declare it invalid, however well satisfied they may be that it is unwise or vicious legislation.

There is no provision in the constitution which prohibits the legislature from conferring exclusive jurisdiction upon the circuit court of the city of Richmond to award writs of habeas corpus in cases where the party for whose benefit the writ is awarded is detained in the custody of the prison association.

It is also claimed that this court has conferred upon it by the constitution original jurisdiction to hear cases of habeas corpus, and that section 3 of the act in question is unconstitutional, because it attempts to deprive this court of that jurisdiction.

If it were true that the constitution conferred upon this court original jurisdiction in cases of habeas corpus, it by no means follows that the act, so far as it deprives other courts of their jurisdiction over such cases, would be invalid.

Section 2 of article 6 of the constitution, providing that this court shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition, does not, *proprio vigore*, confer jurisdiction upon it.

The constitution does not prescribe any case in which the appellate powers of this court shall be exercised, nor declare that it shall exercise original jurisdiction in all cases of habeas corpus, mandamus, and prohibition. The exception as to original jurisdiction in cases of mandamus, habeas corpus, and prohibition invests the court with capacity to receive original jurisdiction in those cases in the event, the legislature shall see fit to confer it, but it does not, of itself, confer the jurisdiction.

This question was fully considered by this court in the case of *Barnett v. Meredith*, 10 Grat. 650, and the conclusion reached—which has since been followed—that whatever jurisdiction this court exercises must be by virtue of some statute enacted in conformity to the constitution. Page v. Clopton, 30 Grat. 417; *Gresham v. Ewell*, 84 Va. 784, 6 S. E. 134; *Price v. Smith* (decided at the April term of this court, 1896) 24 S. E. 474.

We are of opinion that the act is not unconstitutional, and that the county court of Washington county had no jurisdiction of the case.

The judgment complained of must be reversed, the writ quashed, and the case dismissed.

(93 Va. 596)

DIAMOND STATE IRON CO. et al. v.

ALEX. K. RARIG CO. et al.

(Supreme Court of Appeals of Virginia. Oct. 1, 1896.)

BILL OF REVIEW—ESSENTIALS OF—JUDGMENT—RES JUDICATA—PROCEEDINGS TO DISTRIBUTE ASSETS OF INSOLVENT CORPORATION.

1. A corporation conveyed all its assets to a trustee for the benefit of its creditors. The trustee resigned, and a receiver was appointed, who reported to the court as to a certain transaction out of which claims in favor of the corporation might arise. He was authorized, if so advised by his counsel, to bring action for their enforcement, but no such action was commenced, and a final decree for distribution, and discharging the receiver, was entered without objection. Afterwards a creditor, who participated in the distribution, without leave of court, filed a bill, not sworn to, nor alleging newly-discovered evidence, in which some of the parties to the former proceedings were made parties, and others were joined, seeking to enforce for the benefit of creditors the claims in favor of the corporation so reported on by the receiver. *Held*, that such bill could not be considered a bill of review of the court's decree.

2. Such proceeding is not a petition for rehearing.

3. A final decree in proceedings by which the assets of an insolvent corporation are administered through a receiver is conclusive as to all matters which were or should have been litigated in the course of such proceedings; and a bill cannot thereafter be maintained by a creditor of the corporation, who was a party to such proceedings, and participated in the distribution of the assets, against other parties, to enforce rights alleged to exist against them in favor of the corporation, upon which a report was made to the court by the receiver, but to enforce which no action was taken.

Appeal from circuit court, Rockbridge county; William McLaughlin, Judge.

Action by the Diamond State Iron Company and others against the Alex K. Rarig Company and others. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed.

Winbourne & Batchelor and Kirkpatrick & Kirkpatrick, for appellants. J. G. Haythe, H. A. Burroughs, W. A. Anderson, R. L. Parrish, and Hugh A. White, for appellees.

CARDWELL, J. The single assignment of error in the petition for an appeal in this case is to the action of the circuit court of Rockbridge county in sustaining the demurrer to the petitioners' bill.

The bill filed March 19, 1896, by the Diamond State Iron Company and others, on behalf of themselves and all other creditors of the Alex K. Rarig Company, a corporation chartered by the circuit court of Rockbridge county, Va., August 30, 1890, against the Alex K. Rarig Company, Alex K. Rarig & Co., and numerous other parties, stockholders or subscribers to the stock of the Alex K. Rarig Company, avers that the complainants are creditors of the Alex K. Rarig Company, and, after setting out their respective demands, the amounts thereof, etc., it says that on the 9th day of February, 1892, the Alex K. Rarig Company conveyed all of its assets to J. E. Mullen, trustee, for the benefit ratably of all its creditors; that on the 3d Monday in March, 1892, the Southern Railway Supply Company, a supply lienor of the Alex K. Rarig Company, filed a bill in the circuit court of Rockbridge county, on behalf of itself and all other creditors, against the Alex K. Rarig Company, and Mullen, trustee, for the specific object of enforcing its lien, and incidentally for having an account stated of all liens and their priorities; that the Pocahontas Coal Company also filed a bill in the same court against the same defendants for the enforcement of its supply lien; that on the 20th of April, 1892, the Morgan Engineering Company and others filed their bill of complaint in the corporation court of the city of Buena Vista against the same defendants, the objects of which were to have the deed of trust of February 9, 1892, to Mullen, trustee, administered, under the supervision and direction of the court, to require the trustee to give bond, to settle his accounts, and to have a proper account taken of the debts due by the Alex K.

Rarig Company, their respective priorities as liens on the corporate assets, and a sale of the trust property; that this last-named cause was removed to the circuit court of Rockbridge county, and consolidated with the other two causes; and that in the consolidated causes such proceedings were had that the trustee, Mullen, resigned his position as such, and the property and effects of the Alex K. Rarig Company were committed to R. R. Witt, sheriff of Rockbridge county, and as such receiver. It is further averred that the receiver, in his report of September 19, 1893, refers to a contract between Alex K. Rarig & Co., of the one part, and the Buena Vista Company and others, of the other part, dated August 16, 1890, which provides for the purchase by the parties of the second part from said Alex K. Rarig & Co. of \$25,000, at par, of the capital stock of the Alex K. Rarig Company; that the report states that this amount was paid to said Rarig & Co. by the Alex K. Rarig Company, and asks the judgment of the court whether suit should be brought for the recovery of the amount so paid; and that the court thereupon entered an order directing the receiver to sue if he should be so advised by his counsel, but at the September term, 1894, before any suit was brought by the receiver, and without any further report by him on this subject, a decree was entered striking the cause from the docket; and that, therefore, complainants are advised and aver that this decree was improvidently entered; and that the receiver's counsel had not advised against the right to recover the said amount; and that complainants charge that the claim is a good, valid, and just one, and ought to be paid. Complainants here make exhibits, and ask that they be considered as parts of their bill, a copy of the contract of August 16, 1890, referred to, a copy of certain resolutions passed by the stockholders' meeting of the Alex K. Rarig Company on September 5, 1890, and a copy of the charter of incorporation of said company, and aver that the \$25,000 directed to be paid by the said resolution of September 5, 1890, was paid to and received by Alex K. Rarig out of the treasury of the Alex K. Rarig Company, in accordance with the terms of the resolution, and that this sum constituted part of the payment by shareholders on their subscriptions to the capital stock of the company. It is further averred that the agreement to purchase of Rarig & Co. \$25,000 of the capital stock of the Alex K. Rarig Company was, by the express terms of the contract of August 16, 1890, an individual liability of the subscribers, with which the Alex K. Rarig Company had no concern; that the action of the stockholders' meeting of September 5, 1890, in authorizing, and of the officers of the company in making, payment of this sum of \$25,000 to Alex K. Rarig, was ultra vires, and as to complainants, creditors of the company, it was a grossly fraudulent misappropriation of the funds of the company, which then undertook to act as a corporate body; that, at the time, Alex K. Rarig

was president of the Alex K. Rarig Company, and a member of the firm of Alex K. Rarig & Co., which firm held \$150,000 of the stock of the Alex K. Rarig Company, out of a total issue of \$275,000, and was present and participated in the stockholders' meeting which authorized said payment; and that, without his vote, the illegal action could not have been taken and carried out. Therefore complainants charge that this \$25,000 was a trust fund for creditors of the Alex K. Rarig Company, and that Alex K. Rarig & Co., who received, as well as the parties of the second part to the contract of August 16, 1890, whose debts the funds of the Alex K. Rarig Company were used to pay, are personally liable to complainants for the damage they have sustained by reason of the premises.

Complainants further aver and charge that the charter of the Alex K. Rarig Company provided that its minimum capital shall be \$300,000, and this was held out to complainants as an inducement to contract with it, and as a basis of credit; that the subscribers to the stock of the company, to wit, the persons whose names are signed to the contract of August 16, 1890, agree in said contract that \$300,000 shall be the minimum of the company's capital, and yet they, by their contract, conspired and agreed together that only \$275,000 of capital stock should be issued or subscribed for before the corporation commenced business; that they actually organized the pretended company before the minimum capital was subscribed, thereby falsely representing to the complainants and the public generally that the corporation was properly organized, and actually possessed capital stock to the amount of \$300,000; that, by these proceedings and false representations, complainants have been deceived and defrauded, and therefore they charge that it is incumbent on the said subscribers, parties to the contract of August 16, 1890, to make good their representations; that they should be made to pay the amount required to make available this "reserve fund"; that their liability to do this is joint and several; and that, all of the tangible assets of the Alex K. Rarig Company having been exhausted, complainants have no other means of realizing their debts than as herein stated.

The bill prays that it may, in so far as applicable, be treated as a petition in the consolidated cause of the Southern Railway Supply Company et al. against the Alex K. Rarig Company et al.; that the decree in that cause entered at the September term, 1894, in so far as it attempts to strike the cause from the docket, be set aside; that said cause be reinstated on the docket; that an order be entered therein revoking the order of September 19, 1893, empowering the receiver to sue for the recovery of the \$25,000 mentioned in his report of September 19, 1893; "that the payment of the \$25,000 to Alex K. Rarig & Co. by the Alex K. Rarig Company, pursuant to the resolution of September 5, 1890,

be rescinded, vacated, and annulled, the stock which was hypothecated therefor be surrendered, and the defendants required to pay to complainants, or to such person for them as the court may designate, the said sum of \$25,000, with interest," etc.; that the defendants be required to make good the \$25,000 of capital stock required to constitute the minimum of \$300,000, or so much thereof as may be needed to satisfy complainants' demands; that a trustee may be substituted in the deed of February 9, 1892, in the stead of J. E. Mullen, resigned, if the court should deem it advisable for the purpose of this suit, etc.; and that general relief be afforded complainants as their case may require.

The question first presented is: Can the complainants' bill be considered as a petition to rehear the decree of September 15, 1894, and, if not, can it be considered as a bill of review? It is the disposition of courts of equity to regard substance rather than form, and so to mold the pleadings as to attain the real justice of the case; and to this end a petition for a rehearing is sometimes treated as a bill of review, and vice versa. 1 Barb. Ch. Prac. 127, 331, 332, and cases cited. Here, however, the bill cannot be treated as a petition to rehear, or as a bill of review. The decree asked to be reheard is a final decree, and the bill falls far short of containing the requisites of a bill of review. When the application for leave to file a bill of review is based upon the allegation of after-discovered evidence, it is never a matter of right, but rests in the sound discretion of the court. It must be supported by affidavits, which must set forth and satisfactorily prove that the evidence is not only new, but such as the party, by the use of reasonable diligence, could not have known of; for, if there be any laches or negligence in this respect, that destroys the right to relief. The evidence must have been discovered since the decree, and must appear to be material to the case, and such as would probably effect a different result; for immaterial or merely cumulative testimony will not suffice to sustain a bill of review, and if a party should be allowed to go on to a decree without looking for evidence which might be obtained by a proper search, and afterwards, upon finding the evidence, file a bill of review, there would be no end to such bills. 1 Barb. Ch. Prac. 336, 337, and cases cited; *Campbell's Ex'r's v. Campbell's Ex'r*, 22 Grat. 674.

There is no suggestion in the bill here of any after-discovered evidence, nor was the bill sworn to, nor was the leave of court obtained for filing it, both of which are requisite in reference to a bill of review based upon this ground. Nor are there shown anywhere in the bill errors upon the face of the record in the first suit, nor does the bill aver the necessary parties to make it a bill of review, as the plaintiffs in the creditors'

bill in the former consolidated causes are omitted, while, in addition to making the defendants in the former suit defendants here, the subscribers to the stock of the Alex K. Rarig Company are also made defendants. The complainants here were parties to the former suit, and participated in the distribution of the assets of the Alex K. Rarig Company among its creditors in that cause, as shown by the final decree therein of September 15, 1894, wherein appears this clause: "And it appearing \* \* \* that a final settlement has been made with all the creditors entitled to the payment out of said funds [the fund arising from the sale of company's property in that suit], it is therefore adjudged," etc. "And, it appearing that the object of this suit has been accomplished, it is ordered that this cause be stricken from the docket." The deed of assignment to Mullen, trustee, which was being enforced under the direction of the court in the former suit, describes in detail the property of the Alex K. Rarig Company; and to make plain that it was intended to convey every vestige of property of every character and description owned by the company, or to which it was entitled, this clause is found therein: "All accounts, ledgers, account books, and books containing the records of the business of the said Alex K. Rarig Co., all notes, bonds, bills, cash in hand, evidences of debts, in whatsoever form, and choses in action, of whatever kind, including herein rights of action in favor of the said party of the first part against its stockholders and other debtors, \* \* \* arising on account of subscriptions to its capital stock or otherwise. \* \* \*" The deed also names the creditors of the company intended to be secured, and the amount and character of their respective demands; and in this schedule of creditors the complainants here or their assignors are found. It therefore follows that the complainants were not only parties to the former suit, and participated in the distribution of the funds under the control of the court, but had every opportunity to bring to the attention of the court the matters set up in their bill here, if this, in fact, was not done. One of these items had been brought specially to the attention of the court, and the other was, upon the face of the proceedings, patent to the complainants, as well as to every other party interested in the assets of the Alex K. Rarig Company being administered by the court; yet they interposed no objection to the final decree in that cause, nor do they now allege any excuse or explanation for their failure to litigate then the matter of which they now complain, nor do they claim to have been ignorant of them prior to the entry of the final decree.

Treating the bill, then, as an original bill,

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the question remains whether or not the matters sought to be litigated are *res adjudicata*. It was said by Sir James Wigram, V. C., in *Henderson v. Henderson*, 3 Hare, 115, "that, where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which, the parties exercising reasonable diligence, might have brought forward at the time." See, also, 7 Rob. Prac. (New) 175, and cases cited. The doctrine so well and comprehensively stated by Vice Chancellor Wigram is founded upon the familiar maxim in our jurisprudence that no person shall be twice vexed for one and the same cause. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation. It has been sanctioned and approved in numerous cases decided by this court, among which are *Railroad Co. v. Griffith*, 76 Va. 913; *Withers' Adm'r v. Sims*, 80 Va. 660, 661; *McCullough v. Dashiell*, 85 Va. 41, 6 S. E. 610; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361; *Osburn v. Throckmorton*, 90 Va. 316, 18 S. E. 285; *Beale's Adm'r v. Gordon* (Va.) 21 S. E. 667. See, also, *Wells, Res Adj.* § 282; *Freem. Judgm.* §§ 246, 249, 256. It clearly appears from the bill and exhibits that all the matters set up here were, or might have been, and should have been, litigated in the original suit. According to the bill, both arose out of the contract of August 16, 1890,—one specially brought to the attention of the court in the original suit, and the other necessarily known to the complainants prior to the final decree in that cause, or could have been known to them by the exercise of ordinary diligence, and might have been litigated within the scope of the pleadings in the cause, and been decided therein. This being the case, the doctrine of *res adjudicata* applies.

For the foregoing reasons, we are of opinion that there is no error in the decree of the circuit court of Rockbridge county sustaining the demurrer to the complainants' bill, and it is therefore affirmed.

(48 S. C. 21)

STATE ex. rel. COLUMBIA ELECTRIC  
STREET-RAILWAY, LIGHT &  
POWER CO. v. SLOAN,  
Mayor, et al.

(Supreme Court of South Carolina. Nov. 25,  
1896.)

MUNICIPAL ORDINANCES—REGULATION OF STREET  
RAILWAYS.

Petitioner was incorporated as a street-railway company under an act by which it acquired the franchises, and assumed the duties, of its predecessors, whose charters contained provisions making the running of the cars subject to the regulations of the city council; and, when petitioner applied for leave to operate its cars by electricity, it presented the draft of an ordinance which, *inter alia*, declared that the council reserved the right to regulate the manner of operating such railway, and to amend the ordinances relating thereto, as the public welfare should demand. Acts 1871 (14 St. at Large, 569) § 10, authorized the city authorities to make, by ordinance, such regulations relative to streets as were necessary to preserve order and safety. *Held*, that the authorities had power to ordain that petitioner's cars should not be operated without a conductor in charge thereof.

Appeal from common pleas circuit court of Richland county; D. A. Townsend, Judge.

Petition by the Columbia Electric Street-Railway, Light & Power Company for a writ of prohibition against W. McB. Sloan, mayor of the city of Columbia, and another. From an order granting the writ, defendants appeal on exceptions set out below. Reversed.

Exceptions: "The respondents above named except to the judgment and order of Judge Townsend granting the writ of prohibition in the above-entitled proceeding, of date August 5, 1895, upon the following grounds: (1) Because his honor erred in ordering that the writ of prohibition do issue, and in holding that the city council of Columbia had no authority delegated to it by the legislature of the state of South Carolina to regulate the petitioner's domestic affairs in such manner as it has undertaken to do by the ordinance in question. (2) Because his honor erred in not holding that the legislature of the state of South Carolina had delegated authority to the city council of the city of Columbia to pass the ordinance making it unlawful for street cars to be run in the streets of the city of Columbia without a conductor, and to impose a fine of not more than forty dollars for a violation thereof. (3) Because his honor erred in not holding that the ordinance in question was a necessary and proper exercise of the police power of the city of Columbia, under the charter granted to said city by the legislature of the state of South Carolina, to make 'All such ordinances, rules, and regulations relative to the streets and markets of said city as they may think proper and necessary, and to establish such by-laws not inconsistent with the laws of the land as may tend to preserve the quiet, peace, safety, and good order of the inhabitants thereof.' (4)

Because his honor erred in not holding that the franchise granted to the petitioner to operate an electric street railway in the city of Columbia was subordinate to the right of the city, under its charter, to make reasonable rules and regulations for the operation of said electric street railway, and erred in not holding that the ordinance requiring a conductor as well as a motorman was a reasonable regulation. (5) Because his honor erred in not holding that the petitioner could, under its charter, construct or acquire an electric street railway through and upon the streets of the city of Columbia only with the consent of city council, and erred in not holding that the city council of Columbia, in giving its consent, had the right to attach thereto any reasonable rules and regulations for the operation of said road, and had also the right, when giving its consent, to reserve the power, after the building of said road, to make such further rules and regulations for the operation thereof as in their judgment the public safety and welfare might demand, and erred in not holding that the ordinance making it unlawful for electric cars to be run without conductors in the streets of the city of Columbia was a regulation authorized to be made under the reservations which were attached to the city's consent for the occupation of its streets for the purposes of said electric road. (6) Because, if his honor's order was intended, or can be construed, as authorizing the writ of prohibition to restrain the enforcement of any part of the ordinance, other than so much thereof as makes it unlawful for electric cars to be run in the streets of the city of Columbia without conductors, then he further erred therein upon the grounds above mentioned, and also upon the further ground that the validity of the remainder of said ordinance was not at issue before him, and no question was made or raised at the hearing in regard thereto."

John P. Thomas, Jr., for appellants. John T. Sloan and W. H. Lyles, for respondent.

GARY, J. The petitioner herein made application to his honor, Judge D. A. Townsend, for a writ of prohibition to restrain and prohibit the mayor and chief of police aforesaid from enforcing an ordinance of said city making it unlawful for the said company to operate its electric street cars upon the streets of Columbia unless the same were in the charge of conductors. The said ordinance provides that a violation thereof shall be punishable by a fine not exceeding \$40. After trial for a violation of said ordinance, the petitioner company was sentenced to pay a fine of \$10; hence the application for the writ of prohibition. The petitioner alleged, as grounds for the writ, that the ordinance aforesaid was *ultra vires*, null, and void, and that the mayor did not have jurisdiction in the premises. The application was heard and decided by his honor, Judge

Townsend, upon the petition, answer of the mayor and chief of police, and exhibits set out in the case. His honor, Judge Townsend, granted an order allowing the writ to be issued, from which order the mayor and chief of police have appealed to this court upon exceptions which will be set out in the report of the case.

There seems to be no dispute as to the facts, and the question is therefore one of law, to wit, whether the ordinance was ultra vires, and the mayor without jurisdiction to impose the fine. It is alleged in the answer "that, in the judgment of the city council of the city of Columbia, the passage of the said ordinance was necessary for the safety and protection of the inhabitants of the city of Columbia; that the operation of electric cars in charge of motormen, without conductors, in the streets of the city of Columbia, is dangerous to the lives of its citizens; and that the ordinance in question is a necessary and proper exercise of the police power of the city of Columbia, and its enforcement is necessary for the safety of the inhabitants of the city, and for the proper regulation of traffic upon the streets of said city." It is contended that the legislature conferred upon the city of Columbia power to make said ordinance by the act of 1871 (14 St. at Large, 569), section 10 of which provides: " \* \* \* And the said mayor and aldermen shall have, and they are hereby vested with full and ample power from time to time, under their common seal, to make all such ordinances, rules, and regulations relative to the streets and markets of said city as they may think proper and necessary, and to establish such by-laws not inconsistent with the laws of the land as may tend to preserve the quiet, peace, safety, and good order of the inhabitants thereof; and the said mayor and aldermen, or the said mayor alone, may fine, and impose fines and penalties, for violations thereof, which may be recovered in a summary manner, to the extent of forty dollars, before them in council, or before him alone, subject to the right of appeal as hereinbefore provided. \* \* \* " The Columbia Street-Railway Company was prior to the 29th of June, 1886, organized under the provisions of an act of the legislature incorporating it, approved 9th February, 1882. Sections 5 and 6 of this act are as follows:

"Sec. 5. That the said company shall have power to construct single or double railway tracks of such gauge as they may elect, through any street or streets of the city of Columbia as it may deem advisable for the accommodation of the public or the interest of the company, and to extend the same five miles beyond the corporate limits of the city: provided, that the said company shall so construct its railways that they shall not obstruct the streets through which they pass, and that the company shall be required, after laying said railways, to replace the portion of the streets over which they pass in good condition, and thereafter keep their railway in like good order; in consideration of which the said company shall have such exclusive right of way over

said railway, as may be necessary for the proper conduct of its business.

"Sec. 6. That said company shall have power to transport passengers and freight in suitable and sufficient carriages and cars at such rates as may be fixed in the by-laws of the same."

On the 8th of June, 1896, the Columbia Street-Railway Company petitioned the city council of Columbia for leave to lay its tracks, etc., in certain streets of said city. On the 29th of June, 1896, an ordinance was passed entitled "An ordinance to authorize the Columbia Street-Railway Company to lay their tracks along certain streets herein mentioned, to regulate the manner of the same, and to regulate the manner of operating said railway." Section 12 of this ordinance is as follows: "The corporate authorities reserve the right to amend or alter this ordinance whenever circumstances may require it, and the granting of the privilege to this company to construct its tracks through any street is not exclusive, and the said city authorities may grant the same right to other companies through the same streets or thoroughfares if they deem it advisable." By an act of the legislature approved 24th December, 1890, the Columbia Electric Street & Suburban Railway & Electric Power Company was incorporated. Section 5 of this act is as follows: "That the said company shall have power to construct or acquire single or double railway tracks, of such gauge as they may elect, with consent of city council, and to extend the same five miles into the country in any direction or directions they may wish from the state capitol. And the said company is authorized and empowered to contract for and provide electric motor power for any other purpose or purposes." Section 6 of said act is as follows: "That the said company shall have power to operate their cars in the transportation of passengers and freight, over the tracks they may construct or acquire in said city, with electric power, in suitable carriages, and at such rates as may be fixed upon in the by-laws of the same." The petitioner company was incorporated by an act of the legislature approved 16th December, 1891, and, by authority of that act, acquired the rights and franchises of the two companies hereinbefore mentioned, subject to the liabilities and duties of said companies. On the 13th of September, 1892, the Columbia Electric Street-Railway, Light & Power Company petitioned the city council for leave to operate its cars by electricity. In pursuance of said petition the city council on the 11th of October, 1892, passed an ordinance entitled "An ordinance to confer upon the Columbia Electric Street-Railway, Light & Power Company the powers and privileges conferred upon the Columbia Street-Railway Company by an ordinance ratified on the 29th day of June, 1886, and to enlarge the same." Section 3 of the last-mentioned ordinance is as follows, to wit: "And be it further ordained that the city council of Columbia, S. C., shall have the power and hereby reserves the right to regulate by

ordinance the manner of operating such electric railway, and to alter and amend the ordinances relating thereto by such further enactments as in their judgment the public welfare may demand."

The exceptions will not be considered seriatim, as they raise substantially the single question whether the city council had the power and authority to make the ordinance in question. It is not necessary to cite authorities to sustain the general proposition that street railways are subject to reasonable regulations by the authorities of the municipality where they are located, under its police powers. In this case the question whether the ordinance is reasonable is not before the court for consideration. We will proceed to consider whether the city council had the power to make the regulation aforesaid,—that street cars should not be run unless in charge of a conductor. Not only is there an absence of legislative intent to prevent the authorities of the city of Columbia from exercising its powers of police in regard to the street railways, but the trend of the various legislative enactments relative thereto, and hereinbefore mentioned, is to make the running of the street cars subject to rules and regulations prescribed by the city council. This police power of the city seems to have been recognized by the petitioner when it filed its petition with the city council, asking permission to be allowed to make such changes in its line as were necessary to enable it to operate its cars by electricity, and with said petition presented the draft of an ordinance to accomplish that result, section 3 of which ordinance is hereinbefore set out. The authorities are not in harmony touching the abstract question whether municipal authorities have the right to make a regulation that the street cars shall not be operated unless in charge of a conductor. Whatever doubts may exist as to this abstract question, we are nevertheless of the opinion that the facts connected with the case show that the city council had the power to pass the ordinance in question, and that his honor, the circuit judge, was in error in deciding to the contrary. It is the judgment of this court that the order of the circuit court be reversed, and the petition dismissed.

(48 S. C. 8)

**CITY COUNCIL OF ANDERSON v.  
FOWLER.**

(Supreme Court of South Carolina. Nov. 24, 1896.)

**CONSTITUTIONAL LAW—RIGHT OF APPEAL—STATUTE—MUNICIPAL CORPORATIONS—TRIAL OF OFFENSES AGAINST ORDINANCES—DISQUALIFICATION OF OFFICERS.**

1. Const. 1868, art. 1, § 19, providing that "all offenses less than felony \* \* \* shall be tried summarily before a justice of the peace or other officer authorized by law, \* \* \* saying to the defendant the right of appeal," contemplates a right of appeal to a superior court; and under article 4, § 1, authorizing the general assembly to "establish such municipal and other inferior courts as may be deemed necessary,"

all municipal courts so established are inferior courts, standing on practically the same footing as a justice court, and the limiting of a defendant's right of appeal from one municipal court to an appeal to another municipal court is an abridgment of his constitutional rights.

2. Act 1887 (19 St. at Large, 950) and Act 1888 (20 St. at Large, 108), amending section 6 of the charter of the city of Anderson by striking out the provision which gave the mayor and the city council the powers and jurisdiction of a trial justice as to the trial of offenses against the ordinances, under which a defendant had the right of appeal to the circuit court, and substituting a provision that such offenses should be tried before the mayor, from whose decision an appeal might be taken to the council, on the hearing of which the aldermen should sit as jurors, are invalid, by reason of their failure to save to the defendant his constitutional right of appeal to a superior court, and the original section remains in force.

3. A decision of the supreme court holding a statute constitutional when attacked in one action does not constitute an adjudication which concludes the court from declaring it unconstitutional when assailed in another action, between different parties, on other grounds; a decision involving the validity of an act of a co-ordinate branch of the government being properly confined to such questions as are raised and discussed in the particular case.

4. An officer of a municipal corporation is not disqualified from acting as a judge or jurymen, on the trial of a defendant for an offense against the ordinances of the corporation, on the ground that he is a party to the prosecution.

5. On the trial by a city council of an appeal taken by a defendant from a conviction before a member of such council while acting as mayor pro tem., such member is disqualified from voting in the capacity of a juror.

6. Where a member of a city council sits with the other members in the trial of a case brought before them on appeal, the presumption is that he voted on the decision of the case.

Appeal from general sessions circuit court of Anderson county; Joseph H. Earle, Judge.

S. M. Fowler was convicted of the violation of an ordinance of the city of Anderson, on trials before the mayor and the full council; and an appeal taken by him to the general sessions was dismissed, from which order he appeals. Reversed.

Bonham & Watkins, for appellant. Geo. H. Prince, for respondent.

McIVER, C. J. The case, as prepared for argument here, contains the following statement of facts: "The appellant was convicted by Alderman Hill, acting mayor of the city of Anderson, on the 26th day of May, 1896, of the offense of selling intoxicating liquors, against the ordinance of the said city of Anderson. The defendant appealed to the full council. The hearing of said appeal was had on June 22, 1896, and after hearing appellant's written grounds of appeal, all testimony de novo that was offered pro and con, and argument by counsel, council affirmed the rulings and decision of the mayor pro tem., found defendant guilty, and affirmed the sentence imposed by the said mayor pro tem. Whereupon the defendant appealed to the court of general sessions, upon the exceptions herewith filed. The appeal came on to be heard at February term, 1896, of general sessions for

said county, before his honor, Judge Joseph H. Earle, who passed the order hereto attached, dismissing the appeal. In the course of the argument the presiding judge said to appellant's counsel, 'If you can show me that Alderman Hill voted as a juror, I will grant a new trial.' Whereupon appellant's counsel answered: 'It is not incumbent upon us, we submit, to show that he did vote. We have no means of knowing certainly whether or not he did. Our contention is that we are entitled to a reversal of the judgment because he sat with the council, and may have voted.' To this Judge Earle replied, 'In the absence of any showing to the contrary, the court must assume that a public officer did his duty, and that Alderman Hill did not vote on the facts while hearing the appeal.' " It also appears in the case that at the hearing of the appeal by the city council the following were present: Mayor Tolly, Aldermen Hill, Duckett, Ligon, Dillingham, and Fant. The following apparently contradictory statement is also found in the case: "Defendant's attorneys objected to Alderman Hill sitting on this case, he having tried the case as mayor pro tem. City attorney asked defendant's attorneys, in open court, if they objected to Alderman Hill sitting in this case. Defendant's attorneys declined to answer." The exceptions, for the purposes of this appeal, may be stated substantially as follows: (1) That the act of 1887, amending the charter of the city of Anderson, granted by the act of 1882, as well as the act of 1888, amending the said act of 1887, are unconstitutional in that they violate the provisions of the constitution securing the right of trial by jury. (2) Because the said acts are unconstitutional in that they violate the provisions of the constitution securing to the defendant a fair and impartial trial, because the city council sat as judge and jury in a case in which they were the prosecutors. (3) Because the said acts are unconstitutional because they provide that the city council shall sit as judge and jury in a case in which they are interested. (4) Because the circuit judge erred in not holding that it was error for Alderman Hill to sit in council while hearing an appeal from a judgment rendered by him as acting mayor. (5) Because his honor erred in holding that it was incumbent upon the defendant to show that Alderman Hill voted in determining the appeal from his own judgment. (6) Because his honor erred in not holding that it was error for Mayor Tolly to sit at the hearing of the appeal by the council, he having been absent when the case was originally heard by Alderman Hill as acting mayor. (7) Because his honor erred in not holding that it was error on the part of council to affirm the decision of the mayor in the first case, there being no record of the evidence taken at such trial, nor of the rulings there made, upon which council could predicate its action affirming the decision of the mayor, whereas it could only try the case de novo.

Upon the argument in this court, counsel for

respondent, for the first time, has raised the point that the court of sessions had no jurisdiction to hear the appeal from the judgment of the city council, and therefore the circuit judge should have dismissed defendant's appeal upon that ground, without regard to its merits. Although this point was not raised in the circuit court, yet it may still be taken here for the first time. *State v. Penny*, 19 S. C. 218. And, if tenable, it will not only be decisive of this case, but will supersede the necessity for considering any of the points raised by appellant in his exceptions. Indeed, if the circuit judge had no jurisdiction to hear the appeal, then this court would have no jurisdiction to consider whether the points which he undertook to decide were properly decided or not, and any utterance of this court as to such points would be, not only extrajudicial, but improper. It becomes necessary, therefore, first to determine this question of jurisdiction. The ground upon which the counsel for respondent bases his position that the court of sessions has no jurisdiction to hear an appeal from any decision of the city council of Anderson is that there is no provision for such an appeal, either in the charter of that city, or in any of the amendments thereto. The first inquiry, therefore, is, what are the provisions of the charter of the said city in respect to the trial of offenders against the ordinances passed by the city council? The original charter will be found in the act of 1882 (17 St. at Large, 972), and in the sixth section of that act it is provided "that the said mayor, or the city council, and both of them, are hereby vested with all the powers and jurisdiction for the violation of city ordinances, as is now given a trial justice, except in civil cases." And the section proceeds to invest the mayor with power to try all offenders against the ordinances of the city, and to impose upon such offenders, in his discretion, fine or imprisonment, within the limits prescribed by the ordinances; giving to any person aggrieved by the decision of the mayor the right of appeal to the city council. The seventh section of the charter authorizes the city council to "fix and impose" fines and penalties for the violation of the ordinances of the city, "not to exceed the sum of one hundred dollars, or imprisonment for thirty days." And the eighth section authorizes the mayor to sentence persons convicted of a violation of any of the ordinances of said city to a fine or imprisonment, in the alternative, as may be provided. Under provisions such as these, it is quite clear that a person brought to trial before the mayor or the city council for a violation of any of the ordinances of the city would have a right to a trial by jury, if demanded, as well as a right of appeal to the circuit court, just as in a case tried by a trial justice. *Town Council of Beaufort v. Ohlandt*, 24 S. C. 158; *Town of Lexington v. Wise*, Id. 163, recognized and followed in the recent case of *Ex parte Brown*, 42 S. C. 184, 20 S. E. 56. But by the act of 1887 (19 St. at Large, 950) the original charter was amended by striking

out section 6 thereof, and substituting in lieu thereof the following, as section 6: "The said mayor shall have power and authority to try all offenders against the ordinances of said city in a summary manner, without a jury. \* \* \* Whenever the said mayor shall find a party tried before him guilty of violating an ordinance of the said city, he shall have power to impose, in his discretion, fine or imprisonment in the alternative, not to exceed the limits prescribed for such violation. From all decisions of the said mayor any party in interest, feeling himself aggrieved, shall have the right of appeal to the city council: provided he give notice of such appeal. \* \* \* In all cases appealed to the city council the mayor shall preside, or some alderman as hereinbefore provided, and the aldermen shall sit as a jury to try the facts involved, and may also reverse, modify or affirm any or all of the rulings of the mayor in the first trial of the case." And by the act of 1888 (20 St. at Large, 103) the charter was still further amended by adding thereto the following section, to be known as section 6a, to follow section 6 of said act, to wit: "Sec. 6a. In any case tried under the foregoing section upon appeal to the full council, the mayor and three aldermen, or in the absence or inability of the mayor to serve, any four aldermen shall be sufficient to proceed with the trial of such cause or appeal, and the decision of a majority of those present shall determine all questions before the said council except the questions of fact involved, in which the mayor who tried the case shall have no vote, but shall be determined by a majority of the aldermen 'trying the case: provided that, in case of a tie vote of the aldermen on the facts involved, the mayor shall have the casting vote, and the decision of the majority as thus ascertained, shall determine the case."

The purpose of the amendment of 1887, doubtless, was to avoid the effect of the decisions of this court in the cases of *Town Council of Beaufort v. Ohlandt* and *Town of Lexington v. Wise*, supra, then recently rendered, by which it was determined that, where the municipal authorities of any incorporated city or town were invested with the powers of a trial justice for the trial of offenders against the ordinances of such city or town, the effect was to give the accused the right to a trial by a jury, if demanded, and also the right of appeal to the circuit court. Hence, by the act of 1887, section 6 of the original charter, conferring upon the municipal authorities of the city of Anderson the "powers and jurisdiction" of a trial justice in the trial of offenders against the ordinances of said city, was stricken out, and a new section was substituted in lieu thereof, investing the mayor of the city with power to try all offenders against the ordinances of said city "in a summary manner, without a jury," with the right of appeal, not to the circuit court, but to the city council.

It being now contended that, inasmuch as no right of appeal to the circuit court is provided for by the act of 1887, no such appeal

can be allowed, it becomes necessary to consider what is the effect of the failure to provide for such appeal, upon the constitutionality of that act. So far as I am informed, this is the first time that this particular question has been presented, though there are at least two cases in which it might have been raised: *Ex parte Schmidt*, 24 S. C. 363, and *City Council of Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523. But in neither of those cases was the question raised or decided. In the former (*Schmidt's Case*) it seems to have been conceded that there was no right of appeal, while in the latter (*O'Donnell's Case*) the right of appeal to the circuit court was conceded, and the appeal was heard and determined, in a case arising under the same charter now before us, though no question as to the right of appeal was raised, considered, or decided. The question is therefore still an open one. Inasmuch as the offense charged against the defendant was committed before the adoption of the present constitution, and his trial and conviction, both before the acting mayor, as well as before the council, occurred before the present constitution went into effect, the question here presented must be determined by the provisions of the constitution of 1868, and not by those of the present constitution. In section 19 of article 1 of that constitution it is provided that "all offenses less than felony \* \* \* shall be tried summarily before a justice of the peace, or other officer authorized by law, \* \* \* saving to the defendant the right of appeal"; and in section 24 of article 4 the provision is that, in all cases tried by a justice of the peace, "the right of appeal shall be secured under such rules and regulations as may be provided by law." Now, as that constitution, in section 1 of article 4, expressly authorizes the general assembly to "establish such municipal and other inferior courts as may be deemed necessary," and as it has been decided in the case of *State v. Fillebrown*, 2 S. C. 404, that the municipal and other inferior courts authorized by that section to be established practically stand upon the same footing as a court of a justice of the peace, it seems clear that any attempt by the general assembly to establish a municipal or other inferior court, without saving the right of appeal, would be in conflict with the constitution. From this it follows that both the act of 1887 and the act of 1888, above referred to, in failing to save the right of appeal as required by the provisions of the constitution above quoted, are in conflict with the constitution, and cannot be allowed the force of law. If this be so, then it follows that the powers of the municipal authorities of the city of Anderson in trying offenders for violations of the ordinances of the city must be derived from the original charter (the act of 1882, above referred to), conferring upon such authorities the powers and jurisdiction of trial justices, which, as has been shown, involve, not only the right of trial by jury, if

demand, but also the right of appeal to the circuit court.

If it should be said that the provision in section 6 of the act of 1887, as amended by the act of 1888, authorizing a person convicted by the mayor to appeal to the city council, is a compliance with the constitutional provision saving the right of appeal, the answer is that such is not the character of the appeal contemplated by the constitution. The object of that constitutional provision was to secure the right of appeal from any inferior court to some superior court, and the provision in the act for an appeal from one inferior court to another inferior court certainly does not fulfill the requirement of the constitution. Every municipal court, no matter how constituted,—whether consisting of the mayor of the city or of the city council,—established under the authority of section 1 of article 4 of the constitution, is certainly an inferior court; and to give the right of appeal from the municipal court, consisting of the mayor alone, to another municipal court, consisting of the city council, would be merely giving the right of appeal from one inferior court to another inferior court, from which there would still be the right of appeal, and thus the object of the constitutional provision "saving the right of appeal" would be practically defeated.

If, again, it should be said that this court, in the case of *City Council of Anderson v. O'Donnell*, supra, has recognized the constitutionality of the acts of 1887 and 1888, amending the original charter of the city of Anderson, the answer is that in that case the only question (as far as this matter is concerned) which this court was called upon to consider, and the only question which it did consider, was whether those acts were in violation of the constitutional provisions securing a right of trial by jury; but whether those acts were in violation of any other provisions of the constitution this court was not called upon to consider, and did not consider. Under the well-settled, wise, and salutary doctrine that a court should never voluntarily and unnecessarily assail the validity of an act of a co-ordinate branch of the government, but should wait until its validity is assailed by some party to the cause which it is called upon to determine, this court, in that case, did not look, and should not have looked, all around to see if there was any possible ground upon which the constitutionality of those acts might be assailed, but confined its attention to the only ground upon which they were attacked, to wit, that they violated the provisions of the constitution securing the right of trial by jury. The fact, therefore, that this court, in *O'Donnell's Case*, held that the acts of 1887 and 1888 were not in conflict with those provisions of the constitution securing the right of trial by jury, cannot affect the question which is now, for the first time, raised,—whether these acts conflict with other provisions of the constitution securing

the right of appeal from the judgments of all inferior courts. As was said in *Whaley v. Gallard*, 21 S. C., at page 576, where the court was considering a similar question: "A statute which conflicts with any provision of the constitution is a dead letter,—an absolute nullity,—and the fact that the courts have decided in one case that it does not conflict with a particular clause in the constitution cannot impart any vitality to it, if it is found to be in conflict with some other clause of the constitution. \* \* \* In *Boyd v. Alabama*, 94 U. S. 645, which is recognized in *Dougllass v. County of Pike*, 101 U. S., at page 687, as well expressing 'the rules which properly govern courts in respect to their past adjudications,' it is said: 'Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity, when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts, because that point might have been raised and determined in the first instance.'" It must therefore be concluded that the position taken by counsel for respondent—that the appellant had no right of appeal to the circuit court—is untenable and must be overruled. This being so, it becomes necessary to consider the points raised by the appellant's exceptions.

The first exception, raising the point that the acts of 1887 and 1888, purporting to amend the act of 1882, are unconstitutional because they are in conflict with those provisions of the constitution securing the right of trial by jury, cannot be sustained, as that point was made and decided in the case of *City Council of Anderson v. O'Donnell*, supra, adversely to the view contended for by the appellant.

The second and third exceptions may be considered together, as they both rest upon the principle that the constitution forbids the trial of a case by a tribunal, whether judge or jury, where one or all of those constituting such tribunal is a party to the cause, or interested therein. The position of appellant is based upon the assumption that the city council, and all the members thereof, are not only parties to, but interested in, every prosecution brought for a violation of any of the ordinances of the city. But is this assumption well founded? All prosecutions for violations of the laws of the state are brought in the name of the state, which consists of all of its citizens, and yet it was never supposed that any citizen was thereby disqualified from serving as a juror upon the trial of such prose-

cution. So, also, it has always been held that the corporators of a municipal corporation are not thereby disqualified from serving as jurors in cases brought by or against such corporations. *City Council v. King*, 4 McCord, 487; *City Council v. Pepper*, 1 Rich. Law, 364; 1 Dill. Mun. Corp. § 360, and authorities there cited. So in *State v. Billis*, 2 McCord, 12, it was held that it was no objection to a juror, on the trial of an indictment for passing a counterfeit bill on the Bank of the State of South Carolina, that he was a director of the bank, for he has no other interest in the institution than that which is common to all the citizens of the state. Exceptions 2 and 3 must therefore be overruled.

The point raised by exception 4 raises a more serious question. There seems to be no doubt that a person who, as a juror,—even as a grand juror,—has previously passed upon the facts of a case, is not competent to sit as a juror upon a subsequent trial of the same case. In *Bishop on Criminal Procedure*, at sections 773 and 774, this matter is discussed, and the rule is laid down that a person who served as a member of the grand jury which found the bill is not competent to serve as a petit juror upon the trial of the accused under such indictment. The same doctrine had been recognized in this state, in the case of *State v. O'Driscoll*, 2 Bay, 153. It is true that in that case it was held that the objection, not being made until after verdict came too late, but the rule was distinctly recognized that the fact that a person offered as a juror had been one of the grand jury which found the bill was a good cause of challenge. The case of *State v. Williams*, 31 S. C. 238, 9 S. E. 853, cannot be regarded as in conflict with this view, for in that case the jurors objected to upon the ground that they had served as jurors in a previous case, involving the same facts, were examined on their voir dire, and had satisfied the circuit judge that they had formed no opinion as to the case then in hearing, and were not conscious of any bias or prejudice therein; and it was held by the late Chief Justice Simpson, who delivered the opinion of the court,—manifestly with reluctance,—that, under the provisions of section 2261 of the General Statutes, the circuit judge was made the final arbiter in the matter, and his conclusion could not be impeached. But one of the associate justices expressly dissented from the view taken by the chief justice as to this matter, and the other associate justice concurred in the result only; and as there were other grounds upon which the new trial was granted, in which the whole court concurred, it is impossible to say what was the view of the majority of the court as to this particular question. Besides, in that case the jurors objected to were examined on their voir dire, and it was upon that alone that the chief justice based his view, while here Alderman Hill was not examined on his voir dire, and hence it is clear that case cannot

be regarded as decisive of this. Now, in this case it is distinctly stated in the "case," as prepared for argument here, that defendant's attorneys objected to Alderman Hill sitting on this case upon the ground that he had previously tried the case as mayor pro tem. It is true that this statement is followed by the further statement that, when the city attorney asked defendant's attorneys if they objected to Alderman Hill sitting in this case, they declined to answer. Exactly what this means, it is difficult to say. It may be that defendant's attorneys, having made their objection, did not feel called upon to reply to such an inquiry. At all events, the inference is plain that the objection was made, and that is sufficient. If, therefore, Alderman Hill participated in the trial of this case, he must have done so as a juror, even under the provisions of the act of 1887, as amended by the act of 1888; for in no other capacity could he have had the right to participate in the trial, inasmuch as the mayor was present and presided at the trial; and, if so, under the authorities above cited, he was clearly incompetent to serve as a juror. The fourth exception must therefore be sustained.

As to the fifth exception, it is only necessary to say that it is difficult to conceive by what authority the privacy of the jury room (so called) could be invaded with a view to ascertain whether any one of those acting as jurors voted upon any question of fact or of law. If Hill acted as a juror, as he must have done, then it was his duty to vote upon questions of fact as well as of law, and the presumption is that he did so. This exception must therefore be sustained.

The sixth exception must be overruled. The act under which the trial was manifestly conducted expressly requires that the mayor, if present, should preside, and he was present.

The seventh exception cannot be sustained. In the first place, the record before us does not show whether the evidence taken at the first hearing before the mayor pro tem. was or was not in writing, nor does it show what was before the council at the second hearing. In the second place this court has held in the case of *City Council of Anderson v. O'Donnell*, supra, that "in all cases appealed to the city council, the trial must be de novo, and the witnesses must be examined before the council just as though there had been no previous trial." Under this ruling, it is difficult to perceive either the necessity or propriety of bringing before the council either the evidence taken at the trial before the mayor, or the rulings thereon.

The remaining exceptions, not being insisted upon, require no further notice.

It is proper to add that no little embarrassment has been felt in the preparation of this opinion, arising from the fact that while none of the exceptions filed by appellant raises the point upon which the acts of 1887 and 1888 have been hereinbefore held to be unconstitutional, yet, as that point has been raised

by respondent's jurisdictional objection, it became necessary to consider that point; and in disposing of it the conclusion was reached that those acts, while not in conflict with those provisions of the constitution securing the right of trial by jury, yet were in conflict with other provisions of the constitution securing the right of appeal from the inferior courts to the circuit court. The legitimate result of the conclusion thus reached would be to hold that the case should have been tried by the municipal authorities as trial justices, and, not having been so tried, the judgment rendered should, on that ground, be set aside. But, as that point was not raised by any of the appellant's exceptions, it was deemed best to consider the points which were so raised, without regard to the question as to the validity of the acts of 1887 and 1888, with a view to ascertain whether, even assuming the validity of those acts, there was any error in the judgment appealed from. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary.

(98 Ga. 38)

## MORRIS et al. v. LEVERING et al.

(Supreme Court of Georgia. Dec. 2, 1896.)

## HEARSAY EVIDENCE—ASSIGNMENTS OF ERROR.

1. The action being against a partnership for the price of goods alleged to have been sold to it, and the issue being whether the goods were in fact sold to this partnership or to another, declarations of a member of a brokerage company representing the plaintiffs, to an employé of that company, not made in the presence of the defendants, nor with their knowledge, to the effect that a contemplated sale of the goods in question had better be made to the defendants, and not to the other partnership, were, as to the defendants, mere hearsay, and not admissible to show liability on their part.

2. Assignments of error alleged to have been committed in admitting in evidence a letter of a given date, and in admitting a certain book "showing the charge of the goods sued for," without disclosing the contents of the letter, or against whom the charge was made in the book complained of, are not sufficiently definite to require consideration and determination by this court.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Levering & Co. against E. S. Morris & Co. Judgment for plaintiffs. Defendants bring error. Reversed.

The following is the official report:

Levering & Co. sued E. S. Morris & Co., a partnership composed of E. S. Morris and N. W. Murphey, upon an account, dated May 22, 1893, for 10 bags of coffee, \$222.35. Morris, for himself and E. S. Morris & Co., pleaded: Not indebted. Further, that the firm sued did not buy the goods sued for, nor did it receive the goods, nor any value thereof. Said goods were purchased and used for the Atlanta Provision & Commission Company, and this fact

was known to plaintiffs. The firm of E. S. Morris & Co. ceased to do business when said provision company began, and N. W. Murphey had no right nor license to use the firm credit in purchasing the goods for said company. Defendant did not in any way buy said goods, did not authorize nor ratify said purchase, and if made in the name of E. S. Morris & Co. it was without his knowledge or consent. All power N. W. Murphey had to use the name and credit of E. S. Morris & Co. ceased when said company was organized, as E. S. Morris & Co. stopped business; and this contract, if made by N. W. Murphey thereafter, in the name of said firm, was illegal and fraudulent. There was a verdict for plaintiffs for the amount sued for. Defendants' motion for a new trial was overruled, and they excepted. The motion alleged, among other grounds, that the court erred in admitting the testimony of witness Pritchett as to a conversation he had with Mr. John Murphey, in which Murphey told witness that, if they made further sales, they had better sell to Morris & Co., and the testimony of Murphey, that he had notified Pritchett not to sell to the Atlanta Provision & Commission Company. This was objected to as irrelevant, defendants not being present, nor any proof shown that they knew thereof. It appears from the evidence that, at the time of the sale in question, Pritchett was connected with T. B. Paine & Co., merchandise brokers and commission merchants of Atlanta, Ga., who represented plaintiffs. The sale was made by Pritchett. John Murphey was a member of the firm of Paine & Co. Before this sale Paine & Co. had made sales both to the Atlanta Provision & Commission Company and to E. S. Morris & Co., dealing with N. W. Murphey for both companies. Pritchett testified that, shortly before he made the sale, and when he was negotiating with N. W. Murphey about selling him coffee, the conversation occurred with John Murphey in regard to selling the Atlanta Provision & Commission Company the bill, and John Murphey told Pritchett he (Murphey) did not think it was safe to sell the Atlanta Provision & Commission Company, and if "we" made further sales there we had better sell to Morris & Co. Other grounds of the motion alleged error in admitting the letter dated May 22d, addressed to plaintiffs, and signed by Paine & Co., as proving the intention of plaintiffs' agent when making sale of the goods sued for, and the book of Paine & Co., showing the charge of the goods sued for. Each was objected to as irrelevant. These grounds do not show the contents of the letter or the book referred to, though these appear in the brief of evidence.

Mayson & Hill, for plaintiffs in error. C. D. Maddox and Glenn & Rountree, for defendants in error.

ATKINSON, J. 1. The person whose declarations were admitted against the defendant partnership was neither a member of that

partnership nor authorized as its agent to speak for it. He was a broker, engaged in an independent business, and the sayings admitted in evidence were addressed to his own, and not to a servant of the defendant; nor were such declarations made in the presence of or acquiesced in by the defendant partnership. The question being as to the liability of the defendant to the plaintiff, and as to whether the credit extended was to the defendant or another, it was altogether incompetent, as negating the inference, deducible from the defendant's theory and evidence, that the credit, if extended at all, was to another, and not to itself, to prove that a broker representing the plaintiff had said to his own servant that he should sell to the defendant rather than to the other person to whom the defendant insisted the credit was extended. Such instructions, the defendant neither knowing of nor acquiescing in them, were as to it hearsay merely and not admissible.

2. No discussion of the proposition stated in the second headnote is necessary. The insufficiency of the assignment of error is apparent. Judgment reversed.

(98 Ga. 36)

### LOWE v. ECHOLS et al.

(Supreme Court of Georgia. Dec. 2, 1895.)

#### AMENDMENT OF PLEADING—PLEA TO JURISDICTION—VERDICT.

Where the plaintiff in an attachment case, conceiving that his declaration was insufficient to authorize the rendition in his favor of a general judgment against the defendant, voluntarily amended the declaration, so as to make its sufficiency in this respect unequivocal, and thereupon the defendant, under leave of the court, filed a plea to the jurisdiction, to which no exception appears to have been taken, and the case proceeded to trial, it was error, after the rendition of a verdict in favor of the defendant sustaining the plea to the jurisdiction, to grant a new trial, and strike this plea, on the ground that the plaintiff's declaration really needed no amendment, and that, consequently, allowing the defendant to file the plea to the jurisdiction was erroneous, because it was offered too late.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Echols & Richards against A. J. Lowe. From an order granting a new trial, defendant brings error. Reversed.

The following is the official report:

On September 2, 1893, Echols & Richards sued out an attachment against Mrs. A. J. Lowe, the affidavit in attachment alleging that she was indebted to them \$400 principal, with interest at 8 per cent. per annum from May 15, 1893, on \$200, and interest from August 12, 1892, on \$200 at 8 per cent., and — per cent. on the principal and interest for attorney's fees, and that "said Mrs. A. J. Lowe is actually removing without the limits of said county of Fulton." The attachment was sued out in Fulton county. The attachment bond was in the sum of \$800. Neither the

attachment bond nor affidavit stated that Mrs. Lowe resided in or was a citizen of Fulton county. The attachment was made returnable to the November term, 1893, of the city court of Atlanta. On September 4, 1893, defendant gave bond, and replevied the property attached. On November 30, 1893, and during the first term of the court, plaintiffs filed their declaration, and prayed for a "judgment for his said debt and for the sale of the property levied upon as aforesaid, and that the proceeds arising from the sale be applied to the satisfaction and payment of said debt." This declaration did not aver that Mrs. Lowe was of said county of Fulton, or a citizen thereof. At said first term L. R. Ray, as attorney for the defendant, marked his name on the docket opposite her name. No defense in writing was filed to the suit at the first term. The appearance docket was not called at that term. At the March term, 1894 (April 6, 1894), the court, at the instance of plaintiffs' counsel, gave judgment, as a case in default, against defendant and the sureties on her replevy bond. The case was not then in default. This was done without notice to defendant, and before the case was reached in its order. The court did not turn to the docket at or before the signing of said judgment. Had he done so, the marking of the name of defendant's counsel would have been discovered, and the court have refused to sign judgment by default. The judgment was not entered upon the minutes, nor was the case stricken from the docket. On April 9, 1894, defendant filed her plea to the jurisdiction, "because, at the time of the commencement of said suit, this defendant resided in the county of Harris, in said state, and not in the county of Fulton, and the superior court of Harris county has jurisdiction of said case." On September 15, 1894, the case was called in its order and set for trial. At the trial plaintiffs' counsel announced he had judgment, and it was so entered on the docket. On September 21, 1894, defendant filed her motion to set aside the judgment of April 6, 1894, on various grounds, but the only one pressed upon the attention of the court was: "Because said case was taken up out of its order on the docket, without notice to the defendant, and judgment rendered by the court April 6, 1894, in the absence of defendant and her counsel, whose name was marked on the docket, when in its regular order said case would not have been reached by the court until September 15, 1894. The delay in filing this motion was caused from the fact that defendant had no legal notice of the rendition of said judgment until the same was called for trial on September 19, 1894, three days before the filing of this motion, when plaintiffs' counsel stated in open court he had judgment." It was also alleged, in the motion to set aside, that defendant had a good defense, which was fully set forth in her plea to the jurisdiction; that said plea could not have been filed earlier, because she

was seriously ill from December —, 1893, to April 7, 1894, and could give no attention to business; and that plaintiffs took the judgment against defendant and the sureties on her replevy bond without first recovering judgment in their attachment case, as provided in section 3319 of the Code. The motion was granted, on the ground that the case was not in default, but that the marking of the name of defendant's counsel to the bench docket was tantamount to the filing of the plea of the general issue, and had the effect to carry the case to the jury.

The case coming on for trial on January 18, 1895, defendant moved to dismiss the attachment, because the grounds were not sworn to positively, inasmuch as it did not appear, from any of the papers in the case, the affidavit, bond, attachment, or declaration, that defendant was, at the time, or ever had been, a citizen of Fulton county, and because there was nothing in the attachment papers from which the officer who issued the attachment could determine what court or county he should make the same returnable to. Defendant's counsel then presented a plea to the jurisdiction, which the court refused to entertain, on the ground that it came too late,—a plea of the general issue having been filed at the first term, and subsequently insisted on as such, and which had the effect to delay the case for a number of intervening terms. Plaintiffs, by permission of the court, amended their attachment affidavit so as to make it read, "Mrs. A. J. Lowe, of said county of Fulton." And plaintiffs were also allowed to amend their declaration in attachment, so as to broaden the prayer to the asking of a general judgment. Defendant's counsel thereupon again presented their plea to the jurisdiction, and asked that it be entertained. The court held that, plaintiffs having amended their declaration in a material part praying for a general judgment, whereas, before, only a judgment in rem was embraced in the prayer, the pleading rights of the defendant attached de novo in view of this amendment. Defendant further moved to dismiss the attachment because the attachment bond was not in an amount at least double the debt sworn to. This motion was overruled, to which ruling defendant excepts. Under the instructions of the court, the jury found for defendant upon her plea to the jurisdiction, whereupon the court passed an order dismissing the case. Plaintiffs moved for a new trial, to set aside the verdict, and to set aside the judgment allowing the plea to the jurisdiction to be made a part of the record. These motions were argued and considered as one. The motion for new trial was granted, as well as the motion to strike the plea; the court holding that it was satisfied that it committed error in allowing the plea to the jurisdiction to be filed, and consequently erred in the procedure subsequent to the allowance of that plea. The court states: "The reason for the present decision is that the prayer of

the original declaration in attachment was broad enough to include, without any amendment, a claim for a general judgment, the words being, 'Wherefore, your petitioner prays judgment for his said debt, and,' etc. The amendment to the prayer offered by the plaintiffs, and allowed, was purely formal, and in a sense wholly surplusage. The court erred in holding that the filing of this amendment opened the pleading rights de novo to the defendant." To this decision defendant excepts. Defendant also excepts because the court, at the trial, dismissed her plea to the jurisdiction, filed April 9, 1894, on the ground that it was not filed at the first term; that the marking of her counsel's name upon the docket was an appearance and pleading to the merits, and she therefore admitted the jurisdiction of the court.

L. R. Ray, for plaintiff in error. Kontz & Conyers, for defendants in error.

ATKINSON, J. The official report states accurately the facts as they appear in the record, and therefore a restatement of them here will not be necessary in the consideration of the questions made. It will be seen that, although an attachment had issued upon the ground that "said Mrs. A. J. Lowe is actually removing without the limits of said county of Fulton," there was no averment, either in the affidavit upon which such attachment issued, or in the declaration subsequently filed, nor any recital in the bond given or in the writ of attachment, suggesting either that the defendant was a citizen of Fulton county, or that the city court of Atlanta had jurisdiction of her person, or that for any other reason, sufficient in law, such attachment proceeding was properly returnable to that court. Whether or not the case was in default, or whether the marking of defendant's counsel would be a sufficient appearance to prevent the case being in default, need not be considered, inasmuch as the court discharged the defendant's default, and permitted her to make a motion to dismiss the proceeding because it did not appear that the court had jurisdiction of the case or of the defendant's person. When this motion was made, it was met by an amendment of the affidavit in attachment stating the residence of the defendant in the county of Fulton, and thereupon conferring upon the court jurisdiction of the cause. This fact being thereby for the first time issuably pleaded, the court did not err in permitting the defendant to file a plea to the jurisdiction. The marking of defendant's counsel is not, necessarily, such a pleading to the merits as waives the question as to the jurisdiction of the court. An appearance is necessary to a motion to dismiss the suit, and, if made for that purpose, ought not to, and does not, so admit jurisdiction as to preclude the defendant from filing his defense in abatement. *Cox v. Potts*, 67 Ga. 521, 523, 527. Nor does the fact that, upon such an appearance, the

court set aside a judgment by default erroneously rendered, make it a plea to the merits, such as waives jurisdiction. When the defendant answered by marking her counsel's name on the docket, she acquitted herself of all default. An answer of that character may not be effective for all purposes, but it is sufficient to require the court at the trial to hear and determine motions which are predicated upon defects appearing upon the face of the pleadings, and the absence of an averment of jurisdiction is such a defect. We do not think, therefore, that when the court set aside the judgment by default, it thereby adjudged that the defendant could not be heard on the motion to dismiss for the want of jurisdiction; and when this motion was met by an amendment averring jurisdiction, the defendant should have been allowed to file a plea to the jurisdiction which answered this amendment. The allowance of the amendment broadening the prayer of the attachment declaration, so as to authorize the grant of a general judgment, might not have had the effect of opening the pleadings so as to admit the plea to the jurisdiction. Yet the other amendment averring jurisdiction did have this effect, and, although the trial judge may have put his judgment allowing the plea upon the first, rather than upon the last, mentioned amendment, we do not think that for this reason the defendant should be deprived of her right to make this defense. Both amendments were, according to the plaintiffs, at the time they were offered, substantial, and, after a finding in favor of the defendant upon her plea to the jurisdiction, we think the court erred in setting aside the judgment, and granting a new trial, upon the sole ground that the plaintiffs' declaration was good without amendment, and that, as a consequence, the amendments offered were not sufficiently substantial to justify the allowance of the plea to the jurisdiction. Judgment reversed.

(97 Ga. 814)

**WILSON v. WILKINSON.**

(Supreme Court of Georgia. Dec. 21, 1896.)

**PARTNERSHIP ACCOUNTING—INTEREST ON BALANCES.**

1. Although minor errors may have been committed by the master and also by the trial judge, none of them were of sufficient weight or importance to require a reversal of the judgment below.

2. Upon an equitable petition by one partner against another for a settlement of the partnership accounts, interest is not generally allowable in favor of one as against the other upon an unpaid balance; and, to authorize the allowance of such interest, the particular facts upon which interest is claimed and allowable must not only be alleged in the petition and proved on the trial, but the finding of fact upon this issue must be favorable to the contention of the plaintiff as an indispensable predicate for the allowance of such interest in the final decree.

3. The allowance of interest against the defendant below in the present case was not authorized by the pleadings, nor by the evidence, nor by any finding of fact by the master upon which interest could be lawfully allowed.

4. Direction is given that all interest prior to the date of the final decree in the court below be written off, and that such decree be so modified as that the principal thereof shall bear interest only from the date of its rendition. The costs of the writ of error are made chargeable against the defendant in error.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by U. B. Wilkinson against B. J. Wilson. Judgment for plaintiff. Defendant brings error. Affirmed, with direction.

N. J. & T. A. Hammond, for plaintiff in error. A. D. Freeman, Bigby, Reed & Dorsey, for defendant in error.

PER CURIAM. Judgment affirmed, with direction.

(98 Ga. 84)

**STRICKLAND v. STATE.**

(Supreme Court of Georgia. Jan. 13, 1896.)

**ASSAULT WITH INTENT TO KILL—JUSTIFICATION—INSTRUCTIONS.**

1. Upon the trial of an indictment for assault with intent to murder, alleged to have been committed with a knife, it was not error to refuse to charge: "If there be great superiority in physical strength of an assailant who strikes another a blow with his fist, or ill health in the assailed at the time, or other circumstances producing relatively great inequality between them in combat, the assailed can justifiably resent the blow by stabbing the assailant." The principle sought to be embodied in the request would not in any case be applicable, unless the antagonist, having the superior strength, unlawfully assaulted the other, and even in that event the jury, and not the judge, should determine whether such assault could lawfully be defended by stabbing.

2. Although the written request, as submitted, was defective for the reasons above given, and was therefore properly refused, yet, inasmuch as, under the facts disclosed by the record, the question of inequality in physical strength was involved, and the sole defense relied upon as a justification for the stabbing was that the accused was physically unable to otherwise defend himself from the prosecutor's alleged unlawful assault upon him, the court erred in not giving in charge, even without a request, the principle which the request presented sought to express.

(Syllabus by the Court.)

Error from superior court, Madison county; Seaborn Reese, Judge.

K. D. Strickland was convicted of assault with intent to murder, and brings error. Reversed.

E. T. Brown and R. H. Kennebrew, for plaintiff in error. W. M. Howard, Sol. Gen., for the State.

ATKINSON, J. 1. The request to charge, upon the refusal of which error was assigned, was defective for two reasons: It left entirely out of consideration the question as to whether or not the assault was lawful. Whatever may have been the relative difference in sizes, if the smaller person offer to the larger such an insult as justifies a battery, and a battery not disproportioned to the offense given be com-

mitted, the person assailed cannot justify, upon such provocation, the use of a deadly weapon, nor can the person assailed under any circumstances justifiably resent a blow by stabbing. Stabbing may, under some circumstances, be justified as a measure of prevention, but never as a measure of resentment. It may be justified when done to prevent the infliction of a present impending injury amounting to a felony, but cannot be justified when committed in a spirit of resentment for past injuries. If done in heat of blood, upon such provocation as would reduce the grade of his offense to manslaughter in the event death had ensued, it might palliate the degree of the stabber's guilt, and reduce his offense to a misdemeanor; but he could not lawfully be justified. But, even if such a thing were legally possible, it would be a question of fact for the jury to say whether or not the accused could, under all the circumstances proven before them, "justifiably resent" the assault described in the request by stabbing his assailant with a knife; and the charge was properly refused, not only because its effect would have been to give to the jury erroneous instructions as to the law, but because it invited an invasion of the province of the jury by the expression of an opinion upon the evidence.

2. We are of the opinion, however, that, in view of the evidence submitted, the court should have given to the jury instructions embodying at least some reference to the inequality between the relative sizes of the two combatants. The evidence showed that the accused was scarcely half so large a man in physical stature as the person stabbed; that, in addition to this, he was weak and feeble of frame, and greatly emaciated by disease, while, on the contrary, his assailant was a man of splendid physique, and very much his superior in point of ability to fight. It is not difficult to imagine how, under such circumstances, the feeble man might, in order to protect himself against having the life crushed out of him by the superior force of his adversary, justifiably resort to the use of a weapon for his defense; and this is true, even though he might have given the first provocation. For, while the first provocation might be sufficient to excuse a moderate beating, if the battery proved extend so far beyond the provocation as either to amount to a felony or to endanger the life of the person beaten, it would itself then become unlawful, and the person upon whom it was being inflicted might be justified in using even a deadly weapon in resistance. This seems to have been the theory of the defense as it is outlined in the record, and it is difficult to understand how the court could have proceeded with its instructions without referring to the disparity in the sizes of the two men. While the instruction asked was not technically accurate, and was therefore properly refused, the defense set up was so involved in the case made by the evidence as that an omission to charge upon it was equivalent to not instructing the jury at

all upon one of the leading features of the case. With or without request, the court should charge the jury upon the general features of the law which control the substantial issues made; but if the matter be merely collateral, or more specific instructions be desired upon a subject covered by the general charge, such instructions should be requested. As was said by Chief Justice Jackson, speaking for the court in the case of *Railroad v. Harris*, 78 Ga. 510: "The verdict can never be a legal verdict unless instructions on the law of the case be given by him who presides for that purpose. The omission to cover the case substantially must always set it aside." See, also, to the same effect, the cases there cited. We have carefully read the general charge of the court which comes up in the record, and we find no reference to the subject indicated, and hence we are of the opinion that the judgment should be reversed, and a new trial awarded. Judgment reversed.

(98 Ga. 14)

SATILLA MANUF'G CO. et al. v. CASON.  
(Supreme Court of Georgia. Nov. 15, 1895.)

CRIMINAL TRESPASS—WARRANT—MALICIOUS PROSECUTION.

1. An affidavit and warrant averring that a person named therein "did commit the offense of trespass, by digging up and grading a certain street or alley through the lands" of another, without his consent, neither charge a criminal offense against the laws of this state, nor any act amounting to a constituent element in the commission of a crime or misdemeanor.

2. In order to be the basis of an action for a malicious prosecution, the proceeding complained of must at least bear some resemblance to a process authorized by law, under which the person or property of the defendant therein might be lawfully arrested or seized. Accordingly, where an affidavit was made, and a warrant for the arrest of another was issued thereon, and it affirmatively appeared on the face of both the affidavit and the warrant, not only that no offense whatever against the criminal laws of this state was charged, but also that no substantive element of any criminal offense was stated, such warrant was absolutely void, and an arrest upon it, while constituting false imprisonment, would not authorize the bringing of an action for a malicious prosecution.

3. The suit, being for a malicious prosecution only, set forth no cause of action, and therefore ought to have been dismissed upon general demurrer to the same.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Hardeman, Judge.

Action by John P. Cason against the Satilla Manufacturing Company and others. From an order overruling a demurrer, defendants bring error. Reversed.

The following is the official report:

The petition of Cason alleged: He has been damaged by the Satilla Manufacturing Company and Miles Albertson \$5,000. On November 1, 1892, he was marshal of Waycross, and, acting under instructions of the chairman of the street committee of that city, ordered the overseer of the chain gang to take the convicts and have them work in the streets and

lanes of said city, near Old Tebeauville, in said city. The overseer went to Old Tebeauville, and began to work the old road near the property of the Satilla Manufacturing Company, which had been used by the public for many years as a public road. The only work that was done was to level up the road or street, and put the same in good condition for travel. After said work had been entered upon by the chain gang by the authority of the city of Waycross, and the street or road repaired as stated, defendants had a warrant issued by a magistrate named, for the arrest of petitioner and the chairman of the street committee and the overseer of the chain gang, based upon an affidavit made by Albertson, superintendent of the other defendant, charging petitioner and the other two named with trespass "by digging up and grading a street or alley through the lands of the Satilla Manufacturing Company without their consent." The affidavit and warrant were placed in the hands of a constable named, who arrested petitioner, and held him under arrest until he gave bond for his appearance to answer any indictment in the superior court of Ware county for said offense, which court convened on the first Monday in November, 1893, at which time petitioner was present, and remained until the adjournment of the court, and no true bill was preferred against him. After he had been arrested and given bond, the prosecutors appeared before the magistrate and withdrew said proceedings, which was without his consent, and failed to further prosecute the case before the court. Copy of the affidavit, warrant, entry of arrest, and order of withdrawal are attached. His connection with the working of said street, road, or lane was in the capacity as an officer of the city. He only instructed said overseer to have the streets and lanes near the property of said manufacturing company worked for the benefit of the people of the city, in the utmost good faith, as directed by the chairman of said street committee, in the belief that the place so worked was the property of the city of Waycross. Said criminal prosecution was maliciously carried on, and was without any probable cause. The suit was brought in March, 1893. Defendants demurred generally thereto. The demurrer was overruled, and to this ruling they excepted.

Hitch & Myers, for plaintiffs in error. John C. McDonald and Leon A. Wilson, for defendant in error.

ATKINSON, J. The facts are stated in the official report.

1. To enter upon the unclosed lands of another, without his consent, and dig and grade a public street or alley, is not a criminal offense under the law of this state, so far as we are advised or can ascertain, and is therefore not an indictable trespass. It gives to the person injured a right of action civilly, but, upon proof of such facts, no conviction could be had

as for a crime or misdemeanor; and hence an affidavit upon which a warrant issued for the apprehension of a given person, which did not allege more than that such person committed a trespass, "by digging up and grading a certain street or alley through the lands" of the person making the same, neither charged the person who was alleged to have committed the act with the violation of a public law involving the commission of an indictable offense, nor with the commission of any act amounting to a constituent element of such an offense. A warrant based upon such an affidavit, commanding the apprehension of the person so accused, was void absolutely,—was a mere "brutum fulmen,"—and the two combined did not together amount to the institution of a criminal prosecution against the person against whom it was directed.

2. It is a prime requisite to the institution of an action for malicious prosecution that a prosecution should have been instituted and ended; that the person alleging injury should have been prosecuted upon some criminal charge. Code, § 2982, which gives the right of action upon which the plaintiff bases his right to recover in the present case, limits the right to sue to criminal prosecutions maliciously instituted; and hence it follows that, if no criminal prosecution was in fact instituted, then no action would lie. If the proceeding instituted was void in toto, as wanting in any of the constituent elements of a proceeding authorized by law, then it was no prosecution. In *Frierson v. Hewitt*, 2 Hill (S. C.) 499, the distinction between malicious prosecutions proper, and those which bear only a resemblance to such proceedings, is very clearly stated, as follows: "The indictment must charge a crime, and then the action is maintainable per se, on showing a want of probable cause. \* \* \* There is another class of cases which are popularly called 'actions for malicious prosecution,' but they are misnamed. They are actions on the case, in which both a scienter and a per quod must be laid and proved. I allude now—First, to actions for false and malicious prosecutions for a mere misdemeanor, involving no moral turpitude; secondly, to an abuse of judicial process, by procuring a man to be indicted as for a crime, when it is a mere trespass; third, malicious search warrants." Under the provisions of our Code, the institution of a prosecution for a misdemeanor, or the suing of a search warrant, if done maliciously, may amount to a criminal prosecution, and may afford a sufficient basis for the institution of suit as for a malicious prosecution, because our Code, in terms, provides that a total want of probable cause is a circumstance from which malice may be implied, and in each of these instances a warrant for the apprehension of the person accused may lawfully issue, but not so with a mere nonindictable trespass. In such a case a warrant could no more lawfully issue than if one were accused of the nonpayment of a promissory note when it became due. In ei-

ther case, if an affidavit were made and a warrant issued, it would be wholly without authority or color of law, and therefore could in no view amount to a prosecution. "It is a prosecution to swear an information, in consequence of which a warrant is issued for the plaintiff's arrest, if the information contains a statement that the informer believes the plaintiff to have committed an offense, but not otherwise." Steph. Mal. Proc. p. 7. The proceeding in the present case, having been instituted wholly without warrant or authority of law, cannot be the basis of an action as for a criminal prosecution maliciously instituted and carried on. If the action had been for false imprisonment, in consequence of the illegal action of the defendant in the present case, and the declaration framed to that end, it might have been upheld; but in the present case the court erred in not sustaining a general demurrer to the declaration, and its judgment is accordingly reversed.

(100 Ga. 65)

**BURNEY v. STATE.**

(Supreme Court of Georgia. Oct. 19, 1896.)

**CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.**

1. While, in charging a jury trying a criminal case as to the sources from which they should arrive at the truth, the judge may appropriately refer both to the sworn evidence and the statement of the accused, yet, where the statement suggests no theory favorable to the accused which is in conflict with or explanatory of the evidence, an instruction that, in determining the guilt or innocence of the accused, the jury are to look to the evidence submitted to them, is manifestly not cause for a new trial.

2. The charge of the court upon the subject of reasonable doubt and as to where the burden of proof rested was sufficiently full and accurate; no error of law was committed; and the verdict being amply supported, if not demanded, by the evidence, the denial of a new trial was proper.

(Syllabus by the Court.)

Error from superior court, Lowndes county; C. O. Smith, Judge.

Jake Burney was indicted for the murder of Tom Butler. He was found guilty, and, his motion for new trial being overruled, he excepted, and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds: That the verdict was contrary to law, evidence, etc. Because the court erred in failing to charge the jury that the presumption of innocence remained with the defendant until overcome by evidence showing his guilt beyond a reasonable doubt. His honor charged as follows: "The defendant comes before you with the presumption of innocence in his favor, and those presumptions remain with him until overcome by proof." Error is assigned because the court did not go far enough, and, in connection with the charge quoted, failed to add that the proof submitted must show the guilt of the defendant beyond a reasonable doubt. Because the court failed

to charge the jury that the burden was upon the state to establish the guilt of the defendant beyond a reasonable doubt. The court nowhere in his charge instructed the jury that the burden of proof was on the state to establish every material allegation in the indictment to the satisfaction of the jury beyond a reasonable doubt. Error in charging: "Endeavor to ascertain from the evidence what the truth of the case is, and what has been proven, and let your conclusion reflect the truth of the case, and let that be your verdict." Error is assigned upon the above charge because its effect was to exclude entirely from the consideration of the jury the statement of the defendant, though the jury had the right to believe such statement in preference to the evidence in the case. Error in charging: "The defendant in this case is entitled to any doubt you may have in your mind. That, however, must be a reasonable doubt. Then, if your minds are wavering, and you cannot decide, it is your duty to give the defendant the benefit of that doubt by a verdict of acquittal. These doubts extend to every material issue and question in the case. They may arise from a want of evidence or spring out of the evidence." The error assigned thereon being that the court failed in instructing the jury that they might, if they saw proper to believe it, also consider the statement of the defendant in connection with the sworn testimony in the case, and if the statement itself, or the statement in connection with the evidence, raised a reasonable doubt in the minds of the jury as to the guilt of the defendant, it would be their duty to find the defendant not guilty. Movant contends that the court, in charging the jury on the question of reasonable doubt, should not have confined the jury solely to a consideration of the evidence, but should have permitted the jury to consider the statement of the defendant, as well as the sworn testimony. In a note the court states that he did instruct the jury that they could believe the statement in preference to the sworn evidence.

W. H. Ramsey and Frank Park, for plaintiff in error. J. L. Hall, Sol. Gen., W. B. Thomas, and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(100 Ga. 65)

**STRICKLAND v. STATE.**

(Supreme Court of Georgia. Oct. 19, 1896.)

**HOMICIDE—EVIDENCE—INSTRUCTIONS—APPEAL.**

While the charge of the court may not have been in all respects technically accurate, it contained no error prejudicial to the rights of the accused, but, as a whole, on the substantial issues involved, fairly submitted the law of the case. The verdict was undoubtedly as favorable to the accused as the evidence warranted, and, this being so, it will not be set aside because of minor inaccuracies or immaterial errors at the trial.

(Syllabus by the Court.)

Error from superior court, Pierce county; W. N. Spence, Judge.

Lemuel Strickland was indicted for the murder of J. J. Wilson. He was found guilty of voluntary manslaughter, and recommended to mercy. His motion for new trial was overruled, and he excepted, and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in charging: "I charge you, further, that if you have any reasonable doubt in your mind of any of those theories, or the various issues as made in the case; if you have a reasonable doubt as to the guilt of the defendant of murder or voluntary manslaughter; or if you have a reasonable doubt of his guilt, as to whether this is a case of justifiable homicide,—it would be your duty to give the defendant the benefit of that doubt. That doubt must be a reasonable doubt, growing out of the evidence. You look to the evidence, and if you find a reasonable doubt on your mind, growing out of the evidence, as to the truth of either one of these charges, either of murder or manslaughter, you give the prisoner the benefit of that doubt." (a) Because, in thus defining the reasonable doubt meant by the law, the court limited the jury to the consideration of only such doubts as arose out of the evidence, and thereby the court expressly excluded from the jury's consideration all doubts arising from a want of evidence; said limitation of the jury's right to consider doubts arising from a want of evidence having been twice reiterated in the passage of the charge above quoted, in the use of the language: "That doubt must be a reasonable doubt growing out of the evidence. You look to the evidence, and if you find a reasonable doubt on your mind, growing out of the evidence." (b) Because, in charging the jury to give the defendant the benefit of any reasonable doubt, the court omitted to state to the jury that the benefit referred to by the court and meant by the law was, on the issue of voluntary manslaughter or acquittal, a verdict of not guilty; said vague instruction, to "give the defendant the benefit of that doubt," tending to be misconstrued by the jury into a suggestion by the court that, while they might have a reasonable doubt of the defendant's guilt of voluntary manslaughter, yet they could recommend him to mercy, and thus conform to his honor's instructions in regard to giving him the "benefit" of the doubt. (c) Because said charge, touching and defining a reasonable doubt, tended to eliminate from the jury's consideration doubts as to the truth of the state's theory, created on the jury's mind by the unsworn statements of the defendant, and upon which unsworn statements the defendant mainly rested his defense. Error in charging: "The state contends, further, that in this case, that although at the time of the first encounter the defendant may have acted in self-defense, or that his life may have been in imminent danger at the moment the blow was inflicted, that yet this necessity for defending himself was brought about by the person killing. The state contends

that he sought the difficulty with the deceased; that he armed himself, made threats against the deceased or his life, against his person, and that these threats were brought to the defendant; that although such an attack was made on him by the deceased as that he had to take the life of the deceased in order to save his own life, that yet he was not justifiable in so doing, because he had thus armed himself, made the threats, and sought the deceased. I charge you that that is the law." (a) Because the court erred therein, and in effect charged the jury that if the defendant armed himself, made threats, and sought the deceased, that those acts would, of themselves, make the subsequent homicide of the deceased murder, irrespective of the consideration whether or not the defendant was actually the assailant, or whether ingredients in the crime of murder or voluntary manslaughter were present. (b) Because therein the court clearly intimated that the necessity for the killing of the deceased was brought about by the unlawful act of the defendant.

After stating the various contentions of the state, and stating them strongly and in detail, the court thereupon instructed the jury as to the form of the verdict, paused for a considerable length of time, conveying the impression to the minds of the jury that all material instructions had already been given, handed the indictment towards the jury, indicating that they could retire, and only then did it occur to the mind of the court that any of the defendant's contentions, and the law touching his statement and reasonable doubt, should be given to the jury. "I omitted to state the other side of the cause, the other theory of the case." The court proceeded, for the first time, to state to the jury some of the defendant's contentions. The manner of the court, and the arrangement and order of the charge as thus delivered, the defendant submits, tended strongly to disparage his defense, and to discredit it in the minds of the jury, and submitted the defendant's contentions of law and fact to the jury upon unequal terms with those of the state, and was therefore error. Error in charging: "It is contended by the defendant in this case that he didn't go in pursuit of the deceased; that he had knowledge of the fact that deceased had threatened his life that night; and that he armed himself with this weapon, not for the purpose of making an attack upon the deceased, but for the purpose of defending himself against an attack that he apprehended would be made on him; and that he was not searching for the deceased when the defendant met him, but that he was going to the dance that night; and that without any knowledge upon his part of the whereabouts of the deceased, that he met him on the railroad, and that the deceased confronted him on the road, and made the first attack upon him, and that what he did was all done in self-defense; that it was absolutely necessary, to save his own life, to

take the life of the deceased. I charge you, if you find these to be the facts, and that the deceased was the assailant, was the aggressor in that difficulty, and the defendant had to take the life of the deceased in order to save his own life, and was not in search of him at the time,—I charge you that it would be your duty to find the defendant not guilty, if you find those to be the facts.” (a) Because said charge does not state the defendant’s contentions, according to the evidence and the defendant’s statement. (b) Because said charge fixed, as a rule of justification, that the killing must have been absolutely necessary in order to save the defendant’s life, and eliminated from the consideration of the jury their right to acquit him if they found that he acted in good faith, under the fears of a reasonable man, and, under circumstances so authorizing, acted upon the belief that the danger was real. (c) Because said charge, in effect, required the jury to convict the defendant unless they believed that he was not in search of the deceased at the time of the homicide. Error in omitting to charge the jury the contention of the defendant, namely, that he armed himself because he feared Jack Wilson, Lem Davis, and others with them, who, as the defendant claimed, were of bad character, and one of whom, while in company with the others named, threatened to take the life of the defendant. In a note to this ground, it is stated that this contention is covered by the court, so far as applicable to the facts, as will appear from reading the whole charge. Error, after partially stating the contentions of the defendant, and after omitting to state some of the most vital and material contentions of the defendant, notably the one referred to in the last ground, in thereupon instructing the jury, absolutely and unqualifiedly, as follows: “These are all the issues in the case.” For that this last instruction limited the jury to the consideration only of those issues expressly stated by the court; it excluded from the jury the defendant’s contention that he fled from the scene of the first encounter because he was being overpowered and cut to death by the two Wilsons, and that just prior to his flight from the scene of the first encounter he heard the witness Lem Davis come running and hallooing, “Hold him, boys, until I get there, and we’ll kill him”; it excluded from the consideration of the jury the character, relationship, youth, and alleged drunkenness of all of the state’s witnesses, and the bad state of feeling claimed to be existing on the part of the Davis family towards the family of the defendant; it excluded from the consideration of the jury various other contentions, on which the jury might have justified the defendant, or which may have given rise to a doubt as to the defendant’s guilt, which would have entitled him to an acquittal,—all of the above stated contentions thus excluded having been earnestly relied on by

the defendant, and insisted on before the jury by counsel for the defendant. In a note the court states that this contention, so far as applicable to the facts, was given in charge, as will appear from the whole charge.

The court erred in recalling the jury, on his own motion, after they had retired, and charging them the following hypothesis, under which the defendant could be convicted of voluntary manslaughter, namely: “If you believe, from the evidence, that the defendant met the deceased; that the deceased had communicated to him that the defendant was armed with a deadly weapon, and was seeking a difficulty with him; and that the deceased then prepared for that difficulty and met the defendant in the road, and mutually agreed, both of them, to engage in a fight, a mutual fight, and with deadly weapons; and that fight resulted in the death of one of them,—that would not be murder, but voluntary manslaughter. If you believe that both of these parties, the deceased and the defendant, mutually agreed to engage in a fight with deadly weapons, and the result of the fight was the death of one of the parties, it would not be murder, but voluntary manslaughter. Further, if you believe that, after the first rencounter, and you believe the first rencounter was a mutual fight, and deceased ran, and defendant pursued him, and that there was not sufficient time elapsing between the first rencounter and the second for the voice of reason to resume its sway, and that the defendant, acting under that passion supposed to be irresistible, took the life of the deceased, it would not be murder, but voluntary manslaughter.” Because there was no evidence of a mutual intent upon the part of the defendant and the deceased to fight. Under the state’s theory this was murder, and under the defendant’s theory it was justifiable homicide; and the defendant submits that it was error to give the jury this compromise middle ground, on which juries are prone to agree, and to give this hypothetical state of facts not justified by the evidence. The court erred in admonishing the jury, during the charge, as follows: “You have sworn that you have no prejudice or bias in this case, that you are impartial jurors, and that you will try this case by the evidence, and without regard to the sympathy that you may have, or feeling, for any of the parties interested in it.” For the jury having theretofore qualified as impartial and without bias, this admonition amounted to and was an intimation that the jury sympathized with the defendant, who was the only human party to the cause, and that, in order to acquit themselves of any suggestion or suspicion that they were in fact partial, after having sworn that they were not, they had better convict the defendant. The court erred in entirely omitting to instruct the jury anything touching the presumption of innocence which the law

Indulges towards a defendant, until his guilt is satisfactorily shown by the state.

Toomer & Reynolds, L. A. Wilson, Estes & Walker, and J. I. Summerrall, for plaintiff in error. W. G. Brantley, for the State.

PER CURIAM. Judgment affirmed.

(98 Ga. 115)

### CONLEY v. KEY.

(Supreme Court of Georgia. Jan. 20, 1896.)

**LIBEL—PRIVILEGED COMMUNICATIONS—IMPEACHMENT OF WITNESS.**

A person who, as agent of another, swears to the truth of a petition, to obtain an attachment as for a contempt because of an alleged violation of an injunction, is so far a witness in such proceeding as that affidavits, filed by the defendant in support of his answer, tending, by proof of bad character, to impeach the credit of such agent, are privileged, and matters therein recited pertinent to that point are not libelous, and cannot be made the basis of an action for libel, either as against an attorney offering such affidavits in evidence, the defendant, or the witnesses making such affidavits.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by John L. Conley against James L. Key. From a judgment sustaining a demurrer, plaintiff brings error. Affirmed.

The following is the official report:

The declaration was dismissed on demurrer. As originally filed, it alleged, in the first count: Key, on March 17, 1894, in the course of a trial in the superior court, in a case in which Key was of counsel, published of petitioner an affidavit, purporting to have been made by S. L. Holcomb, in which there were the following false, malicious, and defamatory words concerning petitioner: "In person appeared before me, the undersigned, S. L. Holcomb, who upon oath says that he is acquainted with John L. Conley, knows his general character, that his character is bad, and from that character he would not believe the said Conley on his oath." Said words, so written and published, were a false and malicious defamation of petitioner, tending to injure his reputation as an individual, and expose him to public hatred, contempt, and ridicule. In the proceeding in which Key made such publication petitioner had not been sworn as a witness, nor was he a party to said proceeding. Key well knew that the affidavit was wholly irrelevant to the question then at issue, and immaterial to the cause then being heard, but used his privilege as counsel in said cause merely as a cloak for venting his private malice against petitioner, and did not in good faith publish said affidavit in promotion of the object for which said privilege is granted. Said affidavit was written by said Key. The second count contained similar allegations as to an affidavit by J. H. Franklin. The third count contained similar allegations as to an affidavit by F. S. Kendrick. The fourth count contained similar allegations as to an affidavit

by S. F. Trimble. By amendment it was alleged that the cause upon trial, referred to in the declaration, was that of Eliza T. Conley v. J. B. McConnell, a proceeding to attach McConnell for contempt in violating an order of the superior court. The petition was set forth. So far as material, it alleged that theretofore Mrs. Conley had filed her bill against McConnell and others, and the judge of the superior court had passed an order enjoining defendants from obstructing or impeding travel over a road mentioned in said bill; that, after McConnell had been notified of the granting of this order, the order had been violated by McConnell; and prayed that McConnell show cause why he should not be attached for contempt for violating the order. This petition was sworn to by John L. Conley, as agent for Mrs. Conley, on March 5, 1894. On it an order was passed requiring McConnell to show cause, on March 10, 1894, why he should not be attached for contempt as prayed for. The declaration then set out the answer of McConnell, denying that he had violated the injunction, and asserting that the action had not been brought in good faith, or for the purpose of serving any good end, but was prompted by the innate viciousness of John L. Conley, the husband of movant, and was sworn to by McConnell on March 10, 1894. The amendment further alleged that, upon the hearing of said petition, rule, and answer, John L. Conley was not a witness, nor was anything said by him used as evidence, but the allegations in the petition were sustained by the testimony of persons other than said Conley, and by the personal inspection of the locality by the presiding judge, Conley not being present when the inspection was made; and that upon the trial of the issue the court ordered that McConnell be allowed a certain time to remove his fences from a certain road, which they now obstruct in violation of the orders of the court, and, if he failed to do so, the sheriff was directed to arrest and imprison him until he should purge himself of contempt. This order was passed May 12, 1894.

D. P. Hill, A. A. Manning, and W. R. Hodgson, for plaintiff in error. Thos. W. Latham, for defendant in error.

ATKINSON, J. The official report states the facts. The petition, upon which the attachment nisi as for a contempt was issued, was sworn to by the plaintiff in error as the agent of the wife. To meet the charge of contempt, it was necessary for the defendant in that proceeding to answer on oath, and it was perfectly competent to support his answer, either by the testimony of witnesses verifying its truth, or by proving to the satisfaction of the court that the person filing the information was so utterly unworthy of credit as that an information, supported only by his affidavit, was to all intents and purposes not sworn to at all. For the purpose of that inquiry, the

plaintiff in error was a witness, to the extent that his affidavit was the basis of the accusation, and testified against the defendant, and this rendered legitimate the production of impeaching affidavits. Affidavits made in judicial proceedings, pertinent to the issue, are held to be privileged, notwithstanding they may have been made maliciously. See *Francis v. Wood*, 75 Ga. 645. If the witness who makes an affidavit which is pertinent and legal is excused upon the ground of privilege, certainly the attorney who presents it for the consideration of the court cannot be held to have abused his privilege. To rule such a doctrine would be to practically deprive a party of the benefit of counsel in every case in which it became necessary or proper to impeach a witness of his adversary. We therefore conclude that the court committed no error, and that the judgment sustaining the demurrer to the plaintiff's declaration should be affirmed.

(98 Ga. 697)

**MEADS, Coroner, v. DOUGHERTY COUNTY.**

(Supreme Court of Georgia. July 13, 1896.)

**CORONER'S INQUEST—Fees.**

1. There is no law in this state which either requires or authorizes a coroner to hold an inquest over "a lot of bones, bleached by time" constituting parts of a human skeleton casually found upon the bank of a creek, it being obviously impossible to ascertain who the deceased was, how long since death had ensued, or in what manner it was caused. Such bones do not constitute "a dead body," within the meaning of the act of December 18, 1893, relating to coroners' inquests.

2. The interment of such bones in a "soap box, without expense to any one," does not entitle a coroner to the fee of \$15 prescribed in section 3701 of the Code "for furnishing coffin and burial expenses."

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by D. S. Meads, coroner, against Dougherty county, Judgment for plaintiff for part of his claim, and he brings error. Affirmed.

Wooten & Wooten, for plaintiff in error. D. H. Pope, for defendant in error.

**LUMPKIN, J.** We have excellent reason for believing that some of the coroners of this state are overzealous in the matter of holding inquests. From the records of this court, and from knowledge coming to us in the way of general information, we are satisfied that many inquests are held for which there is no real or legal necessity. The act of 1893 (Acts 1893, p. 118), superseding section 589 of the Code, provides that inquests shall be held: "1st. Of all violent, sudden or casual deaths, when there are no eye witnesses to the killing or cause of the death. 2nd. Of all sudden deaths in prison without an attending physician. 3rd. Of all dead bodies found, whether of persons known or unknown, when it is apparent from the body that violence caused the death, or when the

person died or disappeared under suspicious circumstances. 4th. Whenever ordered by a court having criminal jurisdiction." Does "a lot of bones, bleached by time," constituting parts of a human skeleton found upon the bank of a creek, and which presumably had been unearthed or washed up by its waters, warrant the holding of an inquest under any of the provisions of the law above quoted? Obviously not. How could the coroner have had the slightest reason for supposing that the person of whom these bones once formed a part came to a "violent, sudden, or casual" death, at which no witness was present? Surely, there was no reason for believing that the existence of this particular person was ended in prison; or, even if such were the case, that death ensued without the intervention of an attending physician. And certain it is that no court having criminal jurisdiction ordered this particular inquest to be had. We presume that the coroner acted under the third of the above specified provisions. Its language, however, did not warrant him in holding the inquest. It cannot be doubted that the person over a portion of whose remains the solemn ceremonial was conducted was "unknown," but we do not think those few bleached remnants of a human being fall under the descriptive words "dead bodies," as used in the statute. Supposing, however, they were a "body," how was it "apparent from the body that violence caused the death," or what was there to suggest that this "person died or disappeared under suspicious circumstances"? Seriously, such an investigation could result in no possible good, and was never contemplated by law. Again, after the "inquest" was over, the coroner interred the bones in a "soap box, without expense to any one." Surely, this was not "furnishing coffin," and did not entitle the coroner to the fee of \$15 prescribed by law for expenses incurred in burying the body of a human being. Code, § 3701. It appears from the record that the coroner was allowed his fee for holding the "inquest," but denied his charge for the alleged burial expenses. The only question before us relates to this latter charge. We are quite certain he was not entitled to collect it, and, if necessary, would have no difficulty in deciding that he ought not to have received the fee for holding the inquest. Judgment affirmed.

**ATKINSON, J.**, providentially absent, and not presiding.

(98 Ga. 711)

**BURNEY v. SAVANNAH GROCERY CO.**

(Supreme Court of Georgia. July 20, 1896.)

**MARRIED WOMAN — PARTNERSHIP WITH HUSBAND — LIMITING LIABILITY.**

1. There is no law or public policy in this state which forbids a married woman from engaging in business with her husband as a co-partner; and where a partnership between them is formed, and she is held out to the world as one of its members, she becomes liable to one who deals with the firm upon the faith of her membership therein.

2. Secret stipulations in the partnership articles, limiting the wife's liability as a member

of the partnership, are not binding upon innocent third persons who have no knowledge of the same.

(Syllabus by the Court.)

Error from superior court, Pierce county; J. L. Sweat, Judge.

Action by the Savannah Grocery Company against O. A. Burney. Judgment for plaintiff. Defendant brings error. Affirmed.

W. G. Brantley, for plaintiff in error. W. M. Toomer and Toomer & Reynolds, for defendant in error.

**LUMPKIN, J.** 1. This case turns upon the question whether or not, in this state, a married woman may engage in business with her husband as a co-partner. In *Francis v. Dickel*, 68 Ga. 255, it was put in the form of a query: "Can a wife be her husband's partner in business?" We think this question was answered affirmatively by the principle laid down in *Scofield v. Jones*, 85 Ga. 816, 11 S. E. 1032. After a careful examination of all our statutes, and many decisions, we have reached the conclusion that there is no law or public policy in Georgia which forbids such a partnership, provided, always, it is bona fide and actual, and not merely colorable. An alleged partnership cannot be used as a mere device for rendering the wife liable for, or subjecting her property to the payment of, debts of her husband. But, if they really engage in a business as actual partners, we see no reason why the partnership should not be regarded as a lawful one. The woman's law of 1866 went far towards the emancipation of married women. The only restrictions left upon their power to contract were designed for their protection and benefit. In all cases where these restrictions do not apply, they are as free to contract as men; and no one of these restrictions, so far as we have been able to ascertain, prevents a married woman from engaging in a partnership business either with her husband or another. There are many kinds of business in which she is calculated to make an excellent partner, and one who is likely to contribute to the success of the enterprise. The whole matter is summed up in the following quotation from the opinion of Chief Justice Bleckley in the case last cited: "There is nothing contrary to public policy in allowing husband and wife to unite their joint credit in procuring the means of supplying joint resources in the shape of a home, or a place of business from which to derive an income for the support of the family. Very often it would contribute to the well-being and prosperity of both, and to the permanent good of the family. No doubt, such a power can be abused and misapplied; but this is no reason for not recognizing its existence, or why the law should not tolerate it, if, on the whole, its results are beneficial rather than pernicious. At all events, we think the power exists at present under

our law." Page 825, 85 Ga., and page 1085, 11 S. E.

2. Conceding that a wife may lawfully enter into a partnership with her husband, secret stipulations in the partnership articles by which her liability as a member of the partnership is limited can no more in her case than in any other be made binding upon innocent third persons who contract with the partnership in ignorance of these stipulations. One who extends credit upon the faith of her full membership in the firm is entitled to hold her responsible, just as if she were a man or a feme sole. Judgment affirmed.

**ATKINSON, J.**, providentially absent and not presiding.

(97 Ga. 611)

**WAYCROSS LUMBER CO. v. BURBAGE et al.**

(Supreme Court of Georgia. Nov. 15, 1895.)

**TAXATION—EXECUTION AGAINST WILD LAND.**

Under the law as it stood in 1868, a tax collector had no legal authority to issue a tax execution against wild or unimproved land situated in his county, when the owner of such land was a nonresident. Consequently a sale under such an execution was void, and passed no title to the purchaser.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by W. E. Burbage and others against Glover & Co. and the Waycross Lumber Company. From a judgment for plaintiffs, defendant Waycross Lumber Company brings error. Affirmed.

J. O. McDonald and L. A. Willson, for plaintiff in error. Hitch & Myers, for defendant in error.

**SIMMONS, C. J.** The plaintiffs sought an injunction to restrain Glover & Co. from cutting timber upon a certain tract of land in Coffee county, to which the plaintiffs claimed title. Glover & Co. answered that they were in possession of the land as tenants of the Waycross Lumber Company; and the latter was made a party defendant, and answered, alleging that it was the true owner of the premises. The cause was, by consent, submitted to the judge below without a jury; and he found in favor of the plaintiffs, and granted the injunction prayed, to which decision the Waycross Lumber Company excepted. At the hearing the plaintiffs introduced a plat and grant from the state, and deeds showing a complete chain of title from the original grantee down to and into themselves to the premises in dispute. The defendants based their claim of title upon a sale of the land under an execution against it as unreturned wild land, issued by the tax collector of Coffee county December 28, 1868, for one dollar, amount of taxes due the state and county for that year, and costs. In the

execution it was stated that the land was "the property of nonresident." It appeared that when the taxes for 1868 accrued the owner of this land was D. H. Walker, of Walton county, Ga.; and a certificate of the comptroller general was introduced, which showed that Walker made a return of the land for state and county taxes for that year. As the law stood when these taxes accrued, all persons owning unimproved or wild land in counties without the county of their residence were required to make returns of the same to the comptroller general, or to the receiver of tax returns of the county where the land was situated, and the taxes due upon such land were required to be paid to the officer to whom the return was made. Code 1868, § 872. The tax receiver was required to keep a digest of all land not returned to him, separating the improved from the unimproved or wild land, and to forward the digest to the comptroller general. Id. § 869. And it was the duty of the comptroller general, after advertising a list of the unimproved or wild land not given in, to issue execution against such land, directed to the sheriff of the county where the land was situated; and the sheriff was required to advertise and sell the same, and make his returns to the comptroller general. Id. § 875. There was no law authorizing tax collectors to issue executions against such land. The law being as above stated, the tax collector in this instance had no legal authority to issue an execution for taxes for 1868 against the land in question, and the sale under the execution was void, and passed no title to the purchaser. The evidence required a finding in favor of the plaintiffs, and the grant of the injunction was proper. Judgment affirmed.

(98 Ga. 738)

**COMMERCIAL BANK OF AUGUSTA v. BURCKHALTER et al.**

(Supreme Court of Georgia. Aug. 3, 1896.)

**RIGHTS OF WIDOW—EXECUTION FOR YEAR'S SUPPORT—PRIORITY.**

A widow holding an execution against the administrator of her deceased husband for a year's support has the right to redeem land which the latter in his lifetime had conveyed to another for the purpose of securing a debt; and, upon her so doing, may have the land sold under her execution, and take its proceeds in preference to a judgment creditor of the intestate, whose judgment was obtained before the execution of the security deed.

(Syllabus by the Court.)

Error from superior court, Richmond county; B. H. Callaway, Judge.

Action between the Commercial Bank of Augusta and Mary H. Burckhalter and others to determine the priority of liens. From the judgment the bank brings error. Affirmed.

J. R. Lamar, for plaintiff in error. Salem Dutcher, for defendants in error.

LUMPKIN, J. In 1891 the Commercial Bank of Augusta obtained a judgment against Joseph H. Burckhalter. In 1892 the latter conveyed land then subject to the lien of the bank's judgment to Hanlon for the purpose of securing a debt due him. In 1893, Burckhalter died intestate. Upon proper proceedings, a year's support in money was set apart to his widow; and in 1895 the ordinary issued an execution for the same in her favor against the administrator. Thereupon Mrs. Burckhalter paid Hanlon out of her own funds the amount of the debt secured by her husband's deed to him, and he canceled the deed, and surrendered the same to the administrator; it being recited in the instrument of cancellation that this was done "to the intent that the title to the property mentioned in and conveyed by said deed may be reconveyed to and vested in the estate of said Joseph H. Burckhalter as assets thereof, to be distributed by said administrator." These being the facts, the question is, which is, in law, the superior lien upon the land,—the judgment in the bank's favor, or that in favor of the widow for her year's support? In our judgment, the latter is unquestionably entitled to the precedence. While Burckhalter was yet in life, the security deed to Hanlon would have presented no obstacle to an enforcement of the bank's execution by a sale of the land as the property of Burckhalter. His death produced no change in the respective rights of the bank and Hanlon. So far as these two parties were concerned, the lien of the bank continued to be superior to the security deed. This is so because, relatively to Hanlon, it was the right of the bank to treat the land as the property of Burckhalter, irrespective of the question of his death. When, therefore, the widow redeemed the land by paying off Hanlon with her own money, she did not in the least degree, so far as concerned the bank, change or affect the status of or title to the property. She simply put the title back in her deceased husband's estate; and there, according to the bank's theory, and so far as its rights were involved, the title had been all the while. When, however, the widow satisfied Hanlon's claim, and procured from him a cancellation of the deed which had stood in the way of the collection of her year's support, her lien upon the land became perfect and complete; and, as the law makes the year's support a debt of the very highest dignity against the property of the estate, the bank must be postponed. It has lost its money, not because of the cancellation of the deed from Hanlon, for that deed was never in the bank's way, nor in any manner affected its rights, but because the death of Burckhalter and the setting apart of a year's support brought into existence a new and higher lien upon the property of the estate than the bank's judgment. Judgment affirmed.

(98 Ga. 728)

**MALLERY v. YOUNG et al.**

(Supreme Court of Georgia. Aug. 3, 1896.)

**WILLS—CONTEST—OMITTED HEIR.**

1. It is not incumbent upon an heir at law who seeks, under section 2403 of the Code, to render a will inoperative as to him on the ground that it was executed under a mistake of fact as to his existence, to show affirmatively that, but for such mistake, he would have been a beneficiary of the will.

(a) Whether or not this section is applicable in a case where it appears that the testator knew of the existence of the person claiming to be his heir, and acted upon an erroneous conclusion as to the fact of relationship, is not now for determination.

2. The court did not err in granting a new trial.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Action by Mary A. Young and others to set aside a will. From a decree setting it aside, John E. Mallery, executor, brings error. Affirmed.

J. A. Brannen, Hines & Hale, and H. J. McGee, for plaintiff in error. D. R. Groover, H. D. D. Twiggs, G. W. Williams, and Steed & Wimberly, for defendants in error.

**LUMPKIN, J.** This case was before this court at the October term, 1894. See 94 Ga. 804, 22 S. E. 142. It comes back upon a point not then made or discussed. The only legal question now for consideration is whether or not an heir at law who seeks, under section 2403 of the Code, to render a will inoperative as to him on the ground that it was executed under a mistake of fact as to his existence, is bound to show affirmatively that, but for such mistake, he would have been named in the will as a beneficiary. The trial judge charged the jury that it was incumbent upon such an heir at law to do this. Under this instruction, Mrs. Young lost her case, and the judge granted her a new trial, evidently having reached the conclusion that he erred in his charge with reference to this section of the Code. We think he did, and that he rightly corrected the error by setting the verdict aside. In the absence of a will, the estate of one who dies intestate and unmarried descends to his nearest blood relatives, and there is a presumption of law that they are the persons whom such an intestate would naturally desire should become the objects of his bounty. It is requiring more than the law exacts of an heir at law, as to whose existence a testator was mistaken, to render it obligatory upon such heir to prove that he would have been favorably mentioned in the will, but for such mistake. It would be manifestly difficult, if not impossible, in some instances, to show what would have been the testamentary inclination of a testator with reference to one whom he had never known at all, or believed to be out of existence. The heir should not be made to carry such a burden, but, in this regard, may safely stand upon the legal and moral presump-

tion that, other things being equal, he would be favorably remembered in the testator's will. It appears in the present case that the testator actually knew of the existence of Mrs. Young, and was also well aware of the fact that she claimed to be his niece and next of kin. The evidence leaves it in doubt as to whether he so regarded her or not. However, the record does not present for our decision the question whether or not section 2403 of the Code is applicable to this particular state of facts, and for this reason we cannot now undertake to determine it. Judgment affirmed.

(100 Ga. 60)

**WALKER v. STATE.**

(Supreme Court of Georgia. Oct. 19, 1896.)

**MURDER—EVIDENCE.**

The evidence discloses a plain case of murder, and none of the grounds of the motion for a new trial authorize any interference by this court with the refusal of the trial judge to set aside the verdict of guilty.

(Syllabus by the Court.)

Error from superior court, Wilcox county; O. O. Smith, Judge.

Lewis Walker was indicted for the murder of Tobe Walker, and was found guilty, with a recommendation to life imprisonment. He moved for a new trial, and, his motion being overruled, he excepted, and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in admitting, over the objection of defendant, "the evidence against Tobe Walker, purporting to have been issued by one Roberts, without proof that said Roberts had legal authority to issue the same, or had in fact actually so issued it, and for the further ground that said warrant was never out." It was not stated in this ground what objection was made to this evidence when offered. Error in allowing the state, after the announcement that the state had closed, and the defense, after introducing the defendant's statement, had also announced closed, to reopen the case for the purpose of placing said warrant in evidence, and proving by one Belcher that Belcher had informed the deceased that he, Belcher, was an officer when arresting said deceased. It was not stated in this ground that this evidence was objected to. The testimony for the state tended to show that Belcher and others went to Tobe Walker's house to arrest said Tobe; that they did arrest Tobe, and, when they had done so, Lewis Walker snapped a gun at Belcher, and Belcher grabbed the gun by the muzzle; that during the scuffle Lewis Walker got the gun "on" Belcher, and Belcher pushed the gun away; and that when he did so the gun fired, killing Tobe Walker. Error in refusing the following written request of defendant: "If

the defendant had no knowledge that Belcher was an officer, he had a right, when Walker's house was invaded by Belcher and others, to make ready with his gun to defend his father's person or home, if necessary." This request was submitted after the court had completed the charge, and ordered the jury to retire and consider their verdict. Error in omitting to charge the jury as to the law of involuntary manslaughter, the omission being misleading. Error in charging: "I charge you that a man may shoot at another in malice, and kill his best friend, and that would be murder, unless he was acting in self-defense in making the assault or attempting to kill the party he shot. Look to the evidence now upon this question, and see what it is." Error in charging: "If you find from the evidence that he entered the house, whether before or after he made the arrest, and the defendant procured a gun, or that he had a gun when he went in there, and endeavored to shoot Belcher, unless he would have been acting in self-defense under the rules that I have given you, and that Belcher endeavored to prevent him from shooting by taking the gun, provided you find these things from the evidence to be true, and in the scuffle the gun was discharged, and killed the deceased, though he may have been the father of the defendant, and he had no desire to do so, yet, if he was attempting to shoot Belcher, and in the scuffle the gun was discharged, and killed the deceased, I charge you that would be murder."

E. Wall, E. H. Williams, and M. E. Land, for plaintiff in error. Tom Eason, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

#### WEARING v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

##### BURGLARY—APPEAL—EVIDENCE.

There being no complaint that any error of law was committed, and the evidence being sufficient to warrant the verdict, this court will not set it aside, after its approval by the trial judge.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Ed Tucker, Henry Tucker, and George Wearing were indicted for burglary in breaking and entering the storehouse of J. T. Taylor, and stealing therefrom three pocket-knives. Wearing was found guilty, and his motion for a new trial being overruled, he accepted, and brings error. Affirmed.

The following is the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. The evidence for the state tended to show that, between the night of Saturday, May 23d, and Monday morning, May

25th, the store of Taylor was broken and entered, and some knives stolen therefrom. Upon the trial some knives were produced, which Taylor and his clerk testified were similar in appearance to knives which were in the store on Saturday, and had been taken therefrom between Saturday night and Monday morning. There were various other dealers in knives in the town where Taylor's store was located. One of the knives so produced was taken by a policeman from the person of Wearing on Monday night following the burglary. The evidence of Henry Tucker, which was introduced by the state, tended to show that he (Tucker) was an accomplice in the crime; that the store was broken and entered by one Manderson; and that, in a few minutes after Manderson came out with some knives, George Wearing, who was in the neighborhood, met witness and Manderson, and asked Manderson to let him (Wearing) have "that three-bladed knife." Witness did not know whether Wearing had seen the knife or not, or had been with Manderson, after Manderson came out of the store. Manderson did give Wearing the knife, and it is one of the knives produced in court. There was evidence of this witness having some tendency to show that Wearing assisted in the burglary, but not directly showing it.

J. J. Blalock, for plaintiff in error. J. M. Du Pree, Sol. Gen., and J. B. Hudson, for the State.

**PER CURIAM.** Judgment affirmed.

(100 Ga. 72)

#### COOK et al. v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

##### INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

This being an indictment for a misdemeanor against two persons, upon which they were jointly tried and convicted, and the only question for review by this court being whether or not the verdict was contrary to the evidence, and it appearing that there was sufficient evidence to support the conviction of one of the accused, but not that of the other, the judgment as to the former is affirmed, and as to the latter reversed.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

George Cook and Dick Cook were indicted for the unlawful sale of liquors in Bartow county. They were found guilty, and their motion for a new trial, made upon the general grounds alone, being overruled, they excepted and bring error. Affirmed as to one. Reversed as to the other.

The following is the official report:

The evidence for the state, in brief, was: On December 24, 1895, one Chapman saw the two defendants, with an old man and a young man, passing his house about sundown. Stansell was not in the wagon. He came to the house where Chapman was, and Chapman

went back to the wagon with him, and he offered Chapman a dram, which Chapman took. No money was passed, and nothing was said about paying for the whisky. On the same day Tom Cowart saw George Cook near Cass Station, who offered to sell him some tobacco, which he had under his arm, and, after talking with Cowart about the tobacco, Cook said, if Cowart saw anybody who wanted anything, he thought he could get it. Cowart saw J. C. Waldrup in a buggy with George Cook, on the same day, at old man Denson's, in Bartow county, and they got out of the buggy, and Waldrup took a jug out of the buggy, and went towards the wagon which was in Andrew Denson's yard, but George Cook did not go in that direction, but went to the house, and Dick Cook was not present. Cowart never saw either of defendants sell any whisky, and has never seen or was present when any was sold. About 8 o'clock in the morning of the same day, J. C. Waldrup, driving in his buggy towards Cassville, met George Cook on the road, and Cook had some tobacco twists, and offered to sell some to Waldrup. Waldrup told him he was looking for some whisky, and Cook said he knew a man who had some, and would tell Waldrup where he was, and indicated where the man was. Waldrup asked him if he would get in the buggy and drive with Waldrup, and Cook did so. It was near the Denson house, and Cook pointed at an old-looking man, and said he thought this man would let Waldrup have what he wanted. Waldrup went with the man to the wagon, and Cook went the other way into the house. Waldrup bought a gallon of apple brandy from the old man, and paid him for it. George Cook had nothing to do with this sale, except as stated, and Dick Cook was not there. Waldrup never bought any whisky from either of them, and never saw them sell any. During the night of December 23d George Cook and Stansell came to the house of Denson, George's father-in-law. George told Denson that he and his brother had come down to sell tobacco, and had a lot of it in the wagon which was in the yard. There was no whisky in it that Denson saw. Denson left home about 8 o'clock on the 24th, and the wagon was there then, and came back about 3, and it was gone. Henry Halcomb was at Denson's house when George and Stansell came, and got a dram of whisky from George. George had a pint bottle about half full in his pocket, and gave Denson some before breakfast. Denson never saw either of defendants sell whisky. One Wiggins lives about three miles from Cassville, and on December 24th got some whisky from an old man out in the Mack Johnson field, and saw Plunket Haygood get some, and pay for it. Tom Cowart told Wiggins where the whisky was, and how he could get it. The whisky was in two kegs, of 10 and 15 gallons apiece, and sold by an old-looking man Wiggins did not know. Defendants were not there, and Wiggins never saw ei-

ther of them until this trial. A wagon was near the house of Andrew Denson. On December 24th George Cook passed the house of B. F. Posey, and asked Posey if he wanted some good tobacco. He said he had a lot of it in the wagon, and gave Posey a sample. Posey bought some tobacco from Cook, which he delivered afterwards. Posey sent for some brandy by Dyar, who went to Denson's, but there was no whisky there. Posey was at Denson's, and the brandy that Dyar got for him he got out in the Mack Johnson field, near Denson's house. Posey never saw either of defendants sell whisky or brandy. On December 24th Dyar went up to Denson's to get some brandy, and saw George Cook at the house, but did not get any brandy there. Dyar did get some brandy some distance from the house. Dyar met an old man near the house, and asked him if he could get some brandy, and the man said, "Let's take a walk," and Dyar went off in the field with him about half a mile, and he sold Dyar some brandy, which Dyar paid him for. George Cook did not go with them, and had nothing to say about it, and his brother had nothing to do with the sale. Posey put Dyar onto it, and went with Dyar to show him where he could get it. In the afternoon of the same day Chambers, in Bartow county, beyond Denson's, overtook a wagon which was headed towards the mountain. An old man was driving the wagon, and defendants and a young man named Denson were near the wagon. Bought a quart from the old man. Chambers never saw either of defendants sell a drop. About 2 o'clock on the night, before December 24th, when Halcomb was spending the night at Denson's, defendants and old man Stansell arrived in a covered wagon with whisky and tobacco in it. The wagon and one of the mules belonged to Dick Cook, and the other mule to Stansell. George Cook slept in the wagon that night, and Stansell and Dick in the house. George said that he and his brother and Stansell were interested in some whisky they had hauled down, and that each owned one-third of it. Halcomb saw Waldrup come to the house that morning, and go to the place where old man Stansell was, and get into the wagon. George Cook came with Waldrup, but went in the house. Halcomb never saw defendants sell any whisky. The whisky was in kegs in the wagon. Defendants and Stansell live near each other, and near the line of Pickens and Gilmer counties. They left for home late in the evening of December 24th. The wagon and whisky were carried out in Johnson's field that morning. S. A. Denson, brother-in-law of George Cook, went home with defendants. They were walking, and the wagon was behind, with old man Stansell driving, when Jim and Charley Chambers caught up with it, and had some talk with Stansell. Defendants were with Denson at that time, away from the wagon, and Denson knows they had nothing to do with what transpired at the wagon

any more than Denson did. George Cook stated: "I came down with my brother to help him dispose of some tobacco which he had raised and had for sale. Neither of us had any whisky, nor were interested in any. We came to sell tobacco, and did sell it, and nothing else. I did not tell Halcomb that my brother and I had an interest in any whisky, for we did not, and did not see any sold." Dick Cook stated: "I came down to Bartow county with my brother to sell tobacco, and did not come to sell whisky, and did not sell any. Had no interest in any whisky, and had nothing to do with any, and had nothing to do with the sale of any."

J. W. Harris, Jr., for plaintiffs in error. A. W. Fite, Sol. Gen., and A. S. Johnson, for the State.

PER CURIAM. Judgment affirmed in part, and in part reversed.

(100 Ga. 69)

### DAVIS v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

#### LARCENY—EVIDENCE.

There was no evidence to support the conviction of the accused, and a new trial should have been awarded upon the ground that the verdict of guilty was contrary to law.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Rosa, Judge.

Willie Seabrooks and Will Davis were accused in the city court of Macon of larceny from the house in stealing \$15 from the storehouse of W. L. Bazemore. Davis was tried, and found guilty. He moved for a new trial on the general grounds, and, his motion being overruled, excepted, and brings error. Reversed.

The following is the official report:

Upon the trial, Bazemore testified: "Tuesday night about half past eight, I was closing up my store in Macon, and had just counted my cash,—\$15.00 in silver, and some small change,—and put it in a shot sack. I left the sack untied, in my money drawer, and left the drawer open, and went out on the sidewalk in front of the store to close a window, leaving Willie Seabrooks alone in the store; and no one entered it while I was out. I saw my porter and another negro boy in front of the store on the sidewalk. When I went back in the store, Seabrooks came out on the sidewalk. A customer came in almost immediately, and when I went to make change for him I found my money was gone. I suspected Seabrooks, and called him. He was just outside the door, on the sidewalk. He came in, and I searched him, but found no money on him. I kept him with me until I took him home. He had been working at my store that day. I tried to get him to tell me where the money was, but I couldn't find out. About ten

o'clock that night, I brought him to the city, and turned him over to a police officer. He afterwards admitted that he stole the money, and gave it to a boy, who was outside my store. I did not tell any one except Willie Seabrooks that I had lost the money, but kept the matter quiet. Defendant Will Davis did not come into my store. I saw a boy outside the store, but it was too dark to recognise who he was. I don't know whether he is the defendant. Defendant first denied being about my store that night, but afterwards said he was outside on a bench, and that the reason he had denied being there first was because he was frightened." Willie Seabrooks testified that he stole the money while Bazemore was shutting up the store, and, as soon as he stole it, went outside of the store; that he handed the bag of money to defendant, whom he had never seen before that night, and told defendant to keep it for him; that he had given defendant some ground peas before he (witness) stole the money, and defendant was eating them; that defendant did not know what was in the bag, nor that the money was stolen; that witness just handed it to him because he did not want Bazemore to catch up with witness; that defendant never came into the store; that witness was going to see defendant afterwards, and make him give witness the money; that witness is now on the chaingang for stealing the money; that witness did not know where defendant lived, but Alonzo Wyche (Bazemore's porter) knew defendant; that witness and Alonzo had not entered into a plot to steal the money; that witness handed the defendant the money while Alonzo was putting hay in the wagon. Wyche testified: "I was sitting out on the table, near the store, when Willie stole the money. When Bazemore was closing up, Willie came out, and sat down by me on the table. Defendant was on the same table, but I was between him and Willie. I did not see Willie give anything to defendant except some ground peas, which was before Willie went into the store when he says he stole the money. Willie didn't give me any money, and did not pass by me, nor hand anything to defendant, when Bazemore called him. In about four to ten minutes after Bazemore called Willie in to him, defendant went on up the street. I had not arranged with Willie for him to steal the money, and divide with me. I did not get the money." A detective testified that from the description of the boy who was sitting on the table he arrested defendant the morning after the money was stolen; that defendant lived outside of the city, and witness fooled him into the city, telling he wanted him as a witness to testify against some boys who had been fighting; that he got defendant to go with him till he got to the city hall, and witness then told him to come into the office of the barracks; that the boys were in there; that, when defendant saw witness wanted him to

go in there, instead of in the recorder's court room, defendant ran off, and had to be caught; that defendant first denied being present at the store, but afterwards admitted it, and has always denied having anything to do with the theft, and said he had not seen any money; that witness has never recovered the money; that he considered defendant a pretty bright boy; looks to be about 15 years old. For the defendant, his half-sister testified: "Defendant is about fifteen years old, and is not of good mind. He is foolish at times. This was brought on by his having fits when he was younger. He has not had fits in three years; has outgrown them. He does not know the difference between right and wrong sometimes. He has never been accused of anything before. I never knew him to steal anything. I suppose he would know it was wrong to steal." Another witness testified for the defense, and the testimony tended to corroborate that of the last witness. Defendant stated: "I went to the store, and sat on the table outside. I told mother I was going to church. A boy came out, eating ground peas, and I asked him for some, and he gave me a handful. There was another boy sitting on the table with me besides Willie Seabrooks. Mr. Bazemore called in Willie Seabrooks, and he went in the store. I got up after while, and went to church. After church I went home. The next day the detective asked me to go with him, saying he wanted me to swear against some boys who had been fighting. When he got me down to barracks, he told me to come in, and I ran away. I had nothing to do with the money, and have never had it."

Hope Polhill and W. H. & E. R. Black, for plaintiff in error. A. W. Lane, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(99 Ga. 623)

**GOULDING FERTILIZER CO. v. DRIVER.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**SALE OF UNINSPECTED FERTILIZERS—ACTION FOR PRICE.**

1. The seller of commercial fertilizers, which had not been inspected as the law requires, cannot maintain against the buyer an action for the price of the same.

2. There was no error, in the trial of such an action, in rejecting evidence tending to show that the plaintiff had made ineffectual efforts to have the fertilizers inspected.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Jones, Judge.

The following is the official report:

The Goulding Fertilizer Company sued Driver upon an account for \$281.75, being the alleged price of 12 tons of bone compound, with a credit of \$12.25 cash. Upon the trial plaintiff introduced the interrogatories of Kessler, its secretary and treasurer, who testified: Plaintiff sold defendant 12

tons of bone compound, at \$24.50 per ton delivered at Tallapoosa, Ga. Contract was made between them January 23, 1891. Plaintiff sent Hon. R. T. Nesbit 10 cents per ton to pay for this inspection. He was requested to have these goods inspected upon entering the state. The court ruled out the evidence that plaintiff had written Nesbit on the day of making shipment from Pensacola, Fla.; also that, owing to fire at plaintiff's office, the copy of this letter was destroyed. To this ruling plaintiff excepted. The witness further testified: The goods were to be inspected, branded, and tagged before they were turned over to defendant. This evidence the court ruled out, and to this ruling, also, plaintiff excepted. The witness further testified: "On February 10th, as per copy of letter attached to my first set of interrogatories, marked 'No. 1,' we notified defendant that we had notified the commissioner of agriculture to have these goods inspected upon entering the state. We made repeated demands of defendant for settlement of the account, as per copies of original letters attached to said interrogatories, and numbered 2, 3, 4, 5, 6, and 7, which I identify as being true copies. The sale was not complete till delivery of the goods. The agent who made the contract, subject to approval of home office, was W. L. McElmurray. I did not have the agreement and its terms, did not see the stuff inspected, and do not know whether it was or not." Plaintiff proposed to read in evidence said copies of letters referred to in the interrogatories, but the court ruled them out, to which ruling, also, plaintiff excepted. One was dated February 10, 1891, and stated that plaintiff had notified the commissioner of agriculture to have the goods inspected upon entering the state. Another was dated December 27, 1891, and stated that plaintiff had received a letter from defendant saying it was not necessary for him to pay the account, as he disposed of the goods before they were inspected; that plaintiff had investigated, and found that the commissioner of agriculture was paid and instructed to inspect these goods upon entering the state, and their not having been inspected is no fault of plaintiff; that when the goods reached defendant, defendant should have immediately reported the fact to plaintiff or the commissioner of agriculture, but, instead, proceeded to dispose of the goods, although he was well aware of the Georgia laws. Another was dated February 9, 1891 (?). It stated that plaintiff noted that defendant had collected between \$90 and \$100 on the sale of plaintiff's fertilizer, and begged to refer defendant to their contract. Defendant had been served with a notice to produce the originals of these letters, and testified that he had turned over all the letters he received from plaintiff that he had any recollection of receiving, and all that he could find; that, if he had any others, they were lost, and he had no recollection of them.

Plaintiff put in evidence the contract. It was dated January 23, 1891, and by its terms appointed defendant agent at Tallapoosa for the sale of plaintiff's fertilizers during the season of 1891, on the following conditions: Defendant was to take 12 tons of bone compound at \$24.50 per ton, or as much more as might be actually satisfactory at same prices. Plaintiff was to deliver it free on board cars at Tallapoosa, freight to be paid by plaintiff. Defendant was to pay for all goods shipped on his order additional to this sale, and plaintiff to be at no expense after delivery of goods as agreed. Defendant to make settlement by May 1, 1891, by note payable December 1, 1891. Plaintiff put in evidence, also, original bill for the goods, dated at Pensacola, Fla., February 7, 1891, it being for 12 tons of bone compound at \$24.50. Upon it appeared in pencil: "Five sacks inspected 20, Feby. 1891." Also, a receipt for the \$12.25 paid on account, dated February 26, 1892. Also, letters from defendant to plaintiff of various dates, from May 1, 1891, to February 16, 1892, in which defendant refused to pay, and stated that under the law he did not owe plaintiff anything; that the guano did not give anything like satisfaction; that, to render the sale of fertilizer lawful put up in sacks, it was requisite that at the time of sale each sack should bear the inspector's tag, and should have printed, branded, or stamped upon it the manufacturer's guaranteed analysis; that the guano did not come up to the requirements of the law or plaintiff's representations; that defendant had collected between \$90 and \$100 and would give plaintiff that much if plaintiff would receipt in full; that defendant was not fully aware of the Georgia laws until somebody refused to pay for the goods, and not until after he had consulted an attorney. In the letter of May 1, 1891, defendant stated, that he was not very well posted in the guano business, and had been informed that guano must be inspected before sold; that he sold all of the car of goods but six sacks before the inspector came, and, as plaintiff's agent misrepresented the goods in many instances, he (defendant) did not feel willing to sign note until the goods proved to be all right, and it would take some time to settle that question. Plaintiff introduced, also, original letter from it to defendant, dated February 10, 1891, inclosing the invoice for the bone compound, and stating that plaintiff had notified the commissioner of agriculture to have these goods inspected upon entering the state; also, the evidence of T. B. Jones, one of the guano inspectors of the state of Georgia in 1891, as follows: "To the best of my recollection I inspected at Tallapoosa for an agent named Driver. I inspected some for plaintiff at other places. This at Tallapoosa Driver had in his possession. Don't remember that he had more than four sacks on hand. He said the rest had been sold, and some of it put in the ground. I went there at plaintiff's re-

quest, to inspect their guano there in the hands of Driver, and inspected what he had on hand; he accounting for what was not there, and I deeming that sufficient for a correct analysis, report, and test of it to be made. I received the letter from plaintiff of March 3, 1892, and answered it March 7, 1892. May have offered Driver the tags, as I felt I had no right to go around myself, as the sacks were out of his possession. I did not insist on his taking the tags, and tagging it for me. Have no recollection of his refusing to tag the goods, or telling me I could do it, as I was paid to do it, nor that I didn't have time." Plaintiff put in evidence the letter to it from Jones, of March 7, 1892, in which he stated that his recollection was that he received a request from plaintiff to inspect a lot of guano in the hands of Driver at Tallapoosa; that when he went to make the inspection Driver had, Jones thought, but four sacks on hand, and accounted for the balance that they had been put in the ground; and that Jones drew samples from what Driver had on hand, and made return of that inspection for the entire shipment, considering that a sufficient quantity to make a fair analysis from. McElmurray testified: "I sold Driver the goods. The price made to him was to cover cost of inspection, branding, and tagging, and the freight to his place. He told me he used the goods on his own farm, and that the crop was as good as he ever made. Said he had no objection to the goods, but did not intend to pay for them because they were not tagged, and he knew the law would not make him do it. He paid me for four or five sacks that were left in the cars when the inspector got there and tagged them. Said he paid this to keep the cost of court from going against him when plaintiff sued him. He never once complained to me about the value of the goods. I did not tell him that the goods would be tagged and inspected when they reached Tallapoosa. He refused, on May 1, 1891, to give us his note as per contract, on the ground that the goods were not inspected and tagged. I never told him that plaintiff had misrepresented the guano. If I ever sold it to a man once, it was no trouble to sell again." Defendant was introduced by plaintiff and testified: "I furnished these goods to my tenants. Most of it was used on my farm. I sold some of it. I never took any notes for that, and the balance of this here, I refused to send notes, after they terminated this contract." Here plaintiff closed, and defendant moved for a nonsuit, but the court stated defendant had better go on with the case, and the court would see about that after defendant introduced his evidence. Defendant then testified: "I bought the goods from the agent, McElmurray. They were shipped to Tallapoosa, and none of them were inspected, branded, or tagged when they got there. About two weeks afterwards most of them were carried down to my farm. All had been taken away

except five or six sacks. These I sold, but some gentleman came there and tagged and inspected them. He took samples of two or three sacks, and carried the samples away. A person could not see to read where he made the inspection of the sacks. He went away immediately, said he had to hurry to inspect some other guano, and wanted me to take the tags, and put on the other sacks, and I told him I did not see that that was necessary; I thought part of the guano had been used and put in the ground. Most of it was used on my farm. I used 800 pounds of it myself." The evidence here closed, and the court granted a nonsuit, to which ruling, also, plaintiff excepted.

Adamson & Jackson and Cobb & Bro., for plaintiff in error. J. M. McBride, for defendant in error.

PER CURIAM. Judgment affirmed.

(88 Ga. 112)

### JOHNSON v. REDWINE.

(Supreme Court of Georgia. Jan. 20, 1896.)

#### COMPROMISE—PLEADING—HOMESTEAD.

1. The compromise of a doubtful claim is a sufficient consideration to support a promissory note fairly given in settlement of the controversy compromised.

2. In a suit upon a promissory note given for the purchase money of an undivided interest in land, a plea of want of consideration, which alleges that the payee was a son-in-law of the maker, and, as heir of his deceased wife, claimed an interest in the land in question, of which the maker was in possession under a homestead sued out in right of his wife and minor children, which land was purchased with the money of the maker, and that the note sued on was given in settlement of this claim of the payee, and to prevent a threatened suit for partition, even if otherwise sufficient, is incomplete as a defense to the action, because it does not allege either that the maker took the title to the premises in his own name, or that the wife of the payee in fact held no resulting interest in the property covered by the homestead estate.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action on J. B. Redwine against G. A. Johnson on a note. From a judgment for plaintiff, defendant brings error. Affirmed.

M. Foote, Jr., for plaintiff in error. James L. Key, for defendant in error.

ATKINSON, J. 1. The proposition announced in the first headnote requires no elaboration. It is a restatement of elementary law. See 1 Add. Cont. p. 29, § 14.

2. The plea of the defendant was properly stricken on demurrer. It was a plea that the promissory note sued on was without consideration. It alleged that the payee, as an heir at law of his deceased wife, who was a daughter of the maker, claimed an interest in certain lands which he (the maker of the note) had caused to be set apart as a homestead, which was sued out in right of his wife and

children; that the land so set apart was bought with his money; and that the note was given in settlement of the supposed right of the payee, and to prevent the execution of a threat he had made to proceed for partition. There was no allegation that the title was taken in his name, or that the deceased daughter did not have a resulting interest. So that if the plea could be treated as alleging that the contract was entered into by the maker under a mistake as to the rights of the payee, leaving no consideration, legal or moral, to support the contract of compromise, it is wholly defective in the two respects above indicated. For if the daughter really had a resulting interest, or the title was taken originally in the name of the maker's wife and children,—and this we must presume, in the absence of an allegation to the contrary,—then there was ample consideration to support the agreement to compromise, and, as well, the promissory note made in the further execution of that contract. We conclude, therefore, that the plea interposed no legal obstacle to a recovery by the plaintiff, and the court did not err in striking it upon demurrer. Judgment affirmed.

(88 Ga. 717)

### BENDER v. BENDER.

(Supreme Court of Georgia. July 20, 1896.)

#### TEMPORARY ALIMONY—REVIEW OF DENIAL—WARRANT OF ERROR.

1. A judgment, rendered at chambers' denying an application for temporary alimony filed by a wife, under section 1741 of the Code, in behalf of herself and a minor child, pending an action for divorce by her against her husband, is, under section 1748 of the Code, reviewable upon a "fast" writ of error.

2. Where an applicant against whom such a judgment was rendered did not sue out a bill of exceptions within the time prescribed by law, but, instead thereof, filed exceptions pendente lite, she could not, after the lapse of three terms, and after obtaining a final judgment of divorce, bring the refusal to grant temporary alimony to this court for review by then filing a bill of exceptions, and therein assigning error upon the rulings set forth in the exceptions pendente lite.

3. Even if the bill of exceptions had been filed in time, and excluding from consideration the evidence alleged to have been improperly admitted, it does not appear that there was any abuse of discretion in refusing to grant the application for temporary alimony.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Mary L. Bender against Louis Bender for divorce. There was a judgment for plaintiff, and from a previous judgment denying an application for temporary alimony plaintiff brings error. Dismissed.

E. M. & G. F. Mitchell, for plaintiff in error. Bishop, Andrews & Hill, for defendant in error.

LUMPKIN, J. On the 12th day of February, 1894, Mrs. Bender brought an action for

a divorce against her husband. Immediately thereafter she filed an application for temporary alimony, in behalf of herself and a minor child. This application was heard and denied on the 22d day of March, 1894, and the plaintiff filed exceptions pendente lite. Two verdicts in the divorce case were subsequently rendered in her behalf,—the first at the September term, 1894, and the second at the September term, 1895. A judgment of divorce was entered in accordance with these verdicts. This judgment was silent as to alimony. After its rendition, Mrs. Bender filed a bill of exceptions, assigning error upon her exceptions pendente lite above mentioned, but making no assignment of error in the divorce case proper. In other words, she undertook, in the manner stated, after the adjudication of that case in her favor, to bring to this court for review the judgment refusing her application for temporary alimony.

1. The first section of the act of October 28, 1870, "to extend the provision for alimony to the family of the husband," etc., now embodied in section 1741 of the Code, provides that the presiding judge "may, either in term or vacation, grant alimony, or decree a sum sufficient for the support of the family of the husband dependent upon him and who may have a legal claim upon his support, as well as for the support of the wife." Under this law, a wife who has instituted a libel for divorce against her husband may, while the same is pending, apply to the judge for temporary alimony, in behalf of herself and a minor child; and under section 1748 of the Code, which is taken from section 5 of the act of 1870, any judgment rendered upon such an application shall be the subject of a writ of error, and on the same terms as in injunction cases. It is therefore clear that, independently of the status of the divorce case, Mrs. Bender had an undoubted right to bring to this court, by a "fast" writ of error, the judgment denying her application for temporary alimony.

2. She did not choose to pursue this course, but, instead thereof, filed exceptions pendente lite to that judgment, which she allowed to remain pending in the trial court until after the final disposition therein of the divorce case. For many purposes, the law regards the application for alimony and the action for divorce as entirely separate and distinct proceedings. This is manifest when it is remembered that the statute conferred upon Mrs. Bender a clear and undoubted right to have a speedy review upon its own merits of the judgment rendered in the alimony proceeding. She did not avail herself of the remedy thus extended to her, and we entertain no doubt that it is too late, after the lapse of three terms of the court, and after the determination of the divorce case in her favor, for her, by filing a bill of exceptions in that case, to go back and bring up the action of the judge complained of in her exceptions pendente lite. There is no law, nor any precedent of which we are aware, sanctioning such a practice, and

therefore, even if the judgment she now seeks to enforce was wrong, she has lost her right to have it corrected, by her own laches.

3. We did, however, while consulting upon this case, look into the merits, and our conclusion was that, even if a proper bill of exceptions had been filed in time, the result would have been the same; for it does not appear, under the facts disclosed by the record, that the trial judge abused his discretion in refusing to grant the application for temporary alimony. Writ of error dismissed.

ATKINSON, J., providentially absent, and not presiding.

(87 Ga. 813)

#### FICKEN et al. v. STATE.

(Supreme Court of Georgia. Oct. 21, 1895.)

CRIMINAL LAW—NEW TRIAL—REMARKS OF COURT AND COUNSEL—WITNESS—IMPEACHMENT.

1. Where several persons were jointly tried for a criminal offense, and one of them, by consent, testified as a witness for the others, at the same time making a statement in his own behalf, and the trial resulted in the conviction of all the accused, it is not cause for granting any of them a new trial that a question asked by the presiding judge of the witness above mentioned, and a statement made by the solicitor general with reference to him, tended to create the erroneous impression that this witness had been formerly tried in that court for another offense; there being no motion for a mistrial, and it appearing that the injury, if any, done to the accused, was fully corrected by an appropriate withdrawal on the part of the solicitor general of the statement he had made, and also by the judge in his charge to the jury.

2. Where, by consent, a wife was permitted to testify in behalf of her husband and others jointly on trial for the same offense, it was competent to impeach her by proof of contradictory statements previously made, although such statements, if themselves true, tended to show guilt on the part of the husband. While the impeaching evidence could not be used for this latter purpose, it was admissible to show that the witness was herself unworthy of belief.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

William Ficken and others were convicted of crimes, and bring error. Affirmed.

F. R. Walker, for plaintiffs in error. Q. D. Hill, Sol. Gen., for the State.

PER OURIAM. Judgment affirmed.

(98 Ga. 19)

#### KAISER et al. v. BROWN.

(Supreme Court of Georgia. Nov. 15, 1896.)

OPENING DEFAULT—ACTION ON NOTE—LIABILITY OF INDORSER—VERDICT BY JURY.

1. Under the practice prevailing in this state before the passage of the pleading act of 1893, the question of opening a default was a matter in the discretion of the court.

2. Under that portion of the act of February 28, 1876, now incorporated in section 2781 of the Code, when a bill of exchange or promissory note is left at any bank or banker's office for collection it is necessary, in order to bind an indorser thereon, that there should be pro-

test for nonpayment, and notice to him; and, in an action brought against an indorser in such a case, there should be a verdict by the jury, and not a judgment by the court without a jury, as upon an unconditional contract in writing, even though no issuable defense on oath has been filed.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by J. N. Brown against Stewart Johnson and others. Judgment for plaintiff, and Kaiser & Bro. bring error. Reversed.

The following is the official report:

Brown sued Stewart Johnson as principal and A. Kaiser & Bro. as indorsers upon a promissory note for \$1,500, dated March 17, 1892, due six months after date, payable to A. Kaiser & Bro. or order, indorsed: "Pay to the order of J. N. Brown. A. Kaiser & Bro." "J. N. Brown." "For collection and remittance to the Ogdensburg Bank, Ogdensburg, N. Y. S. W. Leonard, Cashier." It was alleged in the declaration that the two last-mentioned indorsements were made for the purposes of collection only. Upon the sounding of the case by the court, the same having been called up by plaintiff's counsel, counsel for Kaiser & Bro. stated in his place that he was not prepared to go on with the case at that time, and was surprised by plaintiff's action in calling it up, because counsel for plaintiff had stated both to the court and to defendant's counsel, at the previous term, that, unless the case was settled by Stewart Johnson, it would be dismissed. This was not admitted by plaintiff's counsel, and of it the court had no recollection. Counsel for Kaiser & Bro. stated that they had a good defense, and a plea had been prepared setting it up, which they desired to present and file in case their motion to dismiss, hereinafter mentioned, should be overruled, and which was at their office, and asked a postponement of the case for at least sufficient time for counsel to go to his office (a few minutes' walk from the court room) and get said plea. The court refused the postponement, observing that it would be considered that the plea was then and there presented, and that, if it had been pleaded at the appearance term, it would have been a good defense, but there being no appearance for either defendant at the appearance term, and the case being marked in default at that term, the court would not allow any plea filed subsequently thereto. Kaiser & Bro. moved to dismiss the suit upon the ground that there had been no proper service upon their co-defendant Johnson, the maker of the note, the return of service as to Johnson being that he was served by leaving a copy of the petition and process at his "most notorious place of business." Plaintiff thereupon dismissed the case as to Johnson; leaving the suit to proceed alone against Kaiser & Bro., indorsers. The latter then renewed their mo-

tion to dismiss, upon the ground that the case, having been instituted against Johnson as maker and them as indorsers, could not, in law, proceed against them alone. The motions to dismiss were overruled. Plaintiff offered in evidence the note, and closed; and the court rendered judgment for plaintiff for principal, interest, and attorney's fees, without the verdict of a jury; the note stipulating for all costs of collection, including 10 per cent. attorney's fees. Kaiser & Bro. excepted to the overruling their motion for a postponement; and to the ruling that they would not be allowed to make and file any defense; and to the overruling their motions to dismiss, and ordering the case to proceed against them alone. They also allege that the court erred in rendering judgment without the verdict of a jury, upon the ground that the case was not founded on an unconditional contract in writing; because it appeared by the declaration and the note, and the indorsements on the note, that plaintiff had indorsed the note to a third person, and it was necessary to aver and prove that he was still its real owner, and that his indorsement of it was for the purpose of collection only; and because it appeared by the declaration, note, and indorsements that the note was delivered and left with the bank for collection, and hence, to charge Kaiser & Bro., it was necessary to show presentation, protest, and notice to said indorsers; and because the court rendered judgment for attorney's fees in the absence of a plea filed by defendant.

Johnson & Krauss, for plaintiffs in error. Crovatt & Whitfield, for defendant in error.

ATKINSON, J. 1. Whatever may have been the effect of the passage of the pleading act of 1893 upon cases in default, the law is so well settled as to the practice prevailing in cases brought before its passage that no discussion of the proposition announced in the first headnote, *supra*, is necessary.

2. The right of the superior court judges to render judgment without the intervention of a jury is limited to suits upon unconditional contracts in writing, where no issuable defense is filed on oath. The contract of an indorser upon a promissory note or bill of exchange which is left at any bank or banker's office for collection is to pay upon nonpayment by the maker after protest, and notice to him of such nonpayment. This is a condition of liability, and hence, his liability not being absolute, he is not an unconditional promisor, against whom, when sued alone without the maker, the court has jurisdiction, without the intervention of a jury, to enter a judgment; and this is true notwithstanding he makes no defense. The court having erroneously entered judgment without a verdict as its basis, it should have been set aside and a new trial awarded. See *Everett v. Westmoreland*, 92 Ga. 670. 19 S. E. 37. Judgment reversed.

(98 Ga. 780)

**LOUDERMILK et al. v. LOUDERMILK.**

(Supreme Court of Georgia. Aug. 18, 1896.)

**EQUITY—MISTAKE OF LAW—CORRECTION—BILLS AND NOTES.**

1. Applying the rule that an honest mistake of law as to the effect of an instrument on the part of both of the parties thereto may, when such mistake operates as a gross injustice to one and gives an unconscionable advantage to the other, be relieved against in equity, it follows that, where both the maker and the payee of a promissory note intended that it should bear no interest, and ignorantly supposed that this would result from an omission to insert in its terms any reference to the subject of interest, equity will, at the instance of the maker, when sued upon the note by a third person, to whom the payee had indorsed it, correct such mistake, when it appears that the plaintiff took the note as a donation, paying nothing for it, and also that at the time of taking it he had full knowledge of the fact that the original parties to it intended that it should not bear interest.

2. This being an action by the indorsee upon such a note, the court erred in striking an equitable plea filed by the maker, and setting up a defense of the nature above indicated.

3. The plea now in question differs materially from that which this court dealt with when this case was before it at the October term, 1893. 21 S. E. 77, 98 Ga. 444.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action by J. M. Loudermilk against T. A. Loudermilk as maker, and James Loudermilk as indorser, on a note. From a judgment for plaintiff, defendants bring error. Reversed.

The following is the official report:

Each of the defendants filed a special plea. Both pleas were stricken on motion, and defendants excepted. This court ruled that there was no error in striking the plea of the maker, but it was error to strike the plea of the indorser. 93 Ga. 444, 21 S. E. 77. After that decision was rendered, the maker filed another special plea by way of amendment to the plea before filed. The defense of the indorser was conceded. On motion, the court ordered that the special pleas of the maker be stricken, except the plea of general issue. To this ruling exception is taken. The amendment sets up the following as equitable grounds against the action and against recovering interest on the note. At the time the note was executed it was agreed between the maker and the indorser (who was the payee) that it did not draw any interest, and such was the plain and manifest intention of both of them. It was by them honestly believed that, as the note did not specify that it drew interest, it would not draw interest; and they did not know that the legal effect of the note would be to draw interest. Had it been known, the note would not have been signed or agreed on between the parties thereto. At the time of the gift to plaintiff by the indorser of the note, plaintiff was informed by the maker and indorser that it

was the intention of both of them that the note was not to draw interest, and plaintiff received the note, well aware of said intention. Plaintiff was not a purchaser of the note. It was a gift to him by the indorser, who is the father of him and of this defendant, the maker. It would be a gross injustice to require defendant to pay this interest to plaintiff. He prays that the intention of the parties be set up as the liability on this note, and, if necessary, that it be reformed so as to speak the intention of the parties; that judgment be rendered against defendant for the amount that it was agreed and understood he was to pay, to wit, \$200, with interest from the time the same was given plaintiff, to the time of the tender, to wit, \$206.66; and for general relief.

Jones & Bowden, for plaintiffs in error.  
J. C. Edwards and A. G. McCurry, for defendant in error.

**LUMPKIN, J.** The facts appear in the official report. This case was before this court at the October term, 1893. 93 Ga. 443, 21 S. E. 77. It now presents a question entirely different from that with which the court then dealt. At the last trial the defense of the indorser, under the rule announced in 93 Ga. and 21 S. E. was conceded. The maker filed another special plea, which the court, on demurrer, ordered to be stricken. In our judgment, this plea set forth a good defense against the plaintiff's right to recover the interest which had apparently accrued upon the note before it came into his possession. The law of the case is really settled by section 3122 of the Code, which is simply a codification of a well-recognized principle of equity jurisprudence. It declares that "an honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity." The facts alleged in the plea now under review bring the case squarely within the provisions of this section, for it is obvious that the plaintiff, who took the note as a donation, and with full knowledge of all the facts, occupies no better footing, as against the maker, than the original payee. Had he been a bona fide purchaser for value, and without notice, of course the question would be entirely different. Judgment reversed.

(97 Ga. 815)

**BRYANT v. STATE.**

(Supreme Court of Georgia. Feb. 7, 1896.)

**CRIMINAL LAW—ADMISSIONS—CONFESSIONS—PROVINCE OF JURY.**

1. Whether or not admissions made by a person accused of crime relate to independent

facts, proof of which would be admissible as circumstances tending to establish the hypothesis of guilt, or of themselves amount to an indirect confession of guilt, is a question of fact for the jury; and the court, having in effect so instructed them, did not, in either view of the matter, err in submitting for their consideration the weight of such admissions.

2. Treating the incriminating admissions either as relating to independent facts or as bearing directly upon the question of guilt, the court's instructions both upon the law as to confessions and upon the degree of certainty required where a verdict of conviction is claimed upon circumstantial evidence, were full and correct.

3. There was no error in admitting evidence. The charges complained of, construed in the light of the entire charge given, were free from criticism; the evidence warranted the verdict; and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Lovett Bryant was convicted of a crime, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. A. W. Lane, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

SIMMONS, C. J., not presiding.

(98 Ga. 20)

SAVANNAH, F. & W. RY. CO. v. BOOTH.  
(Supreme Court of Georgia. Nov. 15, 1895.)

NEGLIGENCE—DEFECTIVE APPLIANCES—INJURY TO LICENSEE.

1. Where a railroad company furnishes to one of its patrons a car to be used by him in loading freight to be delivered to it for transportation, it is liable to a servant of the patron for injuries resulting to such servant from the defective construction of the car; provided the defect be of such a character as to be discoverable by the exercise of ordinary care upon the part of the railroad company, and provided, further, the injuries complained of were inflicted under such circumstances as that the person injured, by the exercise of ordinary care, could not have avoided the consequences resulting to him from the negligent act of the railroad company in furnishing for the use of such patron and his servants such defective car.

2. The evidence was sufficient to authorize a finding that the death of the plaintiff's husband was, without fault on his part, occasioned by reason of defects in the defendant's car, and that its defective condition was due to the defendant's negligence. A careful examination of the several grounds of the motion for a new trial discloses no cause for setting the verdict aside.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by Martha Booth against the Savannah, Florida & Western Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Erwin, Du Bignon & Chisholm and S. W. Hitch, for plaintiff in error. Symmes & Bennet and L. A. Wilson, for defendant in error.

ATKINSON, J. Cribb owned a sawmill on the line of the defendant company's railroad, and was accustomed to receive from it flat cars to be loaded by his employes with lumber while standing on a siding of the company located at his mill, and then to be delivered to the company for transportation over its line of railroad to market. Upon one occasion a flat car was delivered by the defendant company to be so loaded, and, while the employes of Cribb were engaged in this work, it turned over, and in consequence the lumber with which it was partially loaded fell upon one of them, and inflicted injuries upon him of which he died. The employe so injured was the husband of the plaintiff in the present action. It was alleged that the car was defective in that the pin which coupled the platform to the trucks was too short, and was further defective in that it was not so keyed as to prevent its drawing in the event the platform should careen. Upon the trial a verdict was rendered for the plaintiff, and, the trial judge having overruled the defendant's motion for a new trial, the case is now here for review.

The question of law, as to whether, under the circumstances, the defendant company owed to the servant of Cribb, its patron, any duty, and, if so, the measure of that duty, is the only one presented by the record into which it is necessary to enter upon an extended discussion; and inasmuch as an examination of the evidence shows that it was sufficient to support a finding that the death of the plaintiff's husband, without fault on his part, was occasioned by reason of the defects in the defendant's car, as described in the declaration, and that its defective condition was due to the defendant's negligence, we will proceed to inquire as to the liability of the defendant to the plaintiff for injuries resulting from the breach of the supposed duty to her husband.

No contract relation existed between the plaintiff's husband and the defendant company, and hence it owed him no duty resting upon the contract relation of master and servant. But privity of contract is not always essential to create a liability. It may arise as well out of the relative situation of the parties. *Stewart v. Harvard College*, 12 Allen, 58; *Wood, Mast. & Serv.* 912; *Lancaster v. Insurance Co.* (Mo. Sup.) 5 S. W. 23. Its duty, if any, arose out of the peculiar relations established between the company and the master of the injured servant. The defendant company owned a railroad which was engaged in the transportation of freight for hire. Its revenue was dependent upon the patronage of those persons who had merchandise to transport. The immediate master of the injured servant owned a sawmill, and was engaged in the manufacture of lumber which was comparatively valueless without the means of transportation. Under these circumstances, the defendant company and the master agreed that, if the former

would place its cars upon its side track at the master's mill, the latter would undertake to have them loaded for delivery and shipment over the defendant's road. In accordance with this arrangement, the cars of the defendant company, including the one causing the injury, were placed upon the defendant's siding, to be loaded by the servants of the mill owner. The latter had no duty of selecting cars, and no control of them. Save only as to the matter of loading them, the control of the cars was entirely with the defendant company, except in so far as it sometimes became necessary to move them by hand for convenience in loading, and this was done by the servants of the mill owner. Had the injury occurred in consequence of any hidden defect in the premises of the defendant company, under circumstances which would otherwise have rendered it liable, there is not the slightest doubt, according to an almost unbroken current of authority, that the servant of another, entering thereon, upon the invitation of the owner, to engage in lawful work for the benefit of his master, and incidentally for the advantage of such owner, would have been entitled to recover. *Elliot v. Pray*, 10 Allen, 378; *Gilbert v. Nagle*, 118 Mass. 278; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Holmes v. Railway Co.*, L. R. 4 Exch. 254; *Powers v. Harlow*, 53 Mich. 514, 19 N. W. 257; *Bennett v. Railroad Co.*, 102 U. S. 580. And certainly, where the work done was for the mutual benefit of both the master and the owner of the premises, there is no less reason why he should maintain his action. If the company would, under such circumstances, be liable for injuries resulting from defects in the premises, it is difficult to understand why it should be the less liable if the injury resulted from defective appliances which were furnished to the master, and which the servant of the latter was invited to use in a business which was mutually beneficial to the master and the defendant company. Under the arrangement, as we understand it, in the present case, the contract was not one of hiring by the defendant company, to the master, of the defective car, but, selecting and retaining control of it, the company placed it in position, knowing the purpose for which and by whom it would be used, thus extending to the injured servant an invitation to use it. Had the master been a mere hirer, or the company exercising no right as to the selection of the cars to be used, the duty of inspection would have been upon the master; and, in case of injury to his servant in consequence of his furnishing an unsafe appliance, the loss would have fallen upon him. But we think each (the master and the company) owed to the other, and to the servants of the former, the duty of properly discharging his part of the joint undertaking. The master had no duty of providing, or right of selecting, the cars to be used. This duty devolved entirely upon the company. The cars

were intended to be used by the mill owner and his servants in loading them with lumber. The mere act of selecting and furnishing them, with knowledge of the use to which they were to be applied, amounted to an invitation to the mill owner's servants to use them, and we think this knowledge and this invitation cast upon the company the duty of seeing that they were reasonably safe for such use. See the case of *Roddy v. Railroad Co.* (Mo. Sup.) 15 N. W. 1112. The breach of this duty gave a right of action. The jury found that the injury complained of was not due to any negligence upon the part of the injured servant or his master, in using the defective car after it was furnished by the defendant company, but was due wholly to its act in furnishing the defective car; and, the trial judge being satisfied, we are not disposed to disturb the verdict. Judgment affirmed.

(38 Ga. 62)

# COLLINS PARK & BELT R. CO. v. SHORT ELECTRIC RY. CO. et al.

(Supreme Court of Georgia. Dec. 21, 1895.)

SUPERSEDEAS—INSOLVENT CORPORATION—RESCISSION OF CONTRACT—SURRENDER OF NOTES.

1. The right to obtain a supersedeas upon a writ of error to the supreme court by filing an affidavit in forma pauperis, under section 4263 of the Code, extends to insolvent corporations.

2. Where a corporation buys property, giving notes for the purchase money, and taking a bond for titles from the seller, with a condition in the contract of sale, in favor of the seller, that, upon default in payment of the purchase money, he should have the right to re-enter and resume control, the seller, upon breach of condition, and upon a refusal of the purchaser to surrender the possession, may maintain an equitable proceeding for a rescission of the contract of sale, and for the purpose of effectuating his right of re-entry; and under such a proceeding the court may, upon proper pleadings, decree a rescission, direct a surrender of the purchase-money notes, and decree a cancellation of the bond for titles; and, no part of the purchase money having been in fact paid by the corporation, a stockholder of such corporation, who has advanced money to it for the improvement and betterment of the property purchased, is not entitled, as a condition precedent to a rescission, to have restitution to himself of the money thus advanced.

3. There being no valid legal reason against the rendition of the decree of rescission in the present case, and the same being fully warranted by the evidence, the plaintiff in error (it being the corporation indicated in the preceding note) had, under the facts disclosed by the record, no interest in the questions arising upon the distribution of the proceeds of the sale which the decree directed should be made of the property in dispute, and therefore no right of exception to any of the rulings of the judge at the trial, or to any of the terms or provisions of the decree itself. These questions concern exclusively other persons, who are properly parties to the pending litigation, and who alone are entitled, on final decree, to the proceeds of the sale.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lampkin, Judge.

Action by the Short Electric Railway Company and others against the Collins Park &

**Belt Railroad Company. Judgment for plaintiffs. Defendant brings error. Affirmed.**

Simmons & Corrigan, for plaintiff in error. N. J. & T. A. Hammon, John W. Cox, and L. Z. Rosser, for defendants in error.

ATKINSON, J. 1. The word "person," according to section 5 of the Code, includes "corporation," and the word "party," as employed in section 4263 of the Code, cannot mean less than person; otherwise there is no provision of law by which a corporation can obtain a supersedeas to a judgment rendered against it. The mere use of the personal pronoun "his" cannot be held to limit the right of supersedeas to natural persons; for to place upon it the narrow construction which would limit the application of the statute to such persons would likewise limit it to persons of the masculine gender, whereas it was the manifest purpose and intent of the general assembly to provide a means of obtaining a supersedeas in favor of any party whose interest might be affected by the judgment of a court from whose decision a writ of error lies. So we conclude that this right was extended as well to corporations as to natural persons, and that the former, by their appropriate officers, may as lawfully make the oath required to obtain a supersedeas by affidavit in forma pauperis as it may execute a bond to accomplish the same purpose.

2. An examination of the record will show that the defendant in the present case bought of the plaintiff and two other persons the railroad property involved in the present litigation (it being at the time subject to the lien of certain incumbrances), paid no part of the purchase money, but entered into an agreement for the prompt payment of the purchase price; time being made of the essence of such agreement, and it being further conditioned that upon default of payment the seller should have the right of re-entry. Several of the stockholders of the purchaser corporation claimed to have advanced certain moneys upon the betterment and improvement of the property purchased by it. Upon breach of covenant to promptly pay the purchase money, the sellers filed a petition praying for a rescission of the agreement, that they be permitted to re-enter, and, failing this, that the court should decree a sale of the property, and, after discharging the prior incumbrances thereon, the balance of the proceeds be applied to the extinguishment of the sums respectively due to the sellers of the property. The Collins Park & Belt Railroad Company, the defendant in the court below, made no answer, and prayed no judgment or relief of any kind. No point was made by it that it was entitled to have anything returned to it, nor was any such claim or contention made on its behalf at the trial. The court decreed a rescission, and that the purchase-money notes be can-

celed; and, upon the prayers of the cross bill of certain creditors claiming liens upon the property, the entire railroad property and its equipment were sold, and, under the decree, distributed in a manner satisfactory to the plaintiff and the contending creditors. The plaintiff in error insists that the court erred in decreeing a rescission without first repaying to its stockholders moneys advanced by them for improvement and betterment of the road. We do not think that, under the evidence submitted, there was any merit in this contention. The agreement under which the plaintiff in error entered stipulated for a rescission and re-entry upon the part of the sellers upon breach of the condition to pay, and the decree of the court, in so far as it was concerned, went no further than to decree a performance of this agreement. This is not a case in which rescission is sought upon equitable grounds alone, independently of contract, but it rests upon an express covenant for rescission upon breach of condition, which is shown to have occurred, and therefore the doctrine of restitution to the status quo has no application. There is no right to restitution. There is nothing to be restored. At most, under the agreement, the plaintiff in error would have been entitled to no more than a decree directing that its claim for betterments should be allowed as a charge upon the property after all the pre-existing liens were discharged, and there was no pleading which authorized even this. But it will be observed that this money was not paid by the purchaser corporation itself for betterments, but was advanced to it by its individual stockholders for that purpose. Certainly, in favor of such stockholders, who are mere general creditors of the corporation, the right of rescission should not be postponed until restitution of such funds. The effect of such a ruling would be to give such creditors a preference over creditors holding pre-existing liens. So it cannot be said that the court erred in decreeing a rescission without reference to the claims of such individual stockholders. Besides, it would seem that these stockholders were the proper persons to make that question, if they conceived that they had an interest. The corporation was not their guardian, and was not entitled to object for them; but, inasmuch as the question of the right of the corporation to represent them was not made, we have preferred to examine the question as though through their supposed equities the corporation could call in question the decree of the court directing a rescission.

3. The evidence fully authorized the decree of rescission, and inasmuch as, the contract being rescinded, the property was restored to and became the property of the sellers, the court had authority, under the pleadings filed, to proceed, through its receiver, to sell the property, and distribute its proceeds according to the equities of the several con-

flicting claimants of the fund. It is obvious that in this distribution the purchaser corporation had no concern. It had no reverentary interest which it sought by appropriate pleadings to protect, and if, as between the several contestants before the court, errors were committed (and that there were we do not concede), such errors were harmless, in so far as the purchaser corporation was concerned, and therefore afford, on its behalf, no cause either of complaint or exception. For this reason we do not deem it profitable to inquire into the various exceptions taken to the rulings of the court made in adjusting the equities between the conflicting claimants. With the final distribution by the decree they are satisfied, and we acquiesce. Judgment affirmed.

(98 Ga. 87)

**GRAHAM v. MARKS et al.**

(Supreme Court of Georgia. Dec. 21, 1895.)

**ACTION ON NOTE—DURESS OF PRINCIPAL—RELEASE OF SURETY—ILLEGAL CONSIDERATION.**

1. As a general rule, a promissory note, executed under the duress of the principal by legal imprisonment, is not void as to a surety thereon, if the latter, being under no duress, and knowing of the duress of the principal, nevertheless voluntarily signed the note; and, though knowledge of the fact of the principal's imprisonment does not necessarily involve knowledge on the part of the surety of its want of legality, a plea by the latter, alleging that the principal signed under duress of imprisonment, even if in other respects good, ought to allege that the imprisonment was illegal, or, if legal, was used for an illegal purpose, and that the surety was ignorant as to its real character, and therefore ignorant of the duress.

2. A surety upon a promissory note cannot be legally defrauded by a promise, made by another, to have the principal appointed to a public office, even though such promise was made for the purpose of inducing the surety to sign. A promise of this kind, being contrary to the policy of the law, could not be enforced, and therefore could not, in legal contemplation, mislead the person to whom it was made.

3. A plea attempting to allege that a promissory note was given, in whole or in part, for the purpose of settling a threatened prosecution for a criminal offense, is not legally complete unless it alleges facts showing that the person to be prosecuted was charged with having committed an act or acts constituting a crime or misdemeanor.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by S. Marks & Co. against Eliza J. Graham. From an order sustaining a demurrer to her plea, defendant brings error. Affirmed.

The following is the official report:

Marks & Co., by their declaration, alleged that C. M. Davis and Eliza J. Graham were indebted to them on four promissory notes, each for \$85, with interest, and 10 per cent. attorney's fees, and that L. E. Davis and M. Foote, Jr., attorney for Brown Bros., were indorsers on the notes. From the copy note attached it appeared that the notes were dated April 7, 1891, were due six months after date, and were payable to M. Foote, Jr., attorney

for Brown Bros. Davis was not served. Mrs. Graham filed a plea, which plea was demurred to, the demurrer was sustained, and she excepted. The plea was: She is not indebted to plaintiffs, for the following reasons: She is merely security on the notes, and the circumstances under which she signed the notes are as follows: Said Davis purchased from Brown Bros., at some point in the state of Alabama, in the first part of 1893, or the latter part of 1892, a lot of lumber, for which he failed to pay, the lumber having been shipped here and disposed of by said Davis. Brown Bros. ordered said Davis' arrest, charging that he had defrauded them out of said lumber. Davis was arrested in the town of West End by the marshal thereof, and at said Davis' request (this defendant being his aunt) that he be carried to this defendant's house, stating that she would sign a note for him, he was carried there. Whereupon, it was understood that, in the event that she did this, defendant would be released. Davis was accompanied to her house by the marshal of West End, and as this defendant now remembers, by Mord. Foote, Esq., counsel for the plaintiff in this case. The said marshal, to wit, Caldwell, told this defendant, unless she became Davis' security, and settled the matter by uniting with him in a note covering the indebtedness of Davis to Brown Bros., that said Davis would be locked up in Fulton county jail, carried back to the state of Alabama, and there prosecuted on the charge of cheating and swindling. Said Caldwell also told this defendant that, in the event she should sign the note, he would see to it that said Davis would get a position on the police force in the town of West End, and that would pay him a salary of \$50 per month, and that by the time the notes matured said Davis would have made money enough to have almost extinguished said notes, and then and there agreed to give said Davis a position on the police force, in the event this defendant signed the note. This defendant is informed and believes that said Caldwell, in the event he could get the notes secured by this defendant, was to receive \$50 for his trouble, and she so charges that to be true. For the purpose of keeping her relative from being disgraced and imprisoned and prosecuted, she signed said notes under the representations of said Caldwell, marshal of West End, that he (Caldwell) would give said Davis a job on the police force, and thereby enable him (Davis) to pay off his said indebtedness. She charges that these representations were willful, fraudulent, and false; that it was not said Caldwell's purpose to give said Davis a position as policeman on the police force, but it was his sole purpose to get the matters in such shape that he would realize the sum of \$50, as she has been informed, and as she believes, and so charges; that by these representations aforesaid she was induced to sign said notes, and but for said representations she would not have signed said notes. The purpose of procuring her sig-

nature to the notes was to settle a criminal prosecution, and the same is without consideration on her part, and illegal in law. Davis was under duress at the time the notes were obtained. The notes were made payable to Foote, attorney for Brown Bros., and by him immediately transferred to plaintiffs, for the purpose of preventing any defense on the part of this defendant to said notes, knowing the circumstances under which they had been procured, and hoping thereby, if he could get them into the hands of an innocent purchaser, he could shut off any defense this defendant could possibly make. She charges, from information and belief, that the notes still belong to Brown Bros., that plaintiffs have never paid for the notes, and that it was a trick worked on the part of Foote, for the purpose (as he thought) of getting them into the hands of innocent purchasers; but they are not innocent purchasers, because they were fully apprised of the circumstances under which the notes were obtained, "and the consideration, and all the facts connected therewith, by said Foote, they were familiar with." The demurrer was general; further, the plea does not deny valid and good consideration for the notes, and shows that the defendant Davis executed the notes to settle a valid and subsisting debt, and does not deny that the original plaintiffs had good ground for making the alleged arrest; further, it shows on its face that if the principal was laboring under any disability, the defendant, alleged surety, knew it, and she could not take advantage of it after securing his relief; further, it shows no valid defense, and hence defendant is not concerned as to the validity or regularity of the transfer.

R. J. Jordan, for plaintiff in error. M. Foote, Jr., and Longino & Gollightly, for defendants in error.

ATKINSON, J. The official report states the facts.

1. The execution of a promissory note, although under moral or physical constraint, may nevertheless bind the maker to its payment, provided it rest upon a sufficient legal consideration. Assent may, in a legal sense, be free, notwithstanding the person assenting be induced thereto by fear of an impending evil, to which, by reason of his own conduct, he has become lawfully exposed. It is therefore that the maker of a bond or promissory note, upon a sufficient consideration, otherwise legal, is held to be bound, notwithstanding he execute the instrument to relieve himself from imprisonment and arrest, provided the imprisonment and arrest be not illegal, or, being legal, be not in the execution of an illegal purpose. The presumption is that every arrest, by an officer authorized to make it, is legal, and is done in the execution of a legal purpose, and hence, when, in order to relieve himself from the custody of an officer, a person so arrested executes a promissory note, upon a consideration otherwise sufficient, but

with the further understanding and with the further purpose to secure his release from such arrest, and is afterwards sued thereon in order to discharge himself from liability, he must plead and prove, either that the arrest and imprisonment were illegal, or, being legal, the processes of the law were prostituted to the accomplishment of an illegal purpose. A surety upon such a paper is presumed to have knowledge of the circumstances surrounding his principal at the time he becomes his surety, and hence, in order to discharge himself from liability upon his contract, he must not only plead and prove either the duress of his principal by unlawful imprisonment, or duress by lawful imprisonment but for an illegal purpose, and, in the latter event, must prove, not only the duress of the principal, but likewise his ignorance of such duress at the time he became surety; for, if he know of the imprisonment, it being legal, and not used for an illegal purpose, his risk is in no measure increased by any fact unknown to him beyond that of a surety under ordinary circumstances. If he incur a greater peril because of his becoming surety for one so circumstanced, he does it of his own free will, and there is no good reason, in law or morals, why he should not respond. Tested by the principles above announced, the plea of the surety, the defendant in the present case, in so far as the same rested upon the duress of the principal, whether accomplished by threats or imprisonment, was wholly insufficient. It will be observed that there is no averment that the arrest of Davis was without authority of law, that his imprisonment was illegal, nor that, being legal, it was accomplished for an illegal purpose. The nature of the transaction by means of which Brown Bros. were alleged to have been defrauded was not outlined, nor is the nature of the process or action under which they undertook to bring about the imprisonment of Davis disclosed. It is possible for his arrest to have been perfectly legal; for if, in buying lumber from Brown Bros. in Alabama, he had intended to defraud them, the title would not have passed, and it would have been competent for them to have sued out bail trover, and thus hold the principal to bail. Indeed, there are many purposes for which, in connection with this matter, he might have been lawfully arrested, and none of these are negatived by an averment in the plea as to how and in what manner the arrest was unlawful, nor, being lawful, to what unlawful use the processes of the law were being employed. We are bound to presume, then, that what was done was accomplished in some lawful manner. There was ample consideration in the pre-existing indebtedness of Davis to Brown Bros. to support the promise of the principal. The surety had full knowledge of all the facts, signed the note to bring about the discharge of the principal from lawful custody, accomplished that result, and accordingly, in so far as the averments of her plea

sought to negative her liability, she was legally bound. *Plant v. Gunn*, 2 Woods, 372, Fed. Cas. No. 11,205; *Gibson v. Patterson*, 75 Ga. 549 (3); *Patterson v. Gibson*, 81 Ga. 804, 10 S. E. 9.

2. The plea of the surety, to the effect that she was induced to sign the note because of the promise of the arresting officer to secure the appointment of her principal to an office of public trust and emolument, was wholly without merit. Admitting that the promisor had authority to make the appointment, if the averments of the plea be true, the contract could amount to nothing more than a corrupt bargain upon the part of the surety to buy, and upon the part of the officer to sell, a public office. Such transactions the law does not countenance, and therefore propositions of that character, coming from the officer to the surety, could not, in contemplation of the law, mislead her. There was sufficient consideration to support the promise of the surety in the legal obligation of the principal to pay. So that, while the matter stated might have operated upon the mind of the surety as an inducement to become such, it was no part of the consideration upon which her obligation to pay rested, and it is only where the element of illegality enters into and infects the consideration of the contract that the law pronounces it void. The law charges every person with knowledge of its limitations upon the power of public officers, and of the barriers which it throws around public office to protect it against influences which tend to corrupt. Therefore, the surety must have known that the officer had no right to make—much less, power to execute—his promise, and therefore such representations could not possibly have misled or induced her to act to her prejudice.

3. In so far as the plea attempted to allege that it was given for the purpose of settlement of a criminal prosecution, it was entirely without merit. It pleaded a simple conclusion of law. It did not allege that the principal had committed any offense, or aver the facts from which the court could determine, either that he was being prosecuted, or the nature of the offense charged against him. In the absence of such averments, it could not be judicially determined that the note was given for the purpose of suppressing a prosecution. The demurrer admitted only such facts as were well pleaded, but does not admit conclusions, either of law or fact, where the facts are not averred upon which such conclusions are supposed to rest. Judgment affirmed.

(98 Ga. 42)

MICKLEBERRY et al. v. O'NEAL

(Supreme Court of Georgia. Dec. 18, 1895.)

MOTION FOR NEW TRIAL.—SALE TO AGENT.—LIABILITY OF PRINCIPAL.—DEED OF WIFE.—DEBT OF HUSBAND.—REVIEW.—INSTRUCTIONS.

1. Averments, in a motion for a new trial, that the verdict is contrary to certain specified charges of the court, are, in effect, no more

than complaints that the verdict is contrary to law.

2. Although the value of goods sold to an agent upon his own credit alone may, under certain circumstances, be recovered from the principal when disclosed, this, under the facts of the present case, could not be done unless the principal actually received and used or in some way got the benefit of such goods.

3. According to the principle laid down by this court in the case of *Bank v. Bayless*, 23 S. E. 851, 96 Ga. 684, a deed made by a wife to secure a debt not actually her own, but due by her husband, is not binding upon her, although such deed may have been made for the purpose and with the intention of effecting a compromise of what she regarded as a doubtful claim against her property.

4. This principle is also applicable where the deed in question, it being one entire contract, was made partly to secure a debt due by the wife and also a debt due by the husband.

5. Where error is assigned upon various refusals of the court to charge requests submitted, and the entire charge is not brought up to this court, but, instead thereof, a certificate by the trial judge to the effect that all the issues involved were fully and fairly submitted, and as favorably to the plaintiffs in error as the law authorized, and that the requests refused were, so far as legal, covered by the general charge, this court is unable to determine whether such refusals were erroneous or not.

6. The complaints in the motion for a new trial that certain charges given by the court were unwarranted by the evidence are not well founded. There was sufficient evidence to authorize the verdict which the jury rendered, and this court therefore will not set it aside after its approval by the trial judge.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Dinah O'Neal against Mickleberry & McClendon. Judgment for plaintiff, and defendants bring error. Affirmed.

Jno. C. Reed and Simmons & Corrigan, for plaintiffs in error. Mayson & Hill, for defendant in error.

ATKINSON, J. The questions of practice made by the record in this case do not require further consideration than as, expressed in the headnotes. Hiram O'Neal conveyed to his wife the premises in dispute, as she claims, in exchange for certain property to which she held the title, and which was her separate estate. They were engaged each, independently of the other, in business; he in the business of grading streets and town lots, and she in running a small store. In the conduct of his business he bought certain goods and incurred certain indebtedness to the defendants in which she had no interest. Some of the goods bought by him were brought to her store for convenience in delivering them to the laborers employed by him in his business, he using a part of the store occupied by her as a commissary. At the time Hiram O'Neal conveyed to his wife the property in controversy it was subject to a lien for certain moneys advanced to her husband. He failed to pay the defendants the sums due them for goods, became otherwise seriously involved, and then induced her to make

the conveyance now sought to be set aside; they, the defendants, paying off the lien above referred to, and receiving the conveyance in settlement of the amount thus advanced, and also of the sums for which her husband was indebted to the defendants. Afterwards she filed the proceeding under which the questions now here for review arose, and prayed that the conveyance to the defendants be set aside, upon the ground that it was made in payment of her husband's debt, and offering to submit to a decree imposing upon the property involved a lien in favor of the defendants to the extent of the sum advanced by them in discharging the lien above referred to. It was insisted by the defendants that the property conveyed to them was really the property of Hiram O'Neal, and not the property of his wife, and therefore the conveyance to them was good any way; that the whole transaction as between the husband and wife was colorable merely, and that, if this were not true, then in making the purchase of the goods he was really her agent; that the debt was her own, and not his, and therefore the conveyance should be upheld. We have carefully examined the evidence which comes to us in the record, and are unable to find anything which would seem to satisfactorily impeach the bona fides of the transaction between these parties. Even a husband and wife, in their dealings with each other, may be honest, and, however closely transactions between them should be scanned, they are not to be impeached upon suspicion alone; and hence we are not disposed to interfere with the circuit judge in refusing to set aside the verdict upon the ground that the transaction was fraudulent. A husband may be the agent of his wife. If he professes to act as her agent, those dealing with him are bound to inquire as to his authority to act for her. They may both occupy the same house. The law rather encourages such a course. She may even permit him to store his goods in her house without subjecting her separate estate to the payment of his debts, and without incurring the danger of having him treated as her general agent to buy. In the present case, while there is ample evidence in the record showing the sale of the goods by the defendants to Hiram O'Neal, and while it is claimed by them that in a general sense the goods were sold for use in the store of his wife, it is abundantly shown that she had no connection with the business in which the goods were used, had not authorized him to buy them in her name, had no notice that he professed to act as her agent in the matter, and had never gotten or taken the benefit of the purchases. The credit was extended to him alone, and hence this is not a case for holding her as an undisclosed principal. Before she can be bound by his act, he must really act for her. If an agent profess to act for himself, but in

the consummation of a given transaction really acts for and on account of another, who knowingly receives the benefit of the transaction, or who, without the knowledge of the other party, has authorized the professed agent to contract for him, when the fact of agency is discovered the person to whom the obligation of the undertaking is due may resort to the undisclosed principal for redress. In the present case, however, the jury, upon proper instructions and satisfactory evidence, found adversely to the contention of the defendants that the husband of the plaintiff was her agent, and we are not disposed to interfere. A married woman, notwithstanding her practical emancipation by the act of 1866, and the provisions of our law which recognize her separate civil rights, is nevertheless under the disability of being unable to enter into any agreement by which she either assumes or becomes answerable for the debts and defaults of her husband, or by which she undertakes to convey her own property in satisfaction or extinguishment of his debts. No contract, however solemn may be the form of its execution, nor how positive its recitals, if entered into for either of these purposes, creates a charge upon her estate. With respect to such matters she is under a disability imposed by law, which renders her unable, however willing she may be, to contract, and of which she cannot by any agreement divest herself; and hence, wanting the capacity to convey her estate for these purposes, the agreement is wanting in the prime prerequisite to its legal execution, and that is a person able to contract. In such transactions, the law, as in cases of usury, and in all others where a contract is denounced by express legislative enactment, will look beneath the superficial exterior, and determine for itself whether the contract, seemingly legal, is based upon an illegal consideration, or is executed in furtherance of a scheme prohibited by law. The law, in such matters, will not permit a wife to conclude herself by deed, but will look to the bottom of the transaction, and grant relief without reference to the degree of solemnity which may attend upon the execution of the instrument by which it is sought to carry such agreements into execution. The principle here contended for is clearly stated in the case of *Bank v. Bayless*, 96 Ga. 684, 23 S. E. 851. In that case it was held by this court that a wife's property could not be subjected to the payment of her husband's debts, even though she executes a mortgage upon her own property under the impression that it was in some way subject to such debt, and in fact executed the instrument for the purpose of effecting a compromise of a doubtful claim against her own estate. In the present case the deed in question was executed by her as an entire transaction, the vendee undertaking to and actually discharging an in-

cumbrance upon the property purchased by her from her husband, and which incumbrance became, not by assumption of his debts, but by relation, a legal charge upon her estate. Had this been the entire consideration, the conveyance could have been upheld as valid. But the real object of the conveyance was to appropriate the value of the property conveyed, in excess of the amount represented in the incumbrance discharged, to the payment of the sums due by the husband of the vendor to the vendee, thus conveying her estate partially in satisfaction of the husband's debt. The deed is thus an entire transaction. As a conveyance of title it cannot be upheld, because of the impossibility of separating that which is legal from that which is illegal. It is not the case of a mortgage given to secure several debts, some of which are legal and some illegal, and in which that which is legal may be cut off from that which is illegal; but it is a case in which the whole transaction is so infected with the virus of illegality that there is no possibility of upholding the deed executed in pursuance of it as a conveyance of title, and the most that can be done is to award, as was done in this case, that, in so far as the plaintiff has extinguished that portion of the debt legally due by the wife, it be made a charge against her estate. Judgment affirmed.

(98 Ga. 24)

## SCOTT v. LIDDELL.

(Supreme Court of Georgia. Dec. 2, 1895.)

ACTION ON NOTE—ANNUAL INTEREST—ASSIGNMENT OF PRINCIPAL—EXTENSION OF INTEREST.

1. Where the principal of a promissory note was made payable a given number of years after its date, with a stipulation in the note for the payment of the interest annually, the contract to pay interest was severable from that to pay the principal, and a suit for interest past due could be maintained without regard to the time when the note matured as to principal. This being so, it follows that the payee of such a note could lawfully, in writing, assign to another the principal thereof, and reserve to himself the interest, with the right to collect the same.

2. Where such a note also contained a stipulation that the principal should become due instantaneously on 30 days' default in the payment of any interest installment, and, before any default in the payment of interest had occurred, the payee assigned to another the principal only of the note, reserving the interest and the right to collect the same, such payee could, as between himself and the maker of the note, lawfully extend the time of paying any annual installment of interest; and his so doing would not, as to the assignee, render the principal of the note immediately due, so as to authorize the latter to bring suit thereon in advance of the time fixed in the note itself for the payment of the principal in case there was no default in the payment of interest.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by J. A. Scott against J. M. Liddell. Judgment for defendant. Plaintiff brings error. Affirmed.

The following is the official report:

On January 25, 1894, Scott sued Liddell on a promissory note dated May 12, 1890, payable to J. F. Walker or order, for \$8,500, balance purchase price of certain land, due on or before 10 years after date, with interest from [date], payable annually at the rate of 6 per cent. per annum, "principal to become due instantaneously on thirty days' default in payment of any interest installment." The note was indorsed in blank by Walker. It bore credits, signed by Walker, for the interest installments to May 12, 1892. The declaration alleged, among other things, that Walker, for value, transferred and indorsed the note to petitioner, and that the interest due May 12, 1893, was not, and has not been, paid, and that the principal, interest, and attorney's fees were due. The nature of the defense will sufficiently appear from the report hereinafter made. Upon the trial, plaintiff introduced the note. Also a writing signed by Walker, dated November 25, 1892, stating that for value received, and as part security for the payment of twelve promissory notes given by Walker to Scott, aggregating \$10,000,—four due September 1, 1893, four due September 1, 1894, and four due September 1, 1895, with interest from date at 7 per cent. per annum,—and dated September 1, 1892, Walker transferred to Scott the mortgage of Liddell to Walker, dated May 12, 1890, due May 12, 1900, for \$8,500, and interest at 6 per cent. per annum, on 9.352 acres of land on Bleckley avenue, as fully described in said mortgage, with the notes which said mortgage was given to secure. Also an agreement signed by Scott and Walker, September 9, 1892, reciting that Scott, in consideration of the notes of Walker for \$10,000, above described, had agreed to sell to Walker an undivided half of certain property of the Austell-Lithia Land & Spring Company; that Scott was to buy up and own all the capital stock of said company within the next 60 days, and then to deed said undivided half to Walker; that, to secure the \$10,000, Walker was to execute his promissory note so that only one-third of the \$10,000 should be payable on the 1st day of September for the following three years, with interest from September 1, 1892, at 7 per cent. per annum; and that Walker had turned over to Scott, as collateral security to secure the payment of said notes, certain shares of stock, and also had transferred in writing, to Scott, the mortgage from Liddell to Walker above mentioned. Also another agreement signed by Scott and Walker November 25, 1892, to the effect that, as part of the above agreement, it was understood that Walker should be allowed to collect and have all interest as it accrued on the Liddell notes and mortgage above mentioned, which had been transferred by Walker to Scott as collateral security as set out above; Walker to have and collect the interest thereon as the same became payable. It was admitted that the note sued on was transferred and delivered by Walker to Scott

on November 25, 1892, but defendant had no knowledge of said transfer. Defendant's evidence showed that on May 31, 1893, Walker asked him for the interest (\$510) on the note in suit. Defendant said he would like to have some time on this interest, and offered to pay 8 per cent. interest on the interest then due. Walker agreed to this, and accepted a note for \$90, due 60 days after date, as part of the \$510. This note was for temporary use, and the agreement to wait for the interest due was indefinite as to time. It was a part of that contract that the interest due May 12, 1893, was not to become due until after Walker had made a written demand for it of defendant. It was also then agreed between Walker and defendant that no advantage was to be taken of the failure to pay the interest due within 30 days, or of the new contract as to interest, to declare the principal of the note in suit due, and that the principal of the note in suit should not become due until after the written demand for the interest had been made of defendant by Walker, and defendant had refused to pay it. Scott was not present at this interview, nor did Walker exhibit the note in suit. Shortly after defendant was served with a copy of the suit (about the last of January, 1894), he went to plaintiff, in Liebman's office, and tendered him the interest due on the note. Scott declined to accept it, and said, "I have nothing to do with that. That is Judge Walker's matter. You must see him;" or, "I have nothing at all to do with it. I am acting for Judge Walker. You must see him." Plaintiff testified that, when defendant made said tender to him, he declined to receive the money, and said the matter had passed into a suit, and that defendant must see his attorneys. The testimony of Liebman tended to corroborate that of plaintiff.

Under the charge of the court, the jury found that the principal of the note sued on was not due, and the court entered judgment that the action abate. Plaintiff's motion for a new trial was overruled, and he excepted. The motion was upon the grounds that the verdict was illegal. Also because the court erred in directing a verdict finding that the note was not due. Error in charging: "All of the several contemporaneous writings that were made at the time of the transfer and indorsement and delivery of this note to Mr. Scott are considered and treated by the court as one contract." Alleged to be error because said writings do not constitute one contract, and should not have been so considered by the court. Error in charging: "Under this contract transferring this note to Mr. Scott, there was this condition or limitation upon it: 'As a part of the above agreement, it is understood that James F. Walker shall be allowed to collect and have all interest as it accrues on the Liddell note and mortgage above mentioned, which note and mortgage have been transferred by said Walker to Scott as collateral security, as set out in the above and foregoing agreement; the said Walker to have and

collect the interest thereon as the same becomes payable.'" Alleged to be error because said contract was not a limitation or condition upon the transfer of said note. Error in charging: "Under this contract transferring this note to Mr. Scott, there was this condition or limitation upon it: 'As a part of the above agreement, it is understood that James F. Walker shall be allowed to collect and have all interest as it accrues on the Liddell note and mortgage above mentioned, which note and mortgage have been transferred by said Walker to Scott as collateral security, as set out in the above and foregoing agreement; the said Walker to have and collect the interest as the same becomes payable.'" I construe that to have reserved the right in Judge Walker to collect this interest and appropriate it during the period that this debt was running,—during the ten years,—and, he having the right to collect it and apply it to his own use, he had the right to make a new contract in reference to that part of this promissory note." Alleged to be error, because said contract gave Walker no right to collect and apply to his own use said interest, nor did he have the right thereunder to make a new contract with Liddell in reference to either the principal or interest of said note. Error in charging: "In this instance the undisputed evidence discloses that Judge Walker made a new contract in reference to the interest, doing away with the one in the note, and a more advantageous contract in reference to the rate of interest reserved. I hold that he had a perfect right to do it. He had a right to release or waive the interest, or to make any new contract he pleased in reference to it." Alleged to be error, because Judge Walker had no right, under said contract, to treat with Liddell with reference to either principal or interest; because Judge Walker did not have the right to make the contract referred to with Liddell; and because Judge Walker could not, under said contract, waive or release, or make a new contract with reference to it. Because the charge of the court, as a whole, is error, because the court proceeded upon an erroneous view or theory of the case, in that the transfer of the note was without limitation, and said contract gave Walker no right to treat or deal with Liddell in reference to either the principal or interest of said note, and that Walker had no right to make a new contract with Liddell in reference to either the principal or interest of said note, nor to make any agreement touching the provision for default contained in said note.

John L. Hopkins & Sons, for plaintiff in error. A. H. Davis and Candler & Thomson, for defendant in error.

ATKINSON, J. The official report states the facts.

1. The question as to whether the contract to pay the principal of a promissory note, and the contract to pay interest thereon, are

so united as to be incapable of separate assignment and enforcement in the hands of separate holders, we are now for the first time, in this state, called upon to determine. We know of no principle of law which is violated by such an arrangement, and can see no reason why it should not be allowed. While the contract to pay interest is dependent upon the contract to pay principal, it is also, in a certain sense, independent. They may be made to stand for execution at different times. The agreement to pay interest may be void for usury, and yet the agreement to pay principal remain unaffected. By agreement between the parties, the principal may be discharged, and the accrued interest still remain due, and vice versa. So it would seem that the right to demand an enforcement of the one is not dependent upon the enforcement of the other; and hence we can see no good reason why the holder of a promissory note cannot retain title to it, and give or sell the increment of interest to another, so as to retain in himself the right to collect the principal, and vest in that other the right to collect the interest, and vice versa. If this be true, then one may well be pledged without the other. Nor does the fact that actual delivery of the evidence of indebtedness is essential to the validity of the pledge affect the principle stated, as the one evidence of indebtedness may well represent several obligations to pay. The quality of separability between principal and interest is recognized in many classes of cases,—notably in case of bonds bearing interest, with coupons attached representing the accruing interest. So, if, in the one case, principal and interest are separable, they are not so indissolubly connected as to be incapable of dissociation. That the contract to pay principal and interest may be separated, we think, has been practically determined by those cases in which it has been held by this court that a contract to pay interest upon interest accrued and unpaid is valid, and not opposed to the statutes against usury; otherwise the collection of interest upon interest could not be upheld. See *Scott v. Saffold*, 37 Ga. 394. So a separate action may be maintained for the recovery of interest accruing before maturity of the note, even though there be no provision in the note expressly authorizing such action. *Calhoun v. Marshall*, 61 Ga. 275. So, under ordinary circumstances, dividends upon the stock of incorporated companies, accruing after it is delivered in pledge, follow the stock, and vest in the pledgee the right to have them paid to him; but the contrary may be provided by special agreement, and then the pledgor is entitled to receive them. *Guarantee Co. v. East Rome Co.*, 96 Ga. 511, 23 S. E. 503. So, in the present case, we see no difficulty in holding that the holder of the note could lawfully deliver it in pledge, and, by special agreement with the pledgee, provide that his interest as pledgee should attach only to the principal

leaving the right to the accruing interest in the pledgor, and subject to his control.

2. The promissory note sued on in the present case was made payable at the expiration of 10 years from its date, but contained a stipulation that, if the accruing interest were not paid at stated times, the entire debt should immediately become due. The principal of the note was pledged before any installment of interest became due, and the accruing interest, with the right to collect the same, was reserved by the payee. When an installment of interest became due, the payee extended to the drawer, time within which to pay the interest beyond that stipulated in the note, and thereafter the pledgee brought suit for the principal debt, alleging that it had matured, by reason of the nonpayment of interest to the payee. A plea in abatement was filed, upon the ground that the suit was premature, and this plea was sustained and the suit dismissed. The question is, could the payee, after delivery of the note in pledge, enter into an arrangement with the maker by which the contract, as expressed in the note, could be affected or changed so as to prevent its maturity because of the nonpayment of interest? It must be admitted that, as a general proposition, two persons cannot, by contract between themselves, affect a right of a third person, not a party to the agreement, as against either of the two so agreeing. The stipulation for prompt payment of interest made time of the essence of the agreement, and so it would have remained, had not the person to whom the obligation to pay interest was due agreed with the person obliged to pay that another—and, to the debtor, more convenient—season should be substituted. It will be observed that, in the agreement under which the note sued on was delivered in pledge, it was expressly stipulated, not only that the title to the interest should be reserved to the pledgor, but that in the matter of its collection he should have absolute control. He had over it the unlimited power of disposition. He could have given the interest, as it accrued, to the person from whom it was due, and the holder of the principal could have had no cause to complain. Nor is it a reply to the exercise of this right that thereby the probable maturity of the pledgee's right to sue would be postponed. If prompt, actual payment of interest had been deemed of sufficient importance, he should, in accepting the pledge, have stipulated for the control of the interest as well as the principal. The power of unlimited control of the matter of collecting the interest involved the exercise of unlimited discretion as to the means to that end, and these were the rights reserved to the pledgor. Nor is the pledgee without his remedy, not against the maker of the note, but against the pledgor. It is one of the obligations of the pledgor that he will do no act which will tend to deprive the pledgee of his title to the thing pledged, nor, pending

the bailment, do unlawfully any act to lessen the security afforded thereby; and hence if, in the exercise of a right reserved by him in the thing pledged, he does any act, not authorized in the contract upon which the bailment rests, which tends to either of these results, to the injury and damage of the pledgee, he is answerable for such damages. Whatever rights he may have must be exercised in such manner as not to wrongfully deprive the pledgee of the benefit of the bailment. Judgment affirmed.

(98 Ga. 703)

**McDONOUGH et al. v. CARTER et al.**  
(Supreme Court of Georgia. Aug. 3, 1896.)  
**TRESPASS—TITLE TO MAINTAIN—ACTION BY PARTNERSHIP.**

1. Possession of land under a claim of ownership being *prima facie* evidence of title in the occupant, the latter, upon proof of such possession, and without showing complete title, may maintain against a wrongdoer an action for a trespass upon the property, committed while such possession existed.

2. Such an action is maintainable by a partnership composed of two persons in its firm name, where one of its members claimed an undivided two-thirds of the land, and the other the remaining undivided one-third, and they were jointly occupying and using the land in the prosecution of their partnership business.

3. The newly-discovered evidence could, by the exercise of ordinary diligence, have been produced at the trial. There was no error in rejecting evidence, or in directing a verdict for the plaintiffs.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Trespass by P. H. Carter and another, partners as P. H. Carter & Co., against J. J. McDonough and others, partners as J. J. McDonough & Co. From a judgment for plaintiffs, defendants bring error. Affirmed.

O'Connor & O'Byrne, for plaintiffs in error.  
Cain & Kennedy, T. A. Parker, and E. D. Graham, for defendants in error.

**LUMPKIN, J.** 1. In *Whiddon v. Lumber Co.* (decided at the present term) 25 S. E. 770, this court held that, in order to maintain an action of trespass upon realty, brought to recover damages to the freehold, the plaintiff, if not in possession when the injury was committed, would have to show that he was the true owner of the land by proving title in himself, and that in such case mere proof of former possession would not be sufficient to show title. The present case differs from that in the essential particular that the trespass here complained of was committed while the plaintiffs were in possession. Under section 3015 of the Code the bare possession of land authorizes the occupant to recover damages from any person who wrongfully in any manner interferes with such possession. Consequently, in an action like the present, it is not incumbent upon the plaintiff to show a complete and

perfect title, but he may rely upon his possession of the land under a claim of ownership; this being *prima facie* evidence of title in him.

2. The present action was brought by a partnership composed of two persons in its firm name. It appeared that one of the members claimed an undivided two-thirds interest in the land, and the other the remaining undivided one-third; and also that they were jointly occupying and using the land in the prosecution of their partnership business. We therefore are of the opinion that the action was maintainable in the partnership name. It was, in substance, an action brought by tenants in common for an injury done to them as such, and for which they had a joint right of action.

3. One ground of the motion for a new trial was based upon newly-discovered evidence. It is evident that by the exercise of proper diligence this evidence could have been produced at the trial. In view of the entire case, it seems clear that the plaintiffs were entitled to recover, and we see no error in directing a verdict in their favor. Judgment affirmed.

(98 Ga. 624)

**GREEN et al. v. DRISKELL.**

(Supreme Court of Georgia. Nov. 2, 1896.)

**DISMISSAL—REINSTATEMENT.**

1. Where, at the appearance term of an equitable petition, an order is taken directing that a demurrer thereto, and a motion to dissolve an existing restraining order, be heard and determined at chambers, and at a hearing had in pursuance of such order the court dissolves the restraining order and dismisses the action, the judgment of dismissal, even if erroneous, is nevertheless binding until the same is legally vacated and set aside. An order granted thereafter in vacation, and without notice to the opposite parties or their counsel, by the terms of which the judgment of dismissal is vacated and a reinstatement of the case directed, is void.

2. The order of reinstatement being void for the reason above indicated, the subsequent proceedings were entirely nugatory.

(Syllabus by the Court.)

Error from superior court, Douglas county; O. G. Junes, Judge.

Bill by Fannie V. Driskell against J. M. Green and others for injunction. From a judgment against certain defendants, they bring error. Reversed.

The following is the official report:

On October 27, 1891, Mrs. Fannie V. Driskell filed her bill of complaint, returnable to the February term, 1892, of Douglas superior court, against one Willoughby and four Whites, of Douglas county; J. M. Green and Mrs. Slaughter, of Carroll county; and two named persons, of Paulding county. Upon this bill the judge granted a restraining order, and a rule to show cause on the fourth Monday in November, 1891, why the writ of injunction and the other prayers in the bill should not be granted. On November 23, 1891, defendants Green, Willoughby, and

Slaughter filed their motion to dismiss the case for want of process, service, and jurisdiction, and for other defects apparent upon the face of the record. Subject to this motion, they filed their several answers to the bill. On January 18, 1892, three of the Whites named as defendants filed their "petition and answer," apparently not contesting any claim of Mrs. Driskell, but praying for injunction and relief against Green. Upon this they obtained an order that "this petition and answer" be made a part of the record in the case of Fannie V. Driskell v. James M. Green et al., and that Green be enjoined as prayed until further order, and that he show cause at the next term of Douglas superior court why the prayer of petitioners should not be granted. On April 15, 1892, Green filed a plea to the jurisdiction, alleging that he was a resident of Carroll, and not of Douglas county; that no substantial relief was prayed or sought against any citizen of Douglas county; and that the principal defendants who did reside in Douglas county, the Whites, had had themselves made parties plaintiff, and prayed for money judgment against Green. On July 15, 1892, during the February adjourned term of Douglas superior court, an order was passed that the motion to dissolve the temporary restraining order in the case of Fannie V. Driskell v. James M. Green et al., and the demurrer to said case, and the questions made by the "answer and cross bill" filed by the Whites, be set for trial in vacation at chambers at Dallas, Ga., on August 10, 1892. On that date the following judgment was rendered, after stating the case: "In accordance with an order granted in term and in open court, the above-stated case came on to-day for trial; and, after hearing said case, it is hereby ordered and adjudged that the temporary restraining order heretofore granted in said case be, and that same is hereby, dissolved. It is also ordered and adjudged that the temporary restraining order heretofore granted on the application of L. N. White, E. J. White, and J. B. White, some of the defendants in the above-stated case, who filed an answer and prayed therein to be made parties plaintiff, and also prayed for injunction, etc., against the defendant James M. Green, be, and the same are hereby, dissolved; and it is also ordered and adjudged that the status of the parties be the same as though said restraining order had never been granted. It is also ordered and adjudged that said case be, and the same is hereby, dismissed at the plaintiff's costs." On October 15, 1892, in vacation, and without notice to defendants Green, Willoughby, or Slaughter, or their counsel, the court, on motion of plaintiff's counsel, passed an order referring to the former orders before set out, and proceeding thus: "And it further appearing to the court that the leading counsel for E. J., J. B. and L. N. White, to wit, John V. Edge, was physically unable to attend court; it further

appearing to the court that the other counsel in the case for Mrs. Fannie V. Driskell could not be present to attend to any of the matters in said bill or answer,—it is therefore ordered" that the judgment of August 10, 1892, be vacated, and the case or cases be reinstated, and stand on the same footing as if said judgment had not been rendered. Afterwards, at the November term, 1892, a verdict and judgment were rendered in favor of Mrs. Driskell against Green, Willoughby, and Slaughter for \$801.25 principal, besides interest and costs; this in the absence of said three defendants and of their counsel. At the same term they filed their motion to arrest said judgment, and to set aside and vacate the verdict and judgment or decree, and to set aside and vacate the order of October 15th, before stated. This motion was demurred to by plaintiff's counsel as unauthorized and insufficient in law. The demurrer was sustained, and defendants' motion dismissed, which ruling is here excepted to.

Capers, Hodnett, Harrison & Peebles, for plaintiffs in error. J. S. James, for defendant in error.

PER CURIAM. Judgment reversed.

(100 Ga. 67)

#### GRANT v. STATE.

(Supreme Court of Georgia. Oct. 19, 1896.)

APPEAL—CONCLUSIVENESS OF JUDGE'S CERTIFICATE—REHEARING—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. When, in certifying concerning the correctness of the grounds of a motion for a new trial, the judge below explains or modifies its recitals of fact, this court, in arriving at a knowledge of what actually occurred, will be governed by the statements in the judge's certificate.

2. Pursuing this course in the present case at the October term, 1895, this court correctly arrived at the facts; and therefore the application for a rehearing, based upon the ground that it failed to do so, is without merit. Were it otherwise, such application could not be entertained after the expiration of that term.

3. The "extraordinary" motion for a new trial, based upon alleged newly-discovered evidence, when considered in connection with the counter showing presented by the state, affords no legal cause for setting aside the original judgment.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Sam Grant was convicted of murder, and from a judgment denying an extraordinary motion for new trial, made after affirmance of the conviction (25 S. E. 399), he brings error, and applies for a rehearing of the former writ of error. Judgment affirmed. Rehearing denied.

The following is the official report:

Sam Grant was indicted for the murder of George Davis. He was found guilty, and, his motion for new trial being overruled, brought the case to this court, by which the judgment of the court below was affirmed

(October term, 1895). Afterwards he made an extraordinary motion for new trial upon the ground of newly-discovered evidence. This motion was overruled, and to this ruling he excepted. In support of the motion movant produced the affidavit of Moses Phillips: "When I got to the ball where George Davis was killed by Sam Grant, they are all dancing. Sam was calling. Martha and George were standing by the mantel piece, quarrelling. I was standing by the table, about ten feet away, eating. What attracted my attention first, George told Martha that if she repeated those words he would cut her damned throat. Sam walked up to them, and told them not to have any fuss. George said, 'What you got to do with it?' Sam said, 'Bulger told me to keep down any fuss.' George then called Sam a damned son of a bitch, and pulled a pistol from his hip pocket. Sam then pulled his pistol from his outside coat pocket, and snapped it at George, and then fired." Deponent did not inform defendant or his counsel of his knowledge of the events as above testified to until after the trial and conviction of defendant, nor until after the determination of the cause in the supreme court. Also the affidavit of defendant: He was unaware of the testimony that would be given by Moses Phillips, and has only learned since the determination of the motion for a new trial in the supreme court that Phillips would so testify. Also the affidavit of defendant's counsel: The facts contained in the affidavit of Phillips were unknown to them until after the motion for new trial had been heard and determined in the supreme court. Also the affidavit of Matt Hart: He knows the general character of Phillips, and from that knowledge would believe Phillips on his oath in a court of justice. Also the affidavit of Amanda Roberts (not mentioned in the motion for new trial): "A short while before George Davis was killed he came to my house, and said to defendant that he would kill defendant the next time they met. George seemed to be very much angered on this occasion." Deponent did not communicate these facts to defendant or his counsel until after the trial of the case in the supreme court. By way of counter showing the state produced the affidavits of seven persons that they know the general character of Phillips; that it is bad, and from their knowledge of it they would not believe him on his oath in a court of justice. Also the affidavit of O. C. Johnson: He was within forty or fifty feet of the house the night Grant killed Davis. Heard the report of the pistol. Went at once to the house, and reached Davis a few seconds after the shooting. There was a light in the room where Davis was lying. He examined the body of Davis. Saw his hands. He had no pistol nor any weapon about his person, nor was there any weapon near the body of Davis. If so, deponent could have seen it. He saw Grant with his pistol in his hand. Grant ran by him as he ran from the room, and deponent grabbed at him

to catch him, and would have succeeded but for his having his pistol in his hand. Deponent knows Mose Phillips, but did not see him there on that occasion, nor hear any one say that Davis had a pistol, or weapon of any sort, that night. Deponent is acquainted with the general character of Phillips. It is bad, and from his knowledge of it deponent would not believe him on his oath in a court of justice. Also the affidavit of Alice Harvey: When Davis was shot and killed by Grant she was in an adjoining room, and immediately after the shooting went into the room where the homicide occurred, reaching there in a very short time, and before Davis had been moved. Davis did not have any pistol nor any other weapon in his hand. She was near him, and, if he had had a weapon of any kind, she would have seen it. She did not hear any one say that Davis had had a pistol. She is well acquainted with Phillips, and did not see him at the party the night of the homicide. Also the affidavit of Lizzie Bryant: She was standing about ten or fifteen feet from Davis when he was shot, and saw him plainly. He had no weapon in his hands just before the shooting. If he had had a pistol at that time, she would have seen it. She did not see Phillips on that occasion. Also the affidavit of Jesse Calhoun: Saw the shooting, and saw both of the parties just before and during the difficulty. Saw no weapons in the hands of Davis. Was about his body after he fell, and saw no weapons anywhere on or about his person, nor was anything said within his hearing about Davis having any weapon that night by any one. Knows Phillips, and saw nothing of him the night Davis was killed. Also the affidavit of John Bonner: Was standing about four feet from Davis when Grant shot him. Went to Davis right after he fell. Saw no weapons whatever in his hands. Was about him, and did not hear any one say he had any weapons. Was there about an hour before he was shot, and remained there about an hour after he was shot, and did not see Phillips there.

Upon the call of this case in the supreme court, counsel for the plaintiff in error moved for a rehearing of the same upon the former writ of error.

E. F. Hinton, J. F. Watson, and E. A. Nisbet, for plaintiff in error. J. M. Du Pree, Sol. Gen., L. J. Blalock, and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed. Rehearing denied.

(100 Ga. 78)

#### JOHNSON v. STATE.

(Supreme Court of Georgia, Oct. 19, 1896.)  
CRIMINAL LAW — RECOMMENDATION TO MERCY — INSTRUCTIONS.

A person indicted for the commission of a felony, other than one of those enumerated in section 1036 of the Penal Code, is entitled upon his trial to have the judge instruct the jury

that it is within their power, in the event of conviction, to recommend that the accused be sentenced as for a misdemeanor. Such recommendation, while not conclusive upon the judge, is nevertheless a persuasive influence by which the jury may lawfully and appropriately appeal to his discretion, and the court should, whether so requested or not, inform them as to the provisions of the above-cited section of the Code on this subject. The correctness of this conclusion is the more apparent when the policy of the law, as declared in section 1037 of the Penal Code, is considered.

(Syllabus by the Court.)

Error from superior court, Richmond county; B. H. Callaway, Judge.

Walter Johnson was convicted of burglary, and brings error. Reversed.

The following is the official report:

Walter Johnson was indicted for burglary, and was found guilty. His motion for a new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in failing to charge the jury under the act entitled "An act to prescribe penalties for all felonies under the laws of this state except treason, insurrection, murder, assault with intent to rape, rape, sodomy, foeticide, mayhem, seduction, arson, burning railroad bridges, \* \* \* perjury, false swearing and subornation of perjury and false swearing, and to provide that all misdemeanors shall be punished as prescribed in section 4310 of the Code, and for other purposes." Laws 1895, p. 63. Said act provides that on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as prescribed in section 4310 of the Code. The error being that the jury should have been put upon notice that they had, in the case at bar, the power to recommend the prisoner to the mercy of the court.

Chas. A. Picquet, for plaintiff in error. W. H. Davis, Sol. Gen., and Anderson, Felder & Davis, for the State.

PER CURIAM. Judgment reversed.

(39 Ga. 616)

PRATT et al. v. FINKLE.

(Supreme Court of Georgia. Oct. 28, 1896.)

APPEAL — REVIEW — SUFFICIENCY OF EVIDENCE.

The evidence warranted a finding for the plaintiff; but inasmuch as the verdict exceeded the amount sued for, the excess must be written off, and the costs of this writ of error borne by the defendant in error.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Mary E. Finkle against F. B. Pratt and others on a contract for services. From a judgment for plaintiff, defendants bring error. Affirmed, with direction.

The following is the official report:

Mrs. Mary E. Finkle sued Pratt, Thurston, and the Jet Marble Company, alleging: In 1890, Pratt and Thurston represented to A. E. Finkle, her husband, that they controlled valuable marble property in Whitfield county, Ga., and intended to form a joint-stock company, putting said property therein, and issuing stock thereon, and they solicited said Finkle to take stock in the projected corporation. They also offered to pay him a commission of 36 per cent. on all the stock of the company which he should succeed in selling. They made an engagement with him to talk the matter over with her, as she had some means she desired to invest. Convinced by their representations, she and her husband concluded to accept their offer, and in accordance with the contract her husband solicited and obtained subscriptions to the stock of the company to the amount of \$8,000. He himself subscribed to said stock \$4,000 on her behalf, and the amounts paid on said stock were paid by her. The title to the property intended to be put in the corporation was in F. T. Hardwick and others, and consisted of certain lands described. This land was conveyed by said Hardwick and others to Pratt, Thurston, said A. E. Finkle, and others named, who were subscribers to the stock of said company. For the purpose of organizing the company the above-named parties conveyed the property to the Jet Marble Company, a corporation of Georgia, and upon such conveyance said company was organized, and the stock fixed at 8,000 shares at \$25 a share, and was issued to Pratt, Thurston, A. E. Finkle, and others named. This organization was had December 29, 1890. Upon the stock subscribed for by her husband for her, she paid to Pratt and Thurston in all \$2,175, the last payment being made February 10, 1892; and with this and other payments made by other subscribers Pratt and Thurston paid for the property so conveyed to the Jet Marble Company. The stock so taken by her husband for her has been assigned to her by him, and for a valuable consideration he has transferred to her his claim for commissions on stock sold. While the contract her husband made was with Pratt and Thurston, it was made with a view to the organization of said company, and for its benefit when so organized, and said company has taken the benefit of the services of her husband. In the organization of the company Pratt was made president, and Thurston secretary and treasurer. Of the contract so made with her husband the corporation had notice, through its president and secretary, before the stock so obtained by her husband was issued, and thereby became liable to pay her husband the amount so due him. She prayed for judgment against the marble company for the amount of said commissions, "to wit, two thousand and sixteen dollars, with interest thereon from the time of the organization of said company"; or, if this

could not be had, then that the interest of Pratt and Thurston in said company be seized by the court to answer her demand for said commissions against them, and for general relief and process. She afterwards dismissed her suit as to the Jet Marble Company. There was a verdict for plaintiff for \$2,133 principal, with interest. Defendants moved for a new trial, and, their motion being overruled, excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc., and because the verdict was excessive, and without evidence to support it.

Upon the trial, Finkle testified: In the summer of 1890, in Boston, he met Pratt, who proposed to him to act as agent in selling stock of the projected Jet Marble Company. Pratt proposed that he and Thurston would give witness \$9,000 if he would sell \$25,000 of the stock of the company. He asked Pratt if they would allow him a proportionate commission in the event he failed to sell so much as \$25,000 of the stock, and Pratt agreed to do so. Thurston was present at this conversation. That night, at the Quincy House, Pratt and witness and his wife had a conversation in regard to Mrs. Finkle investing her money in the stock, and as to witness acting as agent in selling the stock for said company; and Pratt said substantially what he had said in the conversation first mentioned, as to the commission witness should have. On the next morning Thurston came to the hotel, and witness, Mrs. Finkle, and Thurston had a conversation as to the same matters, and Thurston then stated that witness should have a commission of \$9,000 in case he should sell \$25,000 of the stock, and a proportionate commission if he should not be able to sell so much. The day after, witness saw Thurston and Pratt, and it was verbally agreed that witness should act as agent in sale of the stock on said terms. Witness went to Philadelphia, and spent several days trying to sell stock; went to Cape May and back in an effort to sell stock; and then went to Atlanta. He worked on a good many people in his effort to sell the stock. He sold \$5,925 of the stock (giving the names of the parties and amounts), of which \$2,000 was to Mrs. Finkle. It was all paid for by the parties buying, and before January 1, 1891. Witness knew nothing of syndicate stock. He sold Jet Marble Company stock. Some of the stock he sold was not taken or paid for, and, when the company was afterwards organized, Pratt and Thurston asked him to share with them the deficit, but he declined to do so.

Mrs. Finkle testified substantially as her husband, and, in addition, that when defendants testify the trade about the agency and amount of commission was finally agreed on in the reading room of the Quincy House, she was not present; and that she wrote Thurston, asking him if he could not sell her stock, and borrow some money for her on it. Plain-

tiff then introduced a written transfer of the claim of A. E. Finkle to her, dated June 15, 1894. Finkle further testified that his expenses in working up subscriptions were between three and four hundred dollars, and that there was paid in on subscriptions obtained by him nearly \$6,000.

For defendants, Pratt testified: "Finkle was a stockholder in the Jet Marble Company, and at its organization was elected one of its directors. He was associated with Thurston and myself in a verbal agreement made at the Quincy House, whereby he agreed to raise a certain sum by the sale of syndicate shares of the syndicate known as the Cedar Ridge Syndicate or Cedar Ridge Marble Syndicate, which amount, with the amount raised by Thurston and I, was for the purchase of the property now known as the 'Jet Marble Company realty.' The Cedar Ridge Marble Syndicate was divided into fifty shares of \$1,000 each, and Finkle was to sell twenty-five shares, and for his commission was to have one-third of the profits arising from the sale of the property of the Cedar Ridge Marble Company for \$50,000, the basis of the cost of said property to be taken at \$36,000, plus the expenses of placing said deal. If he failed to sell the twenty-five shares, he was not to have any commissions. This arrangement was made at the Quincy House on or about August 15, 1890, several months before the organization of the Jet Marble Company. During the first part of the interview, Finkle and his wife, Thurston, and I were present. When the terms were finally concluded, Mrs. Finkle was not present. Finkle had nothing to do with the organization of the Jet Marble Company, and was not present at the time. He performed no services for said company or for Thurston or me for which he was to receive any compensation. Of the amount he claimed to have sold only about six shares were actually paid for. He informed me that he had closed the deal, and sold the required number of shares; but when I went to make the collections on the subscriptions I found very few actual subscribers who paid for and took the stock. His claiming to have sold and not having done so proved disastrous to our plans. I never promised to pay him a commission of \$9,000 for the sale of twenty-five shares, or a proportionate commission, if he sold a less amount. He made no return of the sales of \$2,000 worth of stock to Mrs. Finkle, which he claims he sold to her." Thurston testified substantially as had Pratt, and further: "Finkle was to sell eleven syndicate shares, and a sufficient number besides to pay expenses, before he would be entitled to commissions, including his own, and others that paid their subscriptions. He sold only six and one-third syndicate shares. After the organization of the company, we asked him to share with us the responsibility of making up the losses of unpaid subscriptions, and he declined. His whole course was disastrous to the best interest of the syndicate shares, and

his claim that he had placed the shares was fictitious, as the persons he claimed to have sold to did not materialize, or pay for the shares he claims to have sold. His claim that he had placed the full amount of shares to be marketed caused Pratt to take the shares off the Eastern market. When it was found that the claim made by Finkle was fictitious, the result was that the shares could not be replaced by Pratt, as he had given out that the deal had been closed; hence this was very disastrous to the syndicate. Having failed to dispose of the full number of shares, as he repeatedly said he would do, he never had any legal or just claim for commissions, services, or expenses against the company, Pratt, or myself from the time of placing the shares before the market till now. Pratt and I were the original promoters of the Jet Marble Company, and when it was organized owned a majority of the stock, and Pratt was elected president, and I was made secretary. As an inducement for the stockholders to sell Jet Marble Company stock at par for an immediate development fund, it was understood that the party making the sale should receive a commission of ten per cent. Doubtless Mr. Pratt meant in his letter of January 10, 1891, if Finkle sold any of the company's stock, he would receive the ten per cent. commission the same as others. As he did not sell any of this stock, he had no claim for commissions. In my letter to Finkle of October 4, 1892, where the expression is used, 'whenever we realize the amount of the syndicate price, we will keep our promise with you,' I mean that whenever, from the sale of the Jet Marble Company's property, it shall aggregate to the syndicate price \$50,000, we will keep our promise to pay Finkle any part of the commission to which he may be entitled." In rebuttal Finkle testified that he never heard of any such contract as was set out in defendants' evidence until about two years ago. He did have a talk about the matter with defendants in the reading room in the Quincy House, but made no such contract as defendants swear to.

Various letters were introduced, among them one of Finkle's to Thurston of May 11, 1892, asking Thurston if he would not send Finkle a list of the stockholders in the marble company, and the amounts they had paid in, and stating that Finkle was going to write to each, and ask them what they would take for it, and what commission they would give him for selling; and that he would also like Thurston and Frank's (Pratt's). Also, a letter of Mrs. Finkle to Thurston, dated August 4, 1893, asking Thurston to make her a loan of \$200 for one year, taking her marble stock as collateral. Also, a letter of June 30, 1893, from Finkle to Thurston, asking if Thurston could make him a loan of \$500 on his marble stock, etc. Defendants introduced a writing which recited that, whereas a valuable tract of land, describing it, upon which there was known to be valuable deposits of marble, etc.,

and a sound title to which property was guaranteed (that said property had been pooled, and divided into fifty shares of \$1,000 each, payable in installments), therefore the undersigned agreed to take and pay Pratt or Thurston for, as above stipulated, the number of shares set opposite their respective names, Pratt and Thurston agreeing not to call for payment unless the deal was filled. This instrument was headed "Cedar Ridge Syndicate Shares." It was signed by five subscribers, each for one share, except Finkle, who subscribed for two shares. No date appears on the instrument.

Maddox & Starr, for plaintiffs in error. R. J. & J. McCamy, for defendant in error.

PER OURIAM. Judgment affirmed, with directions.

(99 Ga. 617)

### EARLE v. SAYRE et al.

(Supreme Court of Georgia. Oct. 26, 1896.)

ATTACHMENT AGAINST NONRESIDENT—JURISDICTION  
—WAIVER OF OBJECTIONS—CONTRACTS—  
MEETING OF MINDS—EVIDENCE.

1. In case of an attachment against a non-resident debtor, executed by levy, the jurisdiction of a court of this state attaches by virtue of the seizure of the property of such nonresident; and where, in obedience to a writ of attachment, the officer executing the same seizes certain property as the property of such a non-resident debtor, and so makes his return to the court, it acquires such jurisdiction as will enable it to proceed to judgment subjecting his interest in the property to the payment of the debt. In such a case, if the alleged debtor have no separate leviable interest in the property, and he desires to call in question the jurisdiction of the court, he should, in the first instance, plead in abatement; and if, omitting to do this, he appears, and pleads to the merits, the jurisdiction attaches generally by operation of law, and he cannot, at a subsequent term, be heard to plead in abatement of the action. Accordingly, where in such a case a plea in abatement is improperly allowed to be filed by the defendant after the first term, errors at the trial and errors in the charge of the court which relate alone to matters alleged in such plea afford no ground for complaint on the part of the defendant.

2. This being an action in which the plaintiffs sought to recover upon a contract which they alleged had been made in writing between themselves and the defendant by means of an epistolary correspondence, by the terms of which, as they insisted, the defendant was unequivocally bound to pay to them the price of certain goods, and the defense being that no complete and binding contract for the purchase of the goods had ever been made by the defendant, for the reason that the letters composing the correspondence plainly showed that the minds of the parties had never met, and that they had never "agreed to the same thing in the same sense"; and it appearing from an inspection of the correspondence that, if not clearly susceptible of the construction put upon the letters by the plaintiffs, they were at least ambiguous; and it further appearing that the trial judge allowed both the plaintiffs and the defendant the fullest latitude in introducing evidence to explain the true intent and meaning of the letters,—the defendant cannot complain that the jury found in favor of the plaintiffs' version of them, there being ample evidence to support the verdict.

3. The charge, as a whole, fairly submitted the respective contentions of the parties, and certainly contained no misdirection of which the defendant had a right to complain; and there was no error which would justify the granting of a new trial.

4. The verdict, however, was inadvertently rendered for a sum \$12 in excess of what the plaintiffs' recovery should have been. This error has been corrected by an appropriate direction.

(Syllabus by the Court.)

Error from city court of Cartersville; T. W. Milner, Judge.

Attachment by N. C. Sayre and others, partners as Sayre & Couper, against E. P. Earle. From a judgment for plaintiffs, defendant brings error. Affirmed, with directions.

The following is the official report:

An attachment in favor of Sayre & Couper, a partnership composed of N. C. Sayre, R. H. Couper, and J. J. Calhoun, against E. P. Earle, was levied on an undivided one-half part of an interest in a certain tract of land and the improvements thereon, "now in use as an ochre mill," as the property of defendant. By their declaration in attachment, brought to the September term, 1894, of the city court of Cartersville, plaintiffs alleged: Earle brought from them 26½ tons of ochre, at \$13 per ton, on or about August 4, 1894, and thereby became indebted to them \$343.50, besides interest, no part of which he has paid. The declaration then set forth the issuing and levy of the attachment, and prayed judgment specially and generally. By amendment it was alleged that the amount of ochre sold to defendant was 42.937 tons of ochre at \$13 per ton, amounting to \$558.18; and that the \$558.18 should be credited with the manufacturing of the ochre at \$5 a ton, or \$214.68; leaving a balance due plaintiffs of \$243.50, besides interest. This amendment was filed June 17, 1895. Defendant pleaded denying the allegations of the petition. Further, that on the — day of —, 1894, petitioner shipped to him 100 barrels of ochre, to be sold by him for them on commission; that he paid on June 27, 1894, the freight which was due upon this shipment, \$78.22, and also the storage charges, \$45; that prior to the last-mentioned date, on account of being unable to dispose of the ochre, and by authority of petitioners, he had the ochre shipped to Henry Irwin, to have it roasted, and converted into another commodity, and paid Irwin, by authority of petitioners, \$122.29; that he also paid as freight for the ochre in shipping the same \$33.60, and for cartage \$19,—making a total outlay upon this shipment of ochre of \$298.14; that under contract with petitioners he has caused to be manufactured for them 41.875 tons of ochre at \$5 per ton, for which manufacturing he is entitled to \$207.19, and they are indebted to him in the total sum of \$506.33. Further, that on August 2, 1894, he demanded payment of this sum of petitioners, and gave them the opportunity to pay it, or, if they preferred, to have allowed to them \$13 per ton upon the entire

output of ochre which has been shipped to this defendant, and which was then in his possession at Emerson. The amount of ochre for which he agreed to pay \$13 per ton was, as before stated, 41.875, which, at \$13 per ton, entitled petitioners to a credit of \$490.31, leaving a balance of \$7.02, which petitioners are justly indebted to him, and for which he prays judgment.

At the June term, 1895, defendant filed the following plea (numbered 7): The attachment is illegally levied, in that it is a levy upon property and assets of Earle & Oram, a co-partnership. The property seized was bought with the proceeds of the firm, and the firm's business is operated thereon, and a seizure and sale of the property levied upon would dissolve the partnership. This plea was verified by affidavit of defendant's attorney. Plaintiffs moved to strike this plea upon the grounds: (1, 2) Because it was a plea in abatement, was not filed at the first term, and it is now too late to file the same; (3) because it was not verified by defendant in person. This motion was overruled. Plaintiffs excepted pendente lite, and upon these exceptions assigned error in this court.

At the conclusion of the evidence for plaintiffs defendant moved a nonsuit, because (1) the evidence for plaintiffs did not make out a case; (2) the propositions made by defendant in his letter of August 2d was not accepted without variance; (3) the letter of defendant of August 2d; and the letter of plaintiffs of August 6, 1894, showed that there was not a mutual assent by the parties to the same thing in the same sense. This motion was overruled, and to this ruling defendant excepted pendente lite, and upon it assigned error in his final bill of exceptions.

The letter of August 2, 1894, by defendant to plaintiffs, was as follows:

"I am advised by one of Mr. Oram's employes that you have been to Emerson, and have said that Mr. O. and myself have not treated you right; and in fact have spoken very harshly about us in the matter of the ochre we made for you. Be kind enough to look over the statement I send herewith, and bearing in mind the facts that both of you told me when I was in Cartersville that I was to do the best I could for you, but sell the stuff; and, when you have considered the matter, advise me if I or Oram have done anything as yet except exactly the right thing by you. We contend that we always have and always will pay all our just dues, and, if we have done otherwise by you, prove it, and we will do whatever is right. By statement herewith you are in our debt \$506.30, and, unless you cannot conveniently remit same, I hope to have your check for the amount due at once. All the ochre is still either unsold or unpaid for, so that, as you seem to wish to dispose of it yourselves, you can do so. You can either do this, or, if you had rather, I will take all the ochre, including the 100 barrels sent here, and the 80 barrels sent to Chatta-

nooga, and the 41 barrels now at Emerson, from you, and pay you \$13.00 ton for it f. o. b. Emerson; and this is a very good offer, because the goods, or most of them, are very inferior to Oram's ochre, and because you offered these same goods to Lyon, Hall & Co. of Baltimore (and could not sell) at \$14.00. I, however, much prefer that you send me draft for amount due me for making the goods and for cash for expenses paid, and then sell them yourselves, for, if I take them at \$13.00, I may be six months in getting rid of them, and then make only \$40 or \$50 on the lot. The item of freight, cartage into store, and storage was incurred because the C/L sent here was put into store by S. S. Co. while I was in Cartersville. All these figures I can send you receipts for when you decide what I am to do.

## Statement.

New York, Aug. 2, 1894.

Sayre &amp; Couper, Dr., to Earle &amp; Oram.

Manufacturing and barrelling 221 bbls., 41 tons, 875 lbs., \$5.00 per ton.....	\$207 19
Freight, cartage to store, and storage to date .....	123 22
(Goods at Casey's Store, West St., N. Y.)	
Cash paid to Henry Irwin, Bethlehem, for roasting 100 bbls. sent to N. Y....	122 29
Freight paid on C/L from Bethlehem to N. Y.....	88 69
Cartage paid from Casey's store to R. R. ....	19 00
	<u>\$505 30</u>

"You may have the receipted bills for all these items if you want them."

The letter from plaintiffs to defendant of August 6, 1894, was as follows:

"Your letter of the 27 (?) inst. was received Saturday. We accept your offer of \$13.00 per ton f. o. b. Emerson for the ochre. By inclosed copy statement from Mr. Wheeler you will see that there are 49 barrels of ochre at Emerson, instead of 41, as you supposed. The 8 barrels of unground ochre is the lot Mr. Oram made up separate from the other. It is from the vein at the back end of our tunnel, and is the best we have taken out. It is already grinding, but when Wheeler ground the last lot the barrels gave out, and he had to leave this unground. The inclosed statement shows you to be due us \$343.50. Please remit this amount, and close up the whole thing.

## Statement.

Mr. E. P. Earle, to Sayre &amp; Couper.

Dr.

To 100 bbls. ochre in N. Y.

" 80 " " Chatt.

" 49 " " Emerson.

229 " 42.937 tons, at \$13.00... \$558 18

Or.

By manufg. 42.937 tons at \$5.00..... 214 68

Amount due S. & C..... \$343 50  
Wheeler Statement."

There was a verdict for plaintiffs for \$343.50 principal, with interest, and finding both a general judgment and a special judg-

ment on the attachment, and finding the property levied on subject. Defendant moved for a new trial, and, his motion being overruled, excepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in admitting over defendant's objection, the grounds not being stated, the following evidence of R. M. Pattillo: "Q. Read that clause, and state what you would understand by it as a business man: 'You can either do this, or, if you had rather, I will take all the ochre, including the 100 barrels sent here, and the 80 barrels sent to Chattanooga, and the 41 barrels now at Emerson, from you, and pay you \$13.00 per ton f. o. b. Emerson.' A. It means 'free on board the cars at \$13.00 per ton.' The way I understand, it means the buyer pays \$13.00 for it there. Takes it as if it was there." Movant contends that this evidence was objectionable, because it was but the opinion and conclusion of the witness, and because it was the province of the jury, and not of the witness, to determine what the proposition meant.

Because upon the cross-examination of O. M. Jones, witness for the defendant, by plaintiffs' counsel, the court, on its own motion, ruled: "The question as to whether or not this land is a partnership property is a question that must be proved by the evidence of a title to such property. Interest in land is controlled by writing." Alleged to be error because, since title to realty must be laid in the individual, natural or artificial, the fact that such realty is partnership property must come from other sources than the title deeds. Further, because it is competent to prove partnership in realty by other evidence than the title deeds.

Error in charging the jury as follows in stating the contentions of defendant: "The defendant claims that he did not purchase from plaintiffs the ochre, as claimed in the declaration of plaintiffs; that a certain lot of ochre was put into his possession and placed in his trust by plaintiffs; that he was to sell the same, and make returns, under the terms and conditions as set out in his plea, or rather contends before you— It is his contention before you that he has never made any contract for the purchase of ochre from plaintiffs, or such contract as is contended for by plaintiffs." Alleged to be error because an incorrect statement of defendant's plea and contention. Further, because an incomplete and misleading statement of defendant's pleas and contentions.

Error in charging, in stating the contentions of the parties: "To these pleas the plaintiffs reply that at the time mentioned in the letter of August 2, 1894, I believe, that the defendant proposed, he having in his possession certain quantities of ochre which had been previously shipped to him at New York and to Chattanooga, proposed that he would pay to the plaintiffs the amount stated in the

letter per ton, free on board the cars at Emerson, Georgia, for all this ochre, or he would charge them for the freight that he had advanced for storage and drayage, and expenses that had been paid out by him in consequence of the preparation of the ochre by burning it or some other process, and settle the case with them upon those terms; they paying him the amount of these debts that he had expended and paid out, allowing them the right to take back their property,—to take back the ochre they had shipped,—and sell it or dispose of it themselves.” Alleged to be error, because an incorrect statement of the defendant’s pleas and statements; further, because it is a misleading and confusing statement of the contentions of the parties.

Error in charging: “Look to the evidence, and see what the defendant intended to offer for the ochre,—whether he intended to offer them \$13.00 per ton free on board the cars, he paying and assuming all the charges after it left Emerson, or not. If you find that that was his intention, and that intention was known to the parties at the time, and they accepted the conditions, then you will enforce the contract.” Alleged to be error, because it does not discriminate between the ochre that had, prior to the date of the alleged contract of August 2d, been sent away from Emerson, and which had been in defendant’s custody for some time prior to that date, and the ochre which was then at Emerson; because, since there was no contention on the part of the defendant that he was not to pay the charges on the 41 barrels taken at Emerson under the proposition of August 2d, this charge amounts to a direction to the jury to find for the plaintiffs the full amount claimed; because the correspondence does not make an ambiguous contract, but shows that there was never any mutual agreement upon the same thing in the same sense, and should not have been submitted to the jury as a contract ambiguous in its terms.

Error in charging: “If you find that that was not his intention, or that the acceptance on the part of the plaintiffs was not a full, complete, and absolute acceptance of the proposition, but added to that any condition or any variance in any way to the terms of the proposition, as contained in the letter, then the plaintiffs would not be entitled to recover upon the contract as they contend raised by the interpretation as they insist upon that letter.” Alleged to be error, because it is a confusing and misleading enunciation, and fails to enlighten the jury as to their duty.

Error in charging: “If you should find that at the time the defendant wrote that letter dated August 2d, that he had already had in his possession 100 barrels of ochre shipped to him to New York, and also 100, or any part, of the ochre shipped to him at Chattanooga, and he knew at the time, having it in his possession, that the plaintiffs still had other ochre—forty-odd barrels—at Emerson, which

he reduced to his possession by directing his agents, or persons under his control, to ship to him at any point, and he knew at the time he ordered this ochre that the plaintiffs demanded the sum of \$13 per ton f. o. b. cars at Emerson, Ga., and you find that he reduced the property to his possession without their knowledge and their understanding, then in law he would be liable to them for that amount. And in that event they would not be liable for any of the charges for freight, or for cartage, or for any process of manufacturing through which the ochre was put by him subsequent to the delivery of the ochre at Emerson to his address.” Alleged to be error, because it does not discriminate between the ochre at Emerson to be delivered “and the ochre at New York” and Chattanooga, which had been delivered prior to that, and upon which defendant had paid storage, drayage, roasting charges, etc. Further, because it eliminates from the jury’s consideration defendant’s plea of set-off. Further, because it was not warranted by the evidence and proof, and is not the law of the case.

Error in charging: “If you find that the defendant is in possession under his direction, under his conduct,—by his conduct,—of any amount of ochre, or the amount of ochre as claimed by the plaintiffs, then, in equity, he would be entitled, and in law he would be entitled, to recover; that is, the plaintiffs would be entitled to recover from him the value of that ochre at the time it was delivered to him.” Alleged to be error, because not clear, and because calculated to confuse. Further, because not warranted by the allegations or proof. Further, because it ignores defendant’s plea and proof, and restricts the jury to the consideration of the defendant receiving the ochre, and is a direction to find for the plaintiffs; since defendant admitted having received the ochre sued for, contending for a set-off against its value.

Error in charging: “Now, in reference to the plea filed by the defendant, as to the right of the plaintiffs to levy this attachment upon partnership property, there is in evidence before you a deed from some person. I don’t know who is the maker. The deed is to Earle and Oram individually. The effect of that deed is to convey that property to these two gentlemen individually, not as partners; they owning an undivided half interest each under that deed. And if you find that the property described in that deed is the property levied upon by the sheriff under this attachment, why then the levy would be good, because the individual property would be liable. E. P. Earle would be liable to attachment in this case, and in that event you would find for the plaintiffs on that issue.” Alleged to be error, because it fails to present the law as to partnership property in realty not being subject to attachment. Further, because it makes the partnership property in the realty in issue “upon the paper title.” Further, because it withdraws from the jury’s consideration all

the testimony of the witnesses that this realty was partnership assets. Further, because it is an expression of an opinion that all said testimony was untrue, or should be disregarded by the jury. Further, because it is an unwarranted direction to disregard the evidence of partnership interest in this realty as shown by the testimony, and because it was a direction unwarranted by the facts of the case to find for the plaintiffs.

J. W. Harris, Jr., for plaintiff in error. A. S. Johnson, for defendants in error.

PER CURIAM. Judgment affirmed, with direction.

(93 Va. 650)

CHESAPEAKE & O. R. CO. v. ANDERSON.  
(Supreme Court of Appeals of Virginia. Oct. 5, 1896.)

RAILROAD COMPANIES—ERUCTION OF TRESPASSER—SCOPE OF SERVANT'S AUTHORITY—ACTION FOR INJURIES—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. In an action against a railroad company for injuries, it appeared that plaintiff got on a box car to steal a ride; and he testified that after the train started he was kicked off by one of the trainmen, and was injured. *Held* that, though plaintiff was a trespasser, if he was given no reasonable opportunity without exposing himself to danger, but was forced to leave the train while it was in motion, by force exercised by defendant's employes within the scope of their employment, and in so leaving he received his injuries, defendant was liable.

2. It was not error to refuse to charge that, if the company's rules authorized the conductor alone to expel a trespasser, the brakeman was without authority to do so, and therefore defendant was not liable; as it excluded from the jury consideration of evidence that though, under the rules of the company, no authority was conferred on a brakeman to expel a trespasser from a train, it had been their custom to do so, and such custom was known to, and acquiesced in by, defendant.

3. While the expulsion of trespassers from the cars by a brakeman is not a duty incident to his employment, if it is the custom of brakemen to eject trespassers, and the railroad company knows, or ought to know, of the custom, authority to do so may be inferred, and the company be held liable for damage resulting from an unlawful exercise of such authority.

4. In an action against a railroad company, it appeared that plaintiff got on a box car to steal a ride. He testified: That he got on between two box cars, and was standing between the cars, when a man said, "What are you doing?" That he just turned his back to get off, "and he kicked me and knocked me off." His testimony placed the man who kicked him off on top of the car, and he testified that the man had nothing in his hands; "It felt like a kick;" "I guess it was a kick." The testimony showed that from the top of the car to plaintiff's shoulder, where he said he was kicked, was  $3\frac{1}{4}$  feet, and that it was impossible for a man to stand on top of the car and kick down  $3\frac{1}{4}$  feet, especially when the cars were in motion. *Held*, that a verdict for plaintiff was contrary to the law and evidence.

Error to circuit court, Botetourt county; Henry H. Blair, Judge.

Action by Corbin H. Anderson against the Chesapeake & Ohio Railroad Company for personal injuries caused by defendant's neg-

ligence. There was a judgment in favor of plaintiff, and defendant brings error. Reversed.

R. L. Parrish, for plaintiff in error. G. K. Anderson, for defendant in error.

CARDWELL, J. This is a writ of error to a judgment of the circuit court of Botetourt county in favor of the defendant in error, an infant suing by next friend, against the plaintiff in error, the Chesapeake & Ohio Railroad Company, for the sum of \$2,845. On the 5th day of August, 1894, the plaintiff in error, which is a common carrier operating a line of railway through the state of Virginia and other states, ran one of its fast, through freight trains, known as "Train No. 99," from the town of Gladstone to the town of Clifton Forge, in Virginia, in charge of one crew. The crew which took charge of the train at Gladstone, and was relieved at Clifton Forge, consisted, besides the engineer and fireman, of Conductor Lewis and two brakemen, Rudisill and Johnson. The train stopped at Eagle Rock (called some times "Eagle Mountain") for the purpose of taking water. About the time it started from Eagle Rock, the defendant in error (the plaintiff in the court below), a youth between 16 and 17 years of age, got on a box car to steal a ride; and, according to his statement, he was standing between two box cars, and after the train started he was kicked off by one of the crew of the train, and in consequence of the kick fell on the track, was run over by one or more of the cars, and lost his right leg above the knee, and his right arm near the shoulder.

The grounds relied upon by the plaintiff in error in its petition for a reversal of the judgment are: (1) The rejection by the court of the second instruction asked for by the defendant at the trial; (2) the addendum or amendment made by the court to the third instruction; (3) the ruling of the court in rejecting the fifth instruction; (4) the ruling of the court in giving two instructions asked for by the plaintiff; and (5) the action of the court in overruling the motion of the defendant to set aside the verdict of the jury because contrary to the law and the evidence.

We will consider first the error assigned to the ruling of the court in giving two instructions asked for by the plaintiff. The first is as follows: "Although the jury may believe that Corbin Anderson, the plaintiff, had no business or right to be on defendant's train, and was a trespasser thereon, yet if they further believe that he was given no reasonable opportunity, without exposing himself to danger, but was forced to leave the train while the same was in motion, by reason of force exercised by the employes of said company, or any of them, within the scope of their employment, and that in so leaving he received the injuries complained

of, they must find a verdict for the plaintiff." The second instruction was as to what the jury should take into consideration in assessing damages, should they find for the plaintiff; and, if it was proper to give the first instruction, the second should also have been given. It was said by Lee, J., in *Early v. Garland's Lessee*, 13 Grat. 9, "Where there is evidence tending to make out the supposed case, however inadequate in the opinion of the court, or to however little weight it may be deemed entitled, it is best and safest to give the instruction, if it propound the law"; citing *Hopkins v. Richardson*, 9 Grat. 485, and *Farish v. Reigle*, 11 Grat. 697-719. With this rule, sanctioned and approved as it has been in numerous decisions of this court,—see the opinion of Riley, J., in *Michie v. Cochran* (decided at the present term) 25 S. E. 884, and the cases there cited,—we cannot say that this assignment of error should be sustained. Whether the verdict of the jury was sustained by sufficient evidence, or was against evidence, is another and different question.

The second instruction asked for by the defendant, and rejected, distinctly propounded the proposition that if Conductor Lewis was in charge of defendant's freight train at the time of the accident, with sole power, under defendant's rules and regulations, to determine who should be expelled from the train, and if one of the brakemen on the train, without authority from the conductor to expel the plaintiff, kicked the plaintiff from the train, and thereby caused the injury complained of, the act of the brakeman was outside the scope of his duties, and did not render the defendant liable for the injuries resulting from the act. In other words, it said to the jury that if the rules of the company authorized the conductor, Lewis, alone to expel the plaintiff, who was a trespasser, from the train, the brakeman, Callaghan, was without authority to do so, and therefore, though the jury found from the evidence that Callaghan did in fact eject the plaintiff, and in such a manner as to cause the injury, the defendant company could not be held liable for the injury. It, in effect, excluded from the jury the right to take into consideration any evidence tending to show that while, under the rules of the company, no authority was conferred upon a brakeman to expel a trespasser from the train, it had been the custom of the brakemen to do so, and that this custom was known to the company and it acquiesced in it. The question here presented is one of first impression in our state, and has been adjudicated by the courts of last resort in but few of the states of the Union. The first instruction asked for by the plaintiff, and given by the court, recognized that the burden of proof was on the plaintiff to show that Callaghan was acting within the scope of his authority as brakeman when he ejected the plaintiff from the train. We think, upon reason and authority,

that the duty of a brakeman to expel trespassers from a freight train cannot be implied merely from the fact that he is in the service of the company in that capacity. The word "brakeman" is defined by Webster as follows: "The man whose business it is to manage the brake on railways." It was said by Chief Justice Shaw in *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, cited by Story in his work on Agency (pages 567, 568): "To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes; but whether he is responsible, in a particular case, for their negligence or misconduct, is not decided by the single fact that they are, for some purposes, his agents." "Where there is no authority to do the act, the fact that the person doing it is the servant of another does not render the master liable." Wood, Mast. & S. 655. This latter rule, however, applies only in that class of cases where the master owes no duty to third persons,—a case of a trespasser, as here, where the master owes only the duty that one human being owes to another. Id. 654. See, also, 2 Wood, Ry. Law (Ed. 1885) p. 1202, § 316. In the case of *Marion v. Railroad Co.*, 59 Iowa, 428, 13 N. W. 415, cited in note to Wood, Mast. & S. 656, it was held that where a brakeman, who only had authority to remove persons from the cars when so ordered by the conductor, removes a person without such authority, his act is in excess of his authority, and the company is not liable therefor. In the case of *Railroad Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, the supreme court of Texas held that there could be no recovery against a railroad company for an injury caused by the improper expulsion of a trespasser from a freight train by a brakeman; that, where a recovery is sought of the master for an injury inflicted by his servant, the plaintiff must show that the servant did the wrong while acting within the scope of his authority; and that a brakeman on a railroad train has no implied authority to eject trespassers from the cars. To the same effect is the decision of the supreme court of appeals of West Virginia in the recent case of *Bess v. Railroad Co.*, 35 W. Va. 492, 14 S. E. 234. A different view, however, was taken by the court of appeals of New York in the case of *Hoffman v. Railroad Co.*, 41 Am. Rep. 337. It was there held that a recovery against the railway company for an injury to an eight year old boy, resulting from being kicked off the cars while the train was moving about ten miles an hour, was warranted. But it was said in the opinion that there was a very sharp conflict in the evidence upon the question whether the boy was kicked off by the conductor or the brakeman, and that the finding of the jury was not claimed to be unsupported by the evidence. It is true, the court said that the concession that the authority

in the conductor to remove a trespasser in a lawful manner is incident to his position must be made in respect to the authority of a brakeman who finds a trespasser on the platform of the car; but when the facts and circumstances of that case, as gathered from the opinion of the court, are considered, we do not think that the decision is authority in the case at bar.

The case of *Railway Co. v. Mother* (Tex. Civ. App.) 24 S. W. 79, is cited by counsel for defendant in error with apparent confidence; but a careful examination of the case discloses, we think, that it does not sustain his contention. In *Mother's Case* it was held: (1) "A trespasser improperly expelled from a car by a brakeman, who seeks to hold the company liable therefor, must show that the acts of the brakeman were within the scope of the authority in fact conferred on him by the company, since the duty of expelling trespassers rests, *prima facie*, on the conductor." (2) "Though a brakeman may have no authority to use physical force to expel trespassers from the car, yet, if he is clothed with authority to order them off, the company is liable for the death of a trespasser who was compelled to leave the train, while in motion, by the brakeman's abusive language, threatening gestures, and threats of arrest." (3) "Evidence that a railroad company had knowledge of a custom of its brakemen to order trespassers from its cars, and to eject them therefrom, supports a finding by the jury that it had vested its brakeman with implied authority to order trespassers from the cars, so as to render it liable for the improper exercise of such authority by one of them." The proof is conclusive in that case that it was usual for brakemen to put trespassers off the cars, and that it was a general practice among railroad brakemen to put them off. The court says this in the opinion, and adds: "As stated in the findings of fact, no express authority was shown from the company to its brakemen in the premises, but no witness was introduced to show that it was not fully aware of the common practice for them to give these orders, nor was the testimony of these witnesses in any manner contradicted or called in question. Under the circumstances, we think the evidence not only sufficient to justify the submission of the question of authority to the jury, but also sufficient to sustain their finding that it in fact existed. In fact, had not our supreme court already decided otherwise, we would have felt very much disposed to agree with the New York court in *Hoffman v. Railroad Co.*, 4 Am. & Eng. R. R. Cas. 537, in holding that the practice for brakemen to expel trespassers from railway cars is so general that they should be held to have implied authority to do so, in the absence of a showing to the contrary."

In the case at bar it was proved by all the employees of the defendant company on duty on the train No. 99, from which the plaintiff alleged that he had been kicked, and by Carlisle,

superintendent or that division of the company's road, that the custom of its brakemen was to obey the rules of the company, and to report trespassers to their conductors, respectively, and that the custom at the time of this accident was not for brakemen to violate the rules, and to put trespassers off themselves. The law in Virginia, as elsewhere, holds railroad companies, as common carriers, to the strictest responsibility in the selection of their servants and agents, and for the exercise of care, vigilance, and skill on the part of all persons employed by them. Consequently their servants and agents should be employed with a view to their intelligence, integrity, experience, and fitness to perform the duties that may be required of them by the rules and regulations of the company. To say that the railroad company shall not be allowed to prescribe the duties that the servant or agent it employs shall or shall not perform would be to establish a harsh rule, indeed, and one under which the master might be held liable for an injury inflicted upon one to whom he owes no contractual duty, simply from the fact that the injury was inflicted by the wrongful act of a person who happens to be in his service.

We think that the defendant's instruction No. 2 was properly rejected, but while we are of opinion that the expulsion of trespassers from the cars by a brakeman is not a duty incident to the position he occupies, and that authority to do so does not arise by implication, we are also of opinion that if it was the custom of the brakemen to eject trespassers, and the railroad company knew, or ought to have known, of the custom, authority to do so might be inferred, and the company be held liable for damage resulting from an improper and unlawful exercise of the authority by the brakeman.

The next assignment of error is to the action of the court in adding an addendum or amendment to the third instruction asked for by the defendant company. This instruction is predicated upon evidence adduced by the defendant company to show that while it had been agreed between Callaghan, a brakeman on an east-bound freight train standing on a side track at Bessemer, one mile west of Eagle Rock, and Rudisill, the front brakeman on train No. 99, that they would change places,—Rudisill to make the run east to Gladstone, and Callaghan the run west to Clifton Forge,—Conductor Lewis did not assent to this arrangement, except on the condition that the change was not to be made till train No. 99 reached Bessemer, and that, therefore, Callaghan, although on this train when the accident to the plaintiff happened, and on the front of the train, where it was the duty of Rudisill to be, was there without authority to take the position of brakeman between Eagle Rock and Bessemer, and that this did not place him on duty on train No. 99 before it reached Bessemer; but, in the view we take of the case, this assignment of error need not be further considered.

The defendant company asked for the follow-

ing instruction, which the court also rejected: "If the jury believe from the evidence that the brakemen on the trains run by Ex-Conductor J. N. Karnes were in the habit of expelling trespassers from the said trains without orders from said Karnes, but in his sight or hearing, they are instructed that all expulsions so made in the sight or hearing of said Karnes must be construed to be the acts of said Karnes, and must not be construed as a violation of the rules and regulations of the defendant that require its brakemen to report such trespassers to their conductors." It had been proved—and there was no evidence to the contrary—that the rules and regulations of the defendant company require its brakemen to report trespassers on the train to their conductors; and the only evidence adduced by the plaintiff even tending to show that these rules and regulations had been violated, or that it was the custom of the brakemen to violate them, at the time of the accident, or in fact at any time, is the testimony of one J. N. Karnes, who, by his own showing, had been discharged from the service of the defendant company, 2½ years prior to this accident, for a violation of the rules of the company, or for neglect of duty. The effect of this testimony is that, when he was acting as a freight conductor on another division of the company's railroad, the brakemen on his train were in the habit of expelling trespassers from the train without orders from him, but it was done in his sight and hearing and with his approbation; and he does not say that any official of the road, other than himself, knew of the practice on the trains run by him. On cross-examination the witness admitted that it was the duty of the brakemen to report to him when they found a trespasser on his train, and in answer to the question, "You only knew of the cases reported to you, or the cases when they put them off in your sight?" he says, "Yes, sir; that is all I remember of." Then, in answer to the question, "You don't know what anybody's custom has been since you left the road?" he says, "No, sir." In the form that this instruction was offered, it was perhaps proper to reject it, as it might have misled the jury; but upon another trial of the case, should the evidence to which the instruction is directed be substantially the same as at the former trial, and the instruction is asked for in the form following, it should be given, viz.: "If the jury believe from the evidence that the brakemen on the trains run by Ex-Conductor J. N. Karnes were in the habit of expelling trespassers from said trains without orders from Karnes, but in his sight or hearing, and with his approval and assent at the time, they are instructed that all expulsions so made must be construed to be the acts of Karnes, and must not be considered as a violation of the rules and regulations of the defendant that require its brakemen to report such trespassers to their conductors."

The next and last assignment of error is to the action of the court in overruling the motion of the defendant to set aside the verdict as contrary to the law and the evidence. The plain-

tiff was entitled to recover in this case only upon proof sufficient to show that he was in fact ejected from the train by one or more of the defendant company's servants, under such condition or in such a manner as to cause the injuries for which he sues; and, if proved that he was so ejected from the train by a servant of the company, it must also be shown that the servant was acting within the scope of his authority. The only testimony to the effect that the plaintiff was forced to leave the train is his own. His testimony is as follows: Question by his counsel: "Tell the gentlemen of the jury all about it; how you came to get on; all about it." Answer: "I got on at the tank; got between two box cars, and was standing on the piece, holding to the iron steps between the cars. A man came along and said, 'What are you doing here you son of a —?' I just turned with my back to him, to get off, and he kicked me and knocked me off." The plaintiff's own testimony placed the man who, he alleged, kicked him off, on top of the car, right over his head, while he (the plaintiff) was standing between two box cars, on the little platform that comes out from the end of the bottom of the car, near where the draw-heads come together, and shows that upon seeing the man he (plaintiff) turned his back to him, to get off, and instantly received the kick that caused him to fall upon the track, beneath the wheels. He further says that the man had nothing in his hands; "it felt like a kick"; "I guess it was a kick." It is shown by uncontradicted testimony in the record that from the top of the car, where the man stood, to the plaintiff's shoulder, where he says he was kicked, it is 3 feet 3 inches, and that it is impossible for a man to stand on top of a car and kick down 3 feet 3 inches. It is further shown that a kick such as the plaintiff says he received would have cast him clear of the cars, and not down on the track. The act attributed to Brakeman Callaghan is shown by the evidence to be a physical impossibility, even were the train at rest; and the difficulty and danger attending any effort to accomplish such a feat are yet more obvious when the fact is recalled that the train was in motion at the time. It was pressed upon us with great earnestness that the case is, under the law, to be considered as upon a demurrer to evidence; but that rule, while it may, and often does, require us to accept as true that which is capable of proof, though the preponderance of evidence be ever so great against it, cannot compel us to accept as true what, in the nature of things, could not have occurred in the manner and under the circumstances narrated, and may be said, therefore, to be incapable of proof. Subjecting the evidence to the most rigid application of the rules governing demurrers to evidence, it is plain that the defendant company was guilty of no negligence connected directly or remotely with the injuries of the plaintiff, which were, so far as this record shows, due solely to his own reckless intrusion upon the defendant company's cars, as a trespasser. It

was therefore error in the court below to overrule the motion to set aside the verdict of the jury because contrary to the law and the evidence, and its judgment must be reversed, the verdict set aside, and the cause remanded to that court for a new trial to be had therein in accordance with the views expressed in this opinion.

(119 N. C. 230)

**SHIELDS v. UNION CENT. LIFE INS. CO.**  
(Supreme Court of North Carolina. Nov. 17, 1896.)

**APPOINTMENT OF ADMINISTRATOR—RIGHT TO SUE—FOREIGN INSURANCE COMPANY.**

1. A grant of letters testamentary on proof that decedent owned property in the state, no matter when or how such chattels were brought into the state, was valid, though decedent, at the time of his death, was a resident of Alabama, and left assets there.

2. Where an administrator has a policy on the life of the intestate in his possession, he has a right to sue thereon, though an administrator has been appointed in the state of the domicile of the decedent.

3. That the charter of an insurance company provides that it shall be sued only in the state of its domicile is no defense to an action by an administrator of a decedent in another state.

Appeal from superior court, Moore county; Starbuck, Judge.

Action by H. B. Shields, as administrator of Braxton Shields, deceased, against the Union Central Life Insurance Company, to recover on a policy of insurance. From a judgment for defendant, plaintiff appeals. Reversed.

Civil action tried at August term, 1896, of Moore superior court, before Starbuck, J. The decedent, Braxton Shields, was domiciled at the time of his death in the state of Alabama, where, according to the finding of the jury, he left sufficient assets, outside of the policy of insurance sued on in this action, to discharge his indebtedness due there. His body was brought to North Carolina, and interred in Moore county, where he left assets, and where there were creditors of his estate, one debt due said estate being a part of the burial expenses, and where his only heirs at law (his brother, Thomas Shields, and Lydia Fry, wife of James Fry) reside. The decedent was at the time of his death engaged, under the firm name of Shields & Co., in the business of selling drugs in Selma, in the state of Alabama, with Clement Ritter, who is the sole surviving partner, and has, under the laws of the state of Alabama, the exclusive right to wind up the affairs of said partnership, and settle its indebtedness. The intestate, outside of the obligations of the said partnership, owed in Alabama, at the time of his death, to L. A. Moore, \$75, evidenced by note dated March 26, 1894; and his estate incurred liability there, after his death, to J. Breslin, for a casket, \$70, and to Clement Ritter, individually, \$139.60, for expenses of attention to and removal of the body of the deceased to North Carolina for burial. J. Breslin, who held the claim for \$70, was duly appointed and qualified as ad-

ministrator in Alabama. Subsequently, the plaintiff, H. B. Shields, was appointed administrator by the clerk of the superior court of Moore county, and was duly qualified. In order to facilitate the settlement of the estate, the administrator, Shields, and the heirs at law and distributees, Thomas Shields and Lydia Fry, together with her husband, entered into an agreement with the surviving partner, Clement Ritter, of Selma, Ala. They sold and assigned to him all of the right, title, and interest of Braxton Shields in the property and effects of the firm of Shields & Co., and authorized him (Ritter) to pay \$70 due Breslin, and to reimburse himself for expenses incurred in bringing the body to Moore county for burial. Ritter executed a bond to indemnify Shields, as administrator, against any indebtedness of Braxton Shields, as a member of the firm of Shields & Co., and all individual indebtedness of Braxton Shields. H. B. Shields signed an agreement to repay Ritter his own advancements for expenses after the death of the intestate, and to hold him harmless on account of his promise to pay Breslin \$70 for the casket, provided the insurance policy sued on should be paid to him, or other funds received by him, sufficient to settle the indebtedness. Breslin assented to the agreement entered into with Ritter, and Ritter, who had possession of the policy, turned it over to Shields, as administrator. The issues and findings were as follows: Judgment: "It being admitted by the plaintiff that defendant company is a nonresident corporation, and a resident of the state of Ohio, and having a branch office in the state of North Carolina, it is adjudged that the plaintiff recover and take nothing by his suit, and that defendant recover of plaintiff and his surety the costs of action." The plaintiff moved for judgment on the pleadings, findings of the jury, and admissions. The court denied the motion, for reasons set forth in the judgment, and the plaintiff appealed.

Douglass & Spence, for appellant. Black & Adams, for appellee.

EVERY, J. (after stating the facts). The grant of letters testamentary to H. B. Shields on the estate of Braxton Shields, upon proof that he owned property then in this state, no matter when or how such chattels were brought within his jurisdiction, was valid, although it appeared that the decedent, at the time of his death, was a resident of the state of Alabama, and left assets there also. *Hyman v. Gaskins*, 5 Ired. 267; Code, § 1374, subd. 3.<sup>1</sup> Being in under a valid appointment,

<sup>1</sup> Code, § 1374, reads: "The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed; and in cases of intestacy, in the following cases: \* \* \* (3) Where the decedent, not being domiciled in this state, died out of the state, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk."

and having in his hands the policy sued on, the law did not allow the debtor to contest his right to collect on behalf of the administrator in Alabama. Whether Breslin, as the administrator, appointed in the jurisdiction where his domicile was at the time of death, could, in a proper proceeding, recover the policy, as an evidence of debt due the estate, or the proceeds when collected, is a question that does not arise. The acts of an administrator who is not entitled to the appointment are not invalid. He is clothed with all the power of a properly constituted personal representative, and, though one who has the better right may insist upon his removal, he cannot impeach his acts while in office. In so far as he who has been ousted has administered the estate, his acts, like those of a de facto officer, are as valid and binding as if he had been the incumbent de jure. *Garrison v. Cox*, 95 N. C. 353; *Springer v. Shavender*, 116 N. C. 17, 21 S. E. 397; *Lyle v. Siler*, 103 N. C. 261, 9 S. E. 491; *London v. Railroad Co.*, 88 N. C. 584.

Having been appointed by a court having jurisdiction, and being bound to administer all assets that came into his hands or the hands of any other person for him, the plaintiff, with the policy in his possession, has the right to demand payment, and the authority to have his demand, if resisted, enforced through the courts. Indeed, the law devolved upon him the duty of collecting it. *Williams v. Williams*, 79 N. C. 417. The payment of the money in satisfaction of a judgment in this action could not be hereafter drawn in question by Breslin, as administrator of the jurisdiction where he resided, leaving out of view all of the agreements between the heirs at law and distributees and the two administrators. *London v. Railroad Co.*, supra. Whether Breslin, in his representative capacity, could recover, or whether the Alabama creditors could recover, against the plaintiff, is a question which in no way affects the rights of the defendant.

It is needless, for the reasons given, to discuss or pass upon the effect of Breslin's execution of the agreement operating as an assignment. It is sufficient for the maintenance of this suit that the plaintiff is lawful administrator, and has in his hands an unpaid chose in action, which the defendant owes to the decedent's estate.

The judge who tried the case below seems to have rendered judgment for the defendant upon a demurrer *ore tenus* to the jurisdiction, on the ground that an action could only be brought against the defendant company, under the provisions of its charter, in the state of Ohio. It is familiar learning that a corporation is permitted to do business outside of the state where it is created, as a matter of comity, but always with the proviso that it is subject to the laws of the forum, and has no greater privileges than domestic corporations, under its statutes. *Barcello v. Hapgood*, 118 N. C. 728, 24 S. E.

124. The defendant has been brought into court, and has answered on the merits. Code, §§ 194, 195, confer jurisdiction against all foreign corporations doing business in the state, and provides for removal to the proper county, when that named in the summons and complaint is not the proper one. *McMinn v. Hamilton*, 77 N. C. 300.

The court below erred in refusing the plaintiff's motion for judgment, and the ruling below is reversed. The case must be remanded, to the end that judgment may be entered for the plaintiff, in accordance with the verdict. Reversed.

(119 N. C. 367)

#### MORGAN v. ROPER.

(Supreme Court of North Carolina. Nov. 24, 1896.)

#### ACTION ON ACCOUNT — JUDGMENT ON PLEADINGS.

In an action on an itemized account, made a part of the complaint, for goods sold to defendant, aggregating \$630.90, plaintiff admitted credits of \$295.43, and asked judgment for \$345.47. Defendant denied promising to pay the alleged balance; admitted the purchase and receipt of the items in plaintiff's account to the amount of \$259.48, specifying which they were; and as to the other items he averred that he had no knowledge sufficient to form a belief, and therefore denied the same. *Held*, to put plaintiff on proof of all but the admitted items, and it was error to apply the credits to the items of debt denied by defendant, and render judgment on the pleadings in favor of plaintiff for \$233.48.

Appeal from superior court, Richmond county; Green, Judge.

Action by J. C. Morgan against G. A. Roper on an itemized account. From a judgment on the pleadings in favor of plaintiff for \$233.48, which the court adjudged to be admitted to be due by the answer, with interest, defendant appeals. Reversed.

M. L. John and Frank McNeill, for appellant. John D. Shaw & Son, for appellee.

CLARK, J. The plaintiff sues upon an itemized account (made a part of the complaint) for goods sold and delivered to the defendant, aggregating \$630.90, admitting credits amounting to \$295.43, and asking judgment for the balance of \$345.47, which it is averred the defendant promised to pay. The defendant, answering, denies promising to pay the alleged balance. He admits the purchase and receipt of the items in plaintiff's account to the amount of \$259.48, specifying which they are, and as to the other items of plaintiff's account he avers that he "has no knowledge or information sufficient to form a belief, and therefore denies the same." This is in the very words of the denial, in such cases, authorized by Code, § 243, subd. 1, and puts the plaintiff on proof of his account (*Bank v. City of Charlotte*, 75 N. C. 45) outside of the admitted items amounting to \$259.48, and against that amount are the plaintiff's admitted credits of \$295.43. Besides, the defendant pleads additional payments by him to the amount of \$151, which "are not en-

tered among the credits of plaintiff's statement." The court below made the mistake of applying the credits, admitted by the plaintiff, to the items of debit denied by the defendant. Applying the admitted credits to the admitted debits, there was no balance admitted by the defendant for which judgment could be entered. The plaintiff must go on, and prove his disputed items of account; and it will devolve upon the defendant to prove his allegations of additional payments, for, not being pleaded as a counterclaim, they are taken as denied. Code, § 268; Clark's Code (2d Ed.) p. 215. The case relied upon by the plaintiff (*Lay Gas Mach. Co. v. Falls of Neuse Manuf'g Co.*, 91 N. C. 74) differs from this in that there the complaint averred that a certain matter was "within the personal knowledge of the defendant," and the court held that that allegation must be specifically met, and could not be denied in the authorized formula that the defendant had not knowledge or information sufficient to form a belief, because, from the very nature of the averment, he must have knowledge, or must be able to deny having it. But the averment here of a sale and delivery of goods to the defendant is not an averment that the "matter is in the personal knowledge of the defendant." It is not specifically averred, nor is it a necessary implication, for the allegation would be sustained by proof of a delivery to his wife, children, employes, or agents, if authorized to act for him in the matter; and of their action he might well have neither knowledge nor information, by reason of the death, removal, or changed disposition towards him of such agents. Even if the sale had been to him personally, the items not admitted may have escaped his memory, and, while satisfied within himself that he did not get them, he might justly be averse to denying their receipt as a fact, and be content to let the plaintiff prove their delivery. Code, § 243, subd. 1, does not require in such cases that the defendant shall incur the pleadings with the reasons why he has not such knowledge or information, and it is sufficient if he makes the denial (upon the responsibility of an oath, if, as here, the complaint is sworn to) in the form and manner prescribed by the statute. The judgment below is set aside, that the disputed matters of fact may be tried by a jury. Error.

(119 N. C. 339)

**WILLIAMSON et al. v. NEALY (WORTH et al., Interpleaders).**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**ATTACHMENT—PROPERTY SUBJECT.**

Property in the hands of the sheriff, under a mandate in claim and delivery, which requires him to take the property and deliver it to plaintiff, is not subject to attachment.

Appeal from superior court, Columbus county; Henry R. Starbuck, Judge.

Action of claim and delivery by Williamson & Co. against E. Nealy to recover possession of a buggy, in which B. G. Worth and others interpleaded. From a judgment in favor of plaintiffs, the interpleaders appeal. Affirmed.

The court found the facts, which were agreed to by the parties:

"That on April 28, 1896, the plaintiffs sold the defendant E. Nealy a buggy, and said defendant executed to plaintiffs the following paper writing:

"\$20.00. Sixty days after date I promise to pay Williamson & Co. twenty dollars, for value received, in one open Wren buggy. It is to stand good for the above amount, if not paid when due." Given under my hand and seal this April 28, 1896.

"[Signed] E. Nealy. [Seal.]

"M. Q. Coleman."

"That the buggy therein described was the one sold by plaintiffs, and is the buggy in controversy in this action. That on July 11, 1896, the plaintiffs, after default in the payment of the debt described in the paper writing, began this action before a justice of the peace for the recovery of said buggy, and sued the writ of claim and delivery, and that the sheriff seized the buggy, and took the same into his possession under said writ of claim and delivery. That on the same day, and after the seizure of the buggy under said writ, the defendants Hall & Pearsall and Worth & Worth, who have valid debts against defendant Nealy, having been contracted prior to April 28, 1896, sued writs of attachment having proper grounds therefor. That the sheriff, then already in possession of said buggy under the claim and delivery process, levied on the buggy under the said writs of attachment. That the said paper writing was not recorded till after the levying of said attachments. The defendants, other than Nealy, were allowed to implead in this action before the justice on July 13, 1896."

J. B. Schulken, for appellants. John D. Bellamy, Jr., for appellees.

**FURCHES, J.** The plaintiffs claim title to the buggy, under an unregistered mortgage from the defendant Nealy; and the interpleaders, Worth and others, claim title under attachments against the defendant Nealy. The plaintiffs, under claim and delivery proceedings, had caused the buggy to be taken by the sheriff, and, while the sheriff had the property in his possession under these proceedings, the defendant interpleaders placed in his hands the attachment papers on their claim, and the sheriff levied the same, if he had the right to do so, on the buggy, while it was still in his possession, under the claim and delivery proceedings. After this levy, and while the property was still so in the hands of the sheriff, the mortgage under which the plaintiffs claim was registered. It is admitted that an unregistered mortgage is good against the mortgagor, and it is also admitted that it is not

good as against creditors. It was contended by the defendant interpleaders that their attachments were executed by the sheriff before the mortgage was registered, and this entitles them to the buggy; while the plaintiffs contend that the buggy was in custodia legis at the time the attachments were put in the hands of the sheriff, and remained so until after the mortgage was registered, and that for this reason the sheriff could not execute the attachments while the buggy was so in his custody, and the levy after the registration of the mortgage did not or would not affect their title. The plaintiffs' counsel cited, in support of their position (that the buggy, being in custodia legis, could not be levied on), *Alston v. Clay*, 2 Hayw. (N. C.) 171; *Overton v. Hill*, 1 Murph. 47, and *Hunt v. Stevens*, 3 Ired. 365. But this doctrine of custodia legis preventing a levy is overruled in *State v. Lea*, 8 Ired. 94, and *Gaither v. Ballew*, 4 Jones (N. C.) 488. And it is a little singular that the court (*Pearson, J.*, delivering the opinion), in the case of *Gaither v. Ballew*, cites and comments on *Alston v. Clay*, and *Overton v. Hill*, without making any mention of *Hunt v. Stevens*, or *State v. Lea*, supra, when *State v. Lea* enunciated the same doctrine as is enunciated in *Gaither v. Ballew*. The doctrine enunciated in *State v. Lea* and *Gaither v. Ballew* is not put upon the ground of being in custodia legis, but upon the ground that the service of the attachment would interfere with the execution of the process of the court, in the hands of the sheriff, under which he seized the property; but that for money, in the hands of a clerk, where no further order of the court is necessary to be made, and the party to whom it belongs has a right to demand it, an attachment will lie; and the same with a sheriff, where he has money in his hands, collected under process, but which the owner may demand, and the sheriff would have a right to pay over to him, is the subject of an attachment against the owner; and it is only where the service of such attachment would conflict with the discharge of his duties as sheriff in obeying the order or mandate of a court, under which he took possession of the property or effects in his hands, that an attachment cannot be served. In claim and delivery, the mandate is to take the property and deliver it to the plaintiff. Code, § 323. So it would seem that, while the buggy was in the possession of the sheriff, under this mandate of the court, the law will not allow him to serve any other process that would conflict with his duty in delivering the property he had taken, under the claim and delivery proceeding, to the plaintiffs, or that would injuriously affect the plaintiffs' right to the property while it was in his possession under said process. It seems that the law will not allow the execution of its precepts and process to be interfered with until their execution has been completed. Under the facts found by the court, we find no error of law, and the judgment is affirmed.

(119 N. C. 417)

SILVER VALLEY MIN. CO. et al. v.  
NORTH CAROLINA SMELT-  
ING CO. et al.

(Supreme Court of North Carolina. Nov. 24, 1896.)

CORPORATIONS—INSOLVENCY—FRAUDULENT CONVEYANCES.

A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property on hand, which, if converted into money at market prices, would be sufficient to meet liabilities.

Appeal from superior court, Davidson county; Green, Judge.

Action by the Silver Valley Mining Company and others against the North Carolina Smelting Company and others to recover money, and to cancel a mortgage and certain judgments. From a decree for plaintiffs, the defendant smelting company and defendants W. L. Glorieux and another, composing the firm of Glorieux & Woolsey, appeal. Reversed.

Robbins & Raper, for appellants. M. H. Pinnix, Watson & Buxton, and Robbins & Long, for appellees.

AVERY, J. Looking alone to the derivation of the words "solvent" and "insolvent," they mean, respectively, able and unable to pay. Whether the adjective, insolvent, is used to define the condition of a decedent's estate, or the financial status of a living person, its signification is the same. It means unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. This is substantially the definition given by the reputable lexicographers, as will appear by reference to Webster's, Worcester's, or the Standard Dictionary; and not only is the same meaning given to the term by common acceptance, as it is used in the ordinary transactions of life, but, applying the crucial test, we will find that in the discussion of almost every appeal involving an issue of fraud, and depending in any way upon the ability of a debtor to pay his debts at the time of making a conveyance, the discussions in the opinions of this court have been predicated upon the assumption that solvency or insolvency depends upon the question whether the entire assets equal or exceed in value the total indebtedness. Without specifying, it would seem sufficient to refer to cases of this class everywhere, but the citation of a few of the later adjudications will suggest numberless others. *Bank v. Adrian*, 116 N. C. 537, 21 S. E. 792; *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59; *Berry v. Hall*, 105 N. C. 154, 10 S. E. 903; *Helms v. Green*, 105 N. C. 257, 11 S. E. 470; *State v. Mitchell*, 102 N. C. 347, 9 S. E. 702; *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482. It would prove subversive of settled principles, and would tend to im-

pair credit and embarrass trade, to give our sanction to a definition of an insolvent that would bring within the class of which it is descriptive every person, natural or artificial, who in the course of active business is unable to meet the demands of creditors without borrowing money.

The court below instructed the jury that: "Property is not a legal tender in payment of debt, and a debtor has no right to pay a debt with property of any kind. Therefore the amount of defendant's corporate property (if you believe it consisted mostly of valuable mining machinery) was of little consequence. If defendant was unable to pay its matured debt in lawful money, and if it was unable to pay its debts from its own means, and had to obtain money from the personal indorsement of other parties, with which to pay maturing obligations, then the defendant was, in contemplation of law, insolvent." The instruction asked, and in lieu of which the foregoing was given, was as follows: "A corporation is not insolvent so long as it has property sufficient to meet its liabilities, and there is no evidence sufficient to go to the jury that, at the time said mortgage was executed, said corporation did not have property sufficient to meet its liabilities, and therefore the jury should find and answer the issues as to insolvency accordingly; and there is no evidence sufficient to go to the jury that said mortgage was given in contemplation of insolvency, and the jury should so find." It is needless to discuss other exceptions. For the error in substituting the instruction given for that prayed for, the defendants are entitled to a new trial.

(119 N. C. 408)

#### ANDREWS et ux. v. POSTAL TEL. CO.

(Supreme Court of North Carolina. Nov. 24, 1896.)

#### TRIAL—SUBMISSION OF ISSUES—INSTRUCTIONS—EXCEPTIONS.

1. In an action against a telegraph company for failure to send a telegram, the court submitted to the jury the issues: (1) Did defendant negligently fail to transmit or deliver the message as alleged? and (4) what damage, if any, have plaintiffs sustained? *Held*, that plaintiffs were not injured by the improper submission of two other issues, which asked whether plaintiffs, by their own negligence, contributed to the injury, and whether, notwithstanding the contributory negligence of plaintiffs, defendant could, by ordinary diligence, have prevented the injury.

2. In an action against a telegraph company for failure to send and deliver a message, the jury answered an issue, as to whether or not defendant was negligent, in the affirmative. *Held*, that the verdict cured any error in the refusal of the court to give proper instructions, prayed by plaintiffs, bearing on the subject of defendant's negligence.

3. An exception to the charge, "for error in the charge as given," is insufficient.

Appeal from superior court, Cumberland county; Green, Judge.

Action by J. L. Andrews and Mary Andrews, his wife, against the Postal Tele-

graph Company, to recover damages for the negligent failure of defendant to send and deliver a telegram from the feme plaintiff to her husband. From a judgment in favor of plaintiffs for 25 cents, they appeal. Affirmed.

N. W. Ray and G. M. Rose, for appellants.  
J. C. & S. H. MacRae and MacRae & Day, for appellee.

MONTGOMERY, J. This is an action for damages, in which the plaintiffs claim for injury alleged to have been received on account of the negligent failure of the defendant to send and deliver a telegram from the feme plaintiff to her husband, the other plaintiff, informing him of the death of her father, by reason of which negligence the plaintiff husband, it is alleged, was not notified of his wife's father's death in time to be present at the funeral, and to be with and console his wife, the consequence being that they both suffered anguish of mind. The answer denies all the material allegations of the complaint, and on the trial the testimony on the most important questions of fact was conflicting and contradictory. The plaintiff alleged that, when the telegram was delivered to the operator in Fayetteville, 25 cents was paid for its sending, and the operator agreed and promised to send the same immediately, and the plaintiff introduced testimony to this effect. There was testimony for the defendant tending to show that the operator told the sender of the message that the operator at Elizabethtown, the point to which the telegram was directed, was not there; that he was out on the line on duty; and that he would have to accept the telegram subject to delay on this account. The operator at Fayetteville also testified that he often called the operator at Elizabethtown, and that he transmitted the message on first response to call. The operator at Elizabethtown testified that, after he returned to his office, and received the telegram, he immediately went to every boarding house in town to find the plaintiff husband, but he was not to be found; that on the next morning he went to every store in town in search of him, without avail; that, when he was found, he was outside of the free delivery limits. Several witnesses testified, also, that the plaintiff husband said, after he had received the telegram, that the delay in delivering it made no difference, as he could not have gone. The plaintiff denied that.

The following issues were submitted to the jury, and were excepted to by both plaintiffs and defendant: "(1) Did defendant negligently fail to transmit or deliver the message as alleged? Ans. Yes. (2) Did plaintiffs, by their own negligence, contribute to the injury? Ans. —. (3) Notwithstanding the contributory negligence of plaintiffs, could defendant, by ordinary diligence, have

prevented the injury? Ans. Yes. (4) What damage, if any, have plaintiffs sustained by the reason of the negligence of defendant? Ans. 25 cents." We cannot see why the second and third issues should have been submitted. Contributory negligence on the part of the plaintiffs had not been pleaded. But the exception of the plaintiffs to the issues ought not to be sustained, because, under the first and fourth, they were enabled to develop their whole case, and to have every principle of law to which they were entitled applied in any aspect of their case.

The plaintiffs' exception to the charge which was in these words, "For error in the charge as given," is not sufficiently explicit, and we will not review the charge. Exceptions to errors in the charge of the court must be assigned specifically. *McKinnon v. Morrison*, 104 N. C. 862, 10 S. E. 513, and a long line of cases cited in *Clark's Code*, p. 382. Many special instructions were prayed for by the plaintiffs, and the court declined to give them, or any of them. They were each and all bearing on the subject of the negligence of defendant. If there was any error in refusing them, it was cured by the verdict; for, in response to the first issue, whether or not the defendant was negligent, the jury answered, "Yes." There was no instruction asked concerning the rule by which the jury should estimate the plaintiffs' damages; and, no proper exception having been made to the charge of the court, in that or any other particular, the plaintiffs are bound by the verdict and judgment.

This court, at its present term, in the case of *McNeill v. McDuffie*, 25 S. E. 871, decided that the May term, 1896, of Cumberland superior court, was held in accordance with law, and the plea to the jurisdiction was overruled. The plaintiffs are not entitled to a new trial upon their exceptions, and the judgment is affirmed.

(119 N. C. 187)

**BALLARD et al. v. TRAVELLERS' INS. CO.  
OF HARTFORD, CONN.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**INSURANCE—AGENCY—POWER COUPLED WITH INTEREST—REVOCATION—COMMISSIONS ON AFTER-MATURING RENEWALS—RECOVERY.**

1. A contract of agency with an insurance company provided that, for his services, the agent should retain 45 per cent. on first annual premiums and 6 per cent. on renewals, and that it might be terminated at the option of either party on 30 days' notice. Outside the contract, but as a part of it, the company, by letter, agreed to advance each month \$600 to enable the agent to introduce the business; that the money should be repaid out of the proceeds of the agency as rapidly as possible, the company to take the agent's demand note for each advance, and indorse upon the notes the agent's payments, adjusting the interest at the end of the year, or before, if the contract should be discontinued. *Held*, that the agent could protect himself

against the assignment of the notes by making it appear that they were payable in a restricted way, and hence he had no power coupled with an interest, such as would prevent the company from terminating the contract on notice.

2. Under an insurance company's contract of agency, which provides that the agent shall receive, as compensation, a certain per cent. on renewals, his right to collect and retain the commission on renewals ceases on the termination of the contract.

3. A provision of a contract with an insurance company, that, if the agent shall fail to do certain things required of him under the contract, he shall forfeit his rights, and not then be entitled to commissions and renewals maturing after the agency has ceased, does not, in the absence of an express provision that he shall be entitled to them if he carries out the stipulations, affect the rule that such an agent will not be allowed commissions or renewals maturing after the agency has ceased by reason of a revocation of the contract by the principal.

Appeal from superior court, Durham county; Coble, Judge.

Action by V. Ballard, trustee of J. R. Lindsay, and J. R. Lindsay, against the Travellers' Insurance Company of Hartford, Conn., to recover commissions alleged to be due on renewals maturing after the termination of a contract of agency between Lindsay and defendant. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Boone & Bryant, for appellant. Winston & Fuller, for appellees.

MONTGOMERY, J. The contract between the plaintiff's assignor, J. R. Lindsay, and the defendant company, which was in all respects complied with by Lindsay, contained a provision to the effect that it might be terminated, at the option of either party, by written notice to the other party of not less than 30 days. Notice under that provision was given by the defendant to Lindsay, and in May or June, 1895, he ceased to be agent of the defendant. Certain renewal premiums upon policies which were issued while the plaintiff's assignee was the agent of the defendant, falling due after the plaintiff's agency had ceased, and having been paid by the policy holders to the defendants, the plaintiff's assignee brought this action to recover the amount. He claims that his assignee has a right to the same under that part of the contract which provides for his retaining, for his services, "on all other life and endowment policies 45 per cent. of first annual premiums; 6 per cent. on renewals." The defendants resist the recovery on the ground that the contract was terminated in May or June, 1895, and that, with the termination of the agency, Lindsay's right to receive the 6 per cent. on the renewals which fell due and were paid after the agency had been terminated ceased. His honor found the facts, and gave judgment for the plaintiff.

We are of the opinion that the plaintiff is not entitled to recover. It was admitted by the counsel of the plaintiff, in his argument here, that, if the contract had been the usual and ordinary one between insurance companies and their agents, it might be revoked at the

option of the company. But he insisted that a certain letter, written by the defendants to Lindsay, and treated as a part of the contract, conferred a power coupled with an interest, and therefore was irrevocable. The letter is as follows: "Hartford, Conn., October 6, 1892. J. R. Lindsay, Greensboro, N. C.—Dear Sir: Inclosed find contract, which we believe to be in accordance with the terms agreed upon when you were here. It is understood that we are to advance to you, at the beginning of each month, \$600.00, the same to be repaid to the company out of the profits of the agency as rapidly as possible. Rather than incorporate this part of our agreement in the contract, our attorney advises that we take your 'demand' note for each advance, and then indorse upon the notes your payments, adjusting the interest in accordance with an understanding, at the end of the year, or before, if contract is discontinued, you to pay interest at the rate of 6 per cent. This letter is to satisfy you that we intend to advance as agreed upon when you were here. It is also understood that we are to take notes for a reasonable portion of life premiums, and that they are to be discontinued at the rate of 6 per cent., and that, for insurance paid for in notes which are not paid, you are to pay for expired time and the term insurance medical examiner's fees. All such notes are to be indorsed or guaranteed by you. No notes to be taken, or at any rate submitted to the company, which fall due on and after December 1st in any year. Yours, truly, Rodney Dennis, Secretary." We fail to see how this letter can have the effect to deprive the defendants of the right to terminate this agency at their option, upon giving the proper notice to the plaintiff's assignee. The language of the contract is: "This contract may be terminated, at the option of either party, by written notice to the other party of not less than thirty days." The letter, being considered a part of the contract, and construed in its most natural way, simply requires the defendants, as long as the contract should continue, to furnish a certain amount of money every month to the plaintiff, that he might introduce and extend the business of the company for the benefit of both. It is true that the company required Lindsay to give his personal note for the amounts advanced to him by the company, but the notes were to be paid out of the profits of the agency. As long as these notes remain in the hands of the company, their collection cannot be enforced against Lindsay personally,—the agency having been terminated by the principal; and if the company has assigned or transferred them, Lindsay has no one to blame but himself. He had it in his power, in the beginning, to see to it that the money advanced to him by the defendants should appear in the face of the notes as payable in a restricted way. The question—"a power coupled with an interest"—is discussed by Chief Justice Smith, who delivered the opinion of the court in the case of *Insurance Co. v. Williams*, 91 N. C. 69. In

that opinion it is said: "What such an agency is, is thus explained by Chief Justice Marshall, in the opinion in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174: 'We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand, by the word "Interest," an interest in that which is to be produced by the exercise of the power, then they are never united.'" We can see no interest which Lindsay ever had under his contract with the defendants, except an interest in the profits of the agency which were to be produced by the exercise of the powers given the agent under the contract. These profits were to be produced by his work and skill and industry, aided by the money advanced to him from time to time by the company to enable him to build up and to extend his business. The case of *Insurance Co. v. Williams*, supra, is direct authority, too, for the proposition that, in cases where the principal has a right to revoke the agency, and does so, a stipulation in the contract that the agent should receive as compensation 25 per cent. commissions on first year's payments, and 5 per cent. on renewals, does not confer a permanent right upon the agent to collect renewals and retain the 5 per cent. commissions. It is said in that case that "such a contention involves the assumption that the contract confers an absolute and permanent right to proceed with renewals, when the original insurance was effected through the efforts of the defendant, when he can no longer act as agent in making the renewals. Such is not the fair interpretation of the terms of the contract, which allows the specified commissions as compensation for services to the company in the renewals, and necessarily ceases when the services cease."

We have not been inadvertent to the seventh article of the contract, which is in these words: "(7) That if he neglects to make report or remittance, as provided in clause 2, for 15 days after the close of any month, or after any request as contemplated therein, or to comply with any of the stipulations herein, he shall thereby forfeit all rights under this contract, and all commissions on premiums payable thereafter, and on renewal of all policies written hereunder." This provision of the contract, simply declaring that if the agent (Lindsay) should fail to do certain things required of him under the contract, he should forfeit his rights, and not then be entitled to commissions and renewals maturing after the agency had ceased, in the absence of a positive provision to the effect that he should be entitled to them if he carried out the stipulations, will not be allowed to affect the general rule of law that such an agent, when his agency has been revoked under a power given to the principal,

will not be allowed commissions or renewals maturing after the agency had ceased.

The defendants' exceptions to the jurisdiction of the superior court were abandoned here. There was error. New trial.

(119 N. C. 350)

**STATE ex rel. COOK v. SMITH et al.**  
(Supreme Court of North Carolina. Nov. 24, 1896.)

**ACTIONS—JOINDER OF CAUSES—PARTY PLAINTIFF.**

1. Under Code, § 267, subd. 1, allowing several causes of action to be united in the same complaint "when they arise out of the same transaction, or transactions connected with the same subject of action," causes of action against a sheriff and the surety on his official bond, for illegal levy and sale, and against the person who directed such levy and gave the sheriff an indemnifying bond, are properly joined.

2. Such suit may properly be brought in the name of the state, on plaintiff's relation.

Appeal from superior court, Cumberland county; Green, Judge.

Action by the state of North Carolina, on the relation of Henry L. Cook, assignee of A. & A. B. McIvor, against James B. Smith and others, to recover damages for wrongful levy and sale on execution, and to recover the penalty in a sheriff's bond. Defendant F. W. Thornton's demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

W. E. Murchison, for appellant. G. M. Rose, for appellee.

OLARK, J. The defendant Thornton, having, as the demurrer admits *pro hac vice*, directed, caused, and procured the sheriff wrongfully and illegally to seize and sell the goods of the plaintiff (said Thornton giving the sheriff an indemnifying bond to induce him to make the seizure and sale, and having received from the sheriff the proceeds of such illegal sale), is liable to the plaintiff. The sheriff is also liable for the same acts, and is properly joined with Thornton, since the liability "arises out of the same transaction," and is expressly provided for by Code, § 267, subd. 1, and the joinder of the surety on the sheriff's bond is because of his general contract of suretyship for the official acts of the sheriff. The liability to the plaintiff by all the defendants is for the same act, performed by one party (the sheriff) by the procurement and direction of another (Thornton); the surety to the sheriff's bond being joined by virtue of his agreement, and just as he is joined in all actions against the sheriff for misfeasance and neglects in office. The cause of action "affects all parties to the action" (Code, § 267), and the joinder was eminently proper. Benton v. Collins, 118 N. C. 196, 24 S. E. 122; Pretzfelder v. Insurance Co., 116 N. C. 491, 21 S. E. 302; Le Duc v. Brandt, 110 N. C. 289, 14 S. E. 778; Heggie v. Hill, 95 N. C. 303; King

v. Farmer, 88 N. C. 22. That, on account of the surety on the bond, the action is on relation of the state, is merely formal, and of no import, the relator being the real party. Warrenton v. Arrington, 101 N. C. 109, 7 S. E. 632. Always, when the sheriff is sued for official liability, he is responsible personally, and his surety should be sued on the relation of the state, but it has never been held a defect to join them. In the full discussion of this question at last term in Benton v. Collins, *supra*, the authorities are reviewed, and it is pointed out that, when the causes of action arise out of the same transaction, they may be joined, though one should be for a tort and the other in contract; and such seems the manifest intent of section 267 of the Code. Suppose the demurrer for misjoinder were sustained; the court could merely order the action divided into two. Code, § 272; Pretzfelder v. Insurance Co., *supra*. And then on the trial of each of those actions the same witnesses would be introduced, the same transaction proved, and the same questions of liability would arise; thus doubling the time and expense of the litigation, without any possible benefit to any one. It is to prevent this very state of facts that the Code (section 267) expressly provides that "the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they arise out of (1) the same transaction or transactions connected with the same subject of action." The principle that a cause of action in tort cannot be united with one in contract applies only where they arise out of different transactions, and is subordinate to the general provision of the Code, that all causes of action, of whatever nature, in favor of the plaintiff against the same defendants, can be united when they arise out of the same transaction. In sustaining the demurrer there was error. Error.

(119 N. C. 330)

**McPHAIL v. BOARD OF COM'RS OF CUMBERLAND COUNTY.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**COUNTIES—CONTRACT FOR BRIDGES—POWER OF COMMISSIONERS—DELEGATION OF AUTHORITY—QUANTUM MERUIT.**

1. Under Act 1887, c. 370, providing that contracts for the construction or repair of bridges shall be made by the county commissioners, the commissioners may, after determining the necessity for a bridge or its repair, appoint the township supervisors, or others, agents to have the work done, or may refer the matter to the supervisors in the first instance, to report the facts and the lowest price at which the work can be done; but the supervisors have no power to accept a bid without reporting the same to the commissioners for approval.

2. Where repairs have been made on a bridge, and the work accepted by the county, the contractor may recover therefor on a quantum

meruit, though the special contract declared on was invalid, because made with the township supervisors and never submitted to the commissioners for their approval.

Appeal from superior court, Cumberland county; Green, Judge.

Action by J. B. McPhail against the board of commissioners of Cumberland county to recover on a contract for building a bridge. Judgment for plaintiff, and defendants appeal. Reversed.

N. W. Ray, for appellants. Geo. M. Rose, for appellee.

CLARK, J. As the Code (section 2034) originally stood, when bridges were beyond the reasonable capacity of the road overseer and his hands, the board of township supervisors were empowered to contract for the building, keeping, and repairing of the same, with the concurrence of the board of county commissioners. Even under that statute, any contract made by the township supervisors would not have been valid till reported to and concurred in by the county commissioners. The township supervisors here pursued no improper plan in advertising for the lowest bid, but they erred in supposing that they were bound to accept it, no matter how unreasonable, or that they could accept it at all without the concurrence of the county commissioners, to whom they should have reported it for approval. But, even as thus guarded, the legislature of 1887 (chapter 370) thought there was room for abuse, and struck out even this qualified authority in the township supervisors, and provided that the contracts in all such cases shall be made by the county commissioners. The determination whether a bridge or its repair is needed, and the sum to be paid, is thus confided to their judgment, and cannot be delegated. When they have decided that a bridge should be built or repaired, they can appoint the township supervisors, or others, agents to have the work done, at a price fixed by themselves. That would be a mere ministerial duty. And, to enlighten themselves, they can refer the matter beforehand to the township supervisors (or possibly others), to report the facts and the lowest price at which the work can be done, subject, of course, to their own approval. The order passed by the commissioners, "The repairs of Evans Creek bridge are referred to R. J. Harrison and Alexander McNeill," meant no more than that, and was valid. If it had meant to confer upon the referees the power to determine either the question whether the repairs should be made, or the discretion to fix the amount to be paid, without being subject to approval by the county commissioners, the order would have been invalid. Besides, the words of the order cannot, without straining, be construed to carry such powers. As the repairs have been actually made and accepted, the county is bound on a quantum meruit for the reasonable and just value of the work and labor done and material furnished, but not for the attempted

contract of Harrison and McNeill, which, under the law, they had, and could have, no authority to make, so as to bind the county. The question raised as to the legality of the term of the court at which the action was tried is settled by the decision in *McNeill v. McDuffie* (at this term) 25 S. E. 871. Error.

(119 N. C. 298)

NASH v. SUTTON et al.  
(Supreme Court of North Carolina. Nov. 17, 1896.)

VERDICT—SUFFICIENCY—JUDGMENT.

In an action by a trustee to recover church land, the parties stipulated that the answer of the jury to the issue as to whether the trustee was the owner, and entitled to recover possession should settle the whole controversy, and that the answer should be "Yes" if certain facts were true, otherwise that it should be "No." The jury answered the issue "No." Held, that the verdict, together with the stipulation, justified a judgment for defendant.

Appeal from superior court, Lenoir county; Starbuck, Judge.

Action by B. W. Nash, trustee, against S. I. Sutton and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Allen & Dortch, for appellant. George Rountree, for appellees.

FURCHES, J. We find the following agreement entered into by the parties, and made a part of the case on appeal: "The following issue, by permission of the court, the request of plaintiff, and the express agreement between the parties, was the only issue submitted to the jury, with the distinct understanding on the part of the court and the parties that the response to said issue by the jury should settle the whole controversy, and all the issues raised by the pleadings. It is further agreed that, if the jury should find the original conveyance (which had been burned) to the trustee was in trust for the Baptist Church at Hickory Grove and Baptist denomination, they should answer the issue 'Yes'; but, if they should find that it was in trust for the Baptist church at Hickory Grove alone, then they should answer the issue 'No.'" And the issue submitted to the jury under this agreement is as follows: "Is the plaintiff, B. W. Nash, trustee, the owner of, and entitled to recover possession of, the property in controversy? Ans. No." Upon the coming in of the verdict, the following judgment was rendered: "Upon the finding of the jury, and upon admissions made on the trial, it is adjudged that the plaintiff recover nothing from the defendant; that the plaintiff is not the owner, and is not entitled to recover the possession, of the land described in the complaint; that defendant go without day, and recover costs," etc., "and that no witness fees are to be taxed against plaintiff." And this judgment is excepted to by the plaintiff upon the ground that it is not justified by the verdict.

This is the only exception in the case, and it is without merit, and cannot be sustained. The verdict, when taken in connection with the agreement of the parties, fully sustains the judgment of the court, and the same must be affirmed.

(119 N. C. 348)

**FAYETTEVILLE WATERWORKS CO. v. TILLINGHAST.**

(Supreme Court of North Carolina. Nov. 25, 1896.)

**ESTOPPEL IN PAIS — LANDLORD AND TENANT — ACTION BY A LANDLORD TO RECOVER LEASED PROPERTY — PLEAS — ISSUES — RIGHTS OF TENANT.**

1. One who contracted with a waterworks company, through persons interested in it, and professing to represent it, and by virtue of such contract and a lease to him by such persons got possession of the waterworks property, and held it until the lease expired, was estopped from denying that the waterworks company was properly incorporated and officered, and that it was the owner of the property leased.

2. In an action by a waterworks company against one to whom it had leased its property, to recover possession of it after the expiration of the lease, where defendant alleged that plaintiff was not the owner of the property, an additional plea by him that he was a tenant from year to year on account of his being allowed to hold over, and that he had not been served with legal notice, was bad for inconsistency.

3. Since, in an action by a landlord to recover the leased premises, a plea by a tenant in common of the general issue, or what is equivalent thereto, is an admission of ouster, where defendant in such action denies plaintiff's title, which is equivalent to a plea of the general issue, a plea of co-tenancy by him is not available.

4. In an action to recover the leased premises, for an account of the rents, and for the appointment of a receiver, defendant denied plaintiff's ownership of the property, and pleaded that he was a co-tenant of other part owners of the property; and that he was a tenant from year to year, and had not received the statutory notice to surrender. *Held*, that it was not error to submit the issue, "Is the plaintiff entitled to the possession of the property described in the complaint?"

Appeal from superior court, Cumberland county; Green, Judge.

Action by the Fayetteville Waterworks Company against S. W. Tillinghast to recover possession of the property of the waterworks company, leased to defendant, for an account of the rent, and for the appointment of a receiver. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

N. W. Ray, for appellant. G. M. Rose, for appellee.

FURCHES, J. Plaintiff alleges that it is a corporation chartered by the legislature of North Carolina (Acts 1820, p. 44), called and known as the Fayetteville Waterworks Company. And on the 1st day of July, 1883, the defendant on the one part, and William Huske and W. N. Tillinghast, acting for and in behalf of said corporation (being interested in this corporate property, and there being no regular officers of the same), entered

into a contract to lease to the defendant this property for the term of one year, with the option of two more years, which contract and lease is as follows: "Memoranda of agreement and contract of lease made and entered into by and between S. Willard Tillinghast, of Fayetteville, N. C., and the Fayetteville Waterworks Company, a corporation existing under the laws of North Carolina. Tillinghast takes into his possession and full control all the property of every kind belonging and appertaining to the Fayetteville Waterworks, including their franchise, easements, privileges, and rights of every kind, with full power and authority to use the same in such manner as he may deem best, for the aim and purpose for which the said corporation was chartered. He shall do all needed repairing and refitting of the property of every kind, as heretofore in use, and may extend, enlarge, and increase the same in such manner and in such ways and places as he may deem expedient. And for the use and occupation of said property, with the right to collect water rates as allowed by the charter of said company and all its privileges, Tillinghast shall pay (\$50) fifty dollars per annum to each of the present owners or shareholders claiming as heirs or as the assignee or representative of the heirs of the late James Baker, as the said principal shares or interest were on the first of July, 1883, it being understood that this lease is to begin and date as from July 1st, 1883, and to continue for one year at least, and that the said Tillinghast shall have the option to continue it for two years, and for three years, until July 1st, 1886, if he shall desire to do so. At the expiration of the lease, or when it shall be terminated by Tillinghast, he shall surrender all the property now included and given into his possession by virtue hereof, with all the repairs that may be put thereon. But all extension of pipe, additional pumps, reservoirs, conduits, and additional structures and improvements of every kind that may be made, over and above the general repairs to the property as now exists, or the said extensions and additions may be at the expiration or termination of this lease, shall be paid for at such price as may be agreed upon by the parties; and until such price is paid, the said waterworks company shall not have the right to take such extensions and additions into use, possession, or control. [Signed] S. W. Tillinghast. [Seal.] Wm. Huske. [Seal.] W. N. Tillinghast, Agent for May C. Baker. [Seal.]"

The defendant admits making and signing this lease, and that he entered and took possession of the property under the same; that he has been in possession ever since, and is still in possession of the same. But he denies that plaintiff is a corporation; admits that an act of incorporation was passed by the legislature as alleged by plaintiff. But he alleges that it was never organized as a corporation; that it has no officer, and never

has had; and denies its right to bring and maintain this action.

Defendant further alleges that this property is real estate, and belongs to the heirs at law of one Baker and their assigns, who are tenants in common; and that by assignment from some of these heirs he has become the owner and tenant in common of the property, with the other heirs and assignees of Baker. He admits that J. A. Huske, who seems to be the active party in bringing this action, is interested as one of the heirs of Baker; and Huske testifies without objection, and his testimony is not contradicted, that he is the authorized attorney in fact of other heirs, and represented four-sevenths interest in the concern, and was the administrator of his father, William Huske, one of the signers of the lease to defendant. But defendant says there has been no meeting had of the parties interested in this property by which this action is authorized to be brought, and that J. A. Huske has no right to bring the same. He further says that he has never denied the right of the Baker heirs and their assigns, as tenants in common with him, and that he did not have three months' notice to quit, as the law provides and requires should be given. But it seems to us that defendant, by his answer, "cuts himself," as Judge Pearson used to say; that he cannot deny the plaintiff's title, and, falling in that defense, fall back on the ground that he is a tenant in common, and has not refused to let the other tenants in; and, on falling in that defense, fall back upon the defense that he is a tenant of plaintiff, and has not had legal notice to surrender,—treating him as a tenant from year to year on account of his being allowed to hold over. We do not feel called upon to inquire into the regularity of the organization of the plaintiff corporation, as to whether it has any officers or not. The fact that the defendant contracted through those interested in it, and professing to represent it, and by virtue of this contract and lease the defendant was enabled to get possession of the property, and did get possession, and still holds the same, estops him from now denying that the plaintiff is properly organized and officered, and that the plaintiff is the owner. This doctrine is well established by authority, as well as the reason of the thing. *Mining Co. v. Goodhue*, 118 N. C. 981, 24 S. E. 797, and cases there cited; *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405. Neither can the plea of tenancy avail the defendant. He "cannot blow hot and cold at the same breath." He cannot, in the same answer, say to the plaintiff, "You are not the owner of this property, and have no right to the possession;" and then say, "I am your tenant, and would have vacated if you had given me the notice the law requires." *Vincent v. Corbin*, 85 N. C. 108; *Springs v. Schenck*, supra. Nor can he relieve himself of the effect of this relation of landlord and tenant without a complete surrender of the possession

he acquired under contract of tenancy. The parties must be first put in statu quo. *Springs v. Schenck*, supra.

We are not to be understood by anything we have said in this opinion that a landlord has the right to dispossess his tenant from year to year without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the want of legal notice. Nor can the plea of tenancy in common avail the defendant. The plea of the general issue, or what is equivalent to that under the present practice, by a tenant in common, is an admission of ouster. *Gilchrist v. Middleton*, 107 N. C. 683, 12 S. E. 85. The denial of plaintiff's title was equivalent to a plea of the general issue.

There was objection to the issue submitted, which was as follows: "Is the plaintiff entitled to the possession of the property described in the complaint?" to which the jury responded in the affirmative. We are of the opinion this was a proper issue, and the verdict of the jury was a proper finding.

The question made on the trial as to the regularity and jurisdiction of the court was passed upon, and the jurisdiction of the court sustained, in *McNeill v. McDuffie* (at this term) 25 S. E. 871.

There seem to have been no exceptions taken to the judgment of the court. But it appears from the contract of lease under which the defendant went into possession that defendant was authorized to add new extensions, etc., as distinguished from the repairs he might put on the works already in; and that the plaintiff shall not have the right to take the same into possession, and use until they are paid for. The case is still retained and in the hands of a receiver, and, if the defendant has put in any such improvements, the court will see that they are taken into the account, which has been ordered, and that they are paid for out of the rents, or otherwise, before the plaintiff is restored to possession. With this modification in the judgment, it is affirmed. This judgment of the court rests on the doctrine of tenancy and estoppel, and will not affect any rights the plaintiff or defendant may have in a proper proceeding to assert the same. Modified and affirmed.

(119 N. C. 434)

STACK v. PEPPER et al.

(Supreme Court of North Carolina. Dec. 1, 1896.)

BOUNDARIES — PRESUMPTION AS TO METHOD OF SURVEYING—PERPENDICULAR MEASUREMENTS.

Where a line of a survey crossed a perpendicular cliff, at a place where it could not be climbed, and, to give the quantity of land called for by the survey, and to take the line to a boundary shown to have been marked in an old survey, it was necessary to exclude the distance up the face of the cliff, it was not error to instruct the jury to exclude it in determining the boundary.

Appeal from superior court, Stokes county; Brown, Judge.

Action of trespass by A. M. Stack against N. M. Pepper and J. F. Pepper. Judgment for plaintiff, and defendants appeal. Affirmed.

W. W. King, A. E. Holton, and H. R. Scott, for appellants. A. M. Stack, J. T. Morehead, and Jones & Patterson, for appellee.

AVERY, J. It is a fact generally known and acknowledged that in all of the early surveys of entries, and in most of the later ones made in this state, the surface, and not the level or horizontal, mode of measurement, is shown to have been adopted. This is the general rule, and the courts take notice of this fact, and presume that lands embraced in grants and deeds were originally measured in that way, both because it is a matter of general knowledge that such has been the custom, and because the judicial annals of the state are corroborative of that fact. *Duncan v. Hall*, 117 N. C. 445, 23 S. E. 862. The surveyor testified to this custom as universally adopted by practical surveyors. While, however, the presumption is generally that a survey of the surface was contemplated and adopted by the parties to a deed, that presumption prevails only where it appears feasible and reasonable to have pursued that course. On the contrary, the courts will not assume that the surveyor and chain bearers procured ladders, and climbed over a rugged boulder or cliff situated as in this instance, but that they adopted practicable methods. It is well known that where surveyors encounter a river at a point where it is lined with rocks rising above the surface, and it proves impassible by ordinary methods, the distance across is determined by making an offset, and running up and down from the actual point of crossing, not by climbing over the sides of the rocks. It was not improper for the court to instruct the jury in this instance that the surveyor, if his testimony was believed, ascertained the distance, and thereby fixed the location of the disputed corner by the correct mode of measurement. The surveyor Shelton testified that, if he included the distance from the bottom of the cliff up its perpendicular surface to the top as a part of the 23 $\frac{3}{4}$  chains called for, the disputed land would not be embraced within the boundaries of the deeds under which plaintiff claimed title, but if, instead of measuring up this surface, he walked around and measured from the top of the cliff, the defendant would, under that theory of surveying, be a trespasser. The distance up the cliff could only have been ascertained by letting fall a line from the top to the bottom, as the surveyor was compelled to depart from his course to find a point where it was possible to even climb

across it. It is not to be presumed that the state of North Carolina sold to Shober, by means of his grant, the space represented by the perpendicular surface of this cliff. The original surveyor did not find it necessary to ascend its surface in order to ascertain with accuracy what the state was selling. But very steep mountain sides are often very valuable for timber as well as for agricultural purposes; and, when a line crosses a steep mountain or succession of hills, the grantee would get from the state, for cultivation by horizontal measurement, a number of acres largely in excess of that estimated upon the basis of surface measurement. *Duncan v. Hall*, supra. In the case before us, however, the measurement adopted by the surveyor, and sanctioned by the court, gave the grantee, under the operation of the maxim, "*Cujus est solum, ejus est usque ad coelum*," the ownership of the perpendicular cliff, and whatever of minerals, if any, were imbedded in it, without robbing the state of the price of a single acre of cultivable land. Where the elevation of the ground is very different at different points of a line, the grantee may start his lines towards the center of the earth from points nearer to each other than his points of departure would have been by horizontal measurement; but he will generally acquire title for every acre of surface for which he pays the state. The undisputed testimony of the witnesses examined tended to show that the succession of deeds constituting plaintiff's chain of title embraced the land in dispute; and that the plaintiff had an actual possession of a part, and a constructive possession over the whole, of the land embraced within the boundaries of these deeds. This is an action in the nature of trespass *quare clausum fregit*, not in the nature of trespass *in ejectment*. In order to establish *prima facie* the right to recover, it was necessary, therefore, for the plaintiff to show possession in himself, and a trespass upon his possession by the defendant, not, as in *ejectment*, an adverse occupancy by the latter. If the testimony was believed, the defendant entered upon the land embraced within the boundaries of plaintiff's deeds as run without estimating the distance up the face of the cliff, and cut and removed timber trees. So that, if the testimony was credible, the locus where the trespass was committed was within the limits of plaintiff's lands, to which he had *prima facie* shown both title and possession, and the plaintiff was entitled to recover, at least, the nominal damages awarded. As we understand the case and the argument, the assignment of error that has been discussed is the only one relied upon by the defendant of which, according to the transcript, he was entitled to the benefit. It ought to be needless to state that the appellate court is confined to the record. There was no error.

(119 N. C. 437)

**CAUDLE et ux. v. MORAN.**

(Supreme Court of North Carolina. Dec. 1, 1896.)

**ORDER AFFECTING SEPARATE ACTION — VALIDITY.**

1. Pending an action to foreclose a title bond, in which an attachment was issued and levied on personal property, defendant appealed from a judgment obtained in justice's court by plaintiffs, putting defendant out of possession. Defendant afterwards moved in the foreclosure action for an order vacating the attachment. *Held*, that it was error, on refusing to vacate the attachment, to make an order restoring defendant to the possession of the land from which he had been ejected by the justice.

2. It was proper to appoint a receiver of the rents and profits in the foreclosure suit.

Appeal from superior court, Stokes county; Norwood, Judge.

Action by J. W. Caudle and wife against W. E. Moran to foreclose a title bond, in which an attachment was issued and levied on certain personal property of defendant. Pending such action, defendant appealed from a judgment rendered by a justice of the peace in an action against him by plaintiffs, putting defendant out of possession of the land. Defendant afterwards moved in the foreclosure case to vacate the attachment. From an order refusing to vacate the attachment, restoring defendant to possession of the land, and appointing a receiver of the rents and profits, plaintiffs appeal. Modified.

A. M. Stack and Jones & Patterson, for appellants. Watson & Buxton, for appellee.

**FURCHES, J.** It appears from the pleadings in this case: That plaintiffs sold the defendant a tract of land, and gave him a bond for title when paid for, and the defendant executed to plaintiffs his note for the purchase money; and this action is in the nature of a foreclosure proceeding for the purchase money and a sale of the land. That after this action was commenced the plaintiffs sued out warrants of attachment, which were levied upon certain articles of personal property of the defendant. That after this action was commenced the plaintiffs also commenced summary proceedings in ejectment before a justice of the peace, against the defendant, for possession of this same land, and managed the matter so that he got judgment, and turned the defendant out of possession. The defendant appealed from this justice's judgment to the superior court, where the case now stands for trial, as well as this action, brought for the purchase money. That defendant, wishing to have the said attachments vacated, upon notice moved the court for an order vacating the same; but, as the parties were not able to have the same heard at Stokes court, they agreed that it might be heard at Forsyth court, which was done. Upon this hearing the court refused to vacate the attachments, but made an order restoring the defendant to the possession of the land from which he had been ejected by the justice

of the peace, and appointed a receiver of the rents and profits. The plaintiffs, being dissatisfied with that part of the order restoring the defendant to possession, excepted and appealed.

However just this order of restitution may have been, it was a legal error, and cannot be sustained. It was erroneous, because it was not made in the case then being heard by the court, but in another case then pending, and for trial in Stokes county. It was erroneous because it was made before the case on appeal was tried, in which the defendant was ejected. The order appointing a receiver seems to us to have been proper, and that part of the order is affirmed. But that part of the order restoring the defendant to the possession of the land is erroneous, and must be reversed. Error, and order of restitution is reversed. Error.

(119 N. C. 359)

**In re HYBART.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**INSANITY—MANAGEMENT OF ESTATE—ALLOWANCE TO FAMILY—APPOINTMENT OF RECEIVER—PROCEDURE.**

1. Where the wife is not a party to proceedings to have a receiver appointed for an insane husband's estate, the validity of the marriage contract cannot be attacked by ex parte affidavits.

2. Code, §§ 2273, 2274, provide for sending insane persons of sufficient means to asylums outside the state, and that their guardians shall supply funds for supporting them in such asylums as long as their incomes may be sufficient for that purpose, "over and beyond maintaining and supporting those persons who may be legally dependent on the estate of such insane persons"; Const. art. 11, § 10, empowers the legislature to provide for the care of the "indigent insane" at the charge of the state; and Code, § 2278, provides that, in the admission to asylums, preference shall be given to the "indigent insane." *Held*, that "indigent insane" includes all those who have no income over and above what is sufficient to support those who may be legally dependent on the estate.

3. Under such statutes, a wife who lives in the mansion house of her insane husband has the right to remain there, and to use such supplies as may have been provided for his family, or a sufficient quantity of them to maintain her and her family according to their condition in life, as determined by the situation and resources of the husband.

4. A first cousin, who was voluntarily aided by the insane person when in his right mind, is not a dependent on him, within the meaning of the law.

5. Code, § 1676, provides that, where no suitable person will act as the guardian of an insane person, the clerk shall secure the estate in the same way as where the guardians of orphans have been removed; sections 1584, 1585, provide that the clerk shall certify the facts to the solicitor of the judicial district, and that the court shall appoint a receiver for the estate; and Act 1889, c. 89, provides that, on the trial of any proceeding to which an insane person has been made a party, the court may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person. *Held*, that the appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after

the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge.

Appeal from superior court, Cumberland county; Greene, Judge.

In the matter of the appointment of a guardian for the estate of W. M. Hybart, an insane person, a receiver was appointed, and certain orders made for the management of the estate and application of the proceeds. The wife of the insane person was not a party to the proceedings, and from an order overruling her motion to remove the receiver she appeals. Reversed.

The petition of W. M. Hybart, a patient in the North Carolina Insane Asylum, asking for the appointment of a receiver for his estate, heard before Greene, Judge. The petition shows: That Hybart's family consists of a wife, to whom he was married in November, 1895, and a first cousin (Miss Weeks), who lived with him before his marriage, but who now lives with a niece, and is an elderly lady, in feeble health, and of very little means; her board being paid by Hybart up to the time he went to the asylum. He is the owner of a farm about three miles west of Fayetteville, where he lived, worth about \$1,500, but at present without a tenant, and in need of repairs; three stores in the town of Fayetteville, renting at present for \$45.83 per month in the aggregate. That he is in debt for taxes on said property for the last year, and for one other debt, for \$85, to H. A. Tucker & Bro., of Wilmington, N. C., and also a small drug and doctor's bill, and a small amount to his nurse. The petitioner further represents that he believes that no suitable person will consent to act as guardian for said Hybart, wherefore he prays that some discreet person may be appointed receiver of his estate. Signed, "C. W. Broadfoot, Petitioner, for Hybart." The court appointed C. W. Broadfoot receiver, and ordered him to take possession of the estate and collect all moneys, etc. The wife of the lunatic, through her counsel, moves to set aside the order, that she may be restored to her legal rights under the law; that said order be modified so as to give her such an allowance from her husband's estate, and such rights therein, as she is entitled to by law, as the wife of said lunatic, and for such other and further relief, etc., and from the affidavits filed by Mrs. Hybart, and other affidavits offered by her, and the counter affidavits, and the oral testimony offered by the receiver, the court finds the following facts: "That the father of Mrs. Hybart, with whom she was living at the time, and who represented her, had verbal or oral notice of the intended application for a receiver, and that the application was made in her behalf, as well as of other parties named in the order appointing said receiver. That said receiver is a proper person to manage said estate. That, since the birth of the child, the monthly allowance should be raised to \$15, and a present allowance of \$30 paid to cover cost of her confinement, and, as thus modified, the order made at April term shall stand. Wherefore the motion for the removal of the receiver is denied, and the order of April term continued in force, except

as modified by this order. That the present monthly gross income from Hybart's estate is \$45.83, and the allowance named is suitable to Mrs. Hybart's condition in life, and as great as the estate will bear." Judgment was rendered in accordance with the above finding, and directing the payment of \$30 as an extra allowance to her for the benefit to herself and infant child, and of \$15 monthly, instead of \$10, as directed in said former order, "which payment of \$15 per month is to continue from this time until the further order of the court." Signed by Greene, Judge. From the refusal of the court to set aside the order appointing the receiver, the wife of the lunatic appealed.

T. H. Sutton, for appellant. N. W. Ray, for appellee.

AVERY, J. The statute (Code, § 1676) provides that where a person is declared insane, and no suitable person will act as guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed, which is embodied in sections 1581 and 1585 of the Code. It is provided in the last-named section that the judge of the superior court, before whom an action is brought by the solicitor against a removed guardian, shall appoint some discreet person, as receiver, to take possession of the ward's estate; to collect all money due him; to secure, loan, invest, or apply the same for the benefit and advantage of the ward, under the direction and subject to the rules and orders, in every respect, as the said judge may from time to time make in regard thereto. W. M. Hybart was sent to the asylum for the insane at Raleigh prior to the April term, 1896, of the superior court of Cumberland county, and at said term a verified petition was offered by C. W. Broadfoot, setting forth the fact that Hybart had become insane, and was confined in the asylum; that he had a wife to whom he was married in November, 1895, and a first cousin, Miss Mary Weeks, who lived with him up to a short time before his marriage, but then lived with a niece, Mrs. James N. Smith, of Fayetteville, and that Miss Weeks was very feeble, had very little means, and that her board had been paid by W. M. Hybart up to the time he went to the asylum. It set forth the further facts that Hybart's property consisted of three stores in Fayetteville, which rented in the aggregate for the sum of \$45.83, and a small farm, worth about \$1,500, where he lived, but which was then in need of repairs, and without a tenant. Upon hearing this petition, and in any aspect of the testimony, without notice to the wife of the insane man, the judge appointed the petitioner receiver, and ordered him to pay out of his estate: (1) To W. M. Hybart, or those having him in charge, such sums of money, or supply him with such necessities or comforts, as are suitable to his condition

in life, and as are approved by the superintendent of said asylum. (2) To the wife of said Hybart, \$10 per month. (3) To the person who may furnish board for Miss Mary C. Weeks, \$7 per month, she being partially dependent on said W. M. Hybart. (4) Taxes due on Hybart's property, insurance and necessary repairs, his doctor's bills and druggist's accounts. (5) A small amount to his nurse who took care of him while here; a debt due H. A. Tucker & Bro., of Wilmington, of \$35.

It seems that Hybart lived with his wife at his country home, where he was supplied with household and kitchen furniture, and had corn and meat in his smokehouse, when he was taken to the asylum. The receiver has taken possession of the household effects and supplies, including the trunk of Mrs. Hybart. Meantime Mrs. Hybart has been sick, and, it appears, has incurred a doctor's bill of \$33; and expecting to be confined soon, with all of the attendant expense, she insists that \$10 per month is totally inadequate to support her. The small allowance to the wife seems to have been made upon affidavits that she was of low origin, and upon the idea that her condition in life had not been changed by the misalliance of her husband with her. The affidavits also collaterally and incidentally attacked the validity of the marriage, by averring that it was contracted when Hybart's mind was falling, and that he was duped and tricked into it by the wiles of her father, Elias Godwin. The validity of the marriage contract between W. M. Hybart and Della J. Hybart cannot be questioned collaterally; certainly not upon an ex parte affidavit suggesting that it was procured by her father. Being but 17 years old, she was a child (though capable of contracting marriage with the consent of her father). If it be true that she was pregnant at the time of the marriage by W. M. Hybart, the child, when born in lawful wedlock, will be legitimate, and will be entitled to such protection and such benefits as the law extends to the legitimate offspring of any person whose misfortune it is to be immured in an asylum for the insane. In interpreting the meaning of statutes, it is the duty of the courts to look at all of the provisions of the constitution and laws of the state that bear upon the subject of the act under consideration, and construe all as in *pari materia*. If W. M. Hybart had died at the date of his removal to the asylum, his widow could have claimed dower in his land, and an allowance out of his personal property for the support of herself and child. The small amount of indebtedness would probably have been settled without sale of any, or, at most, by disposing of a small portion, of the real estate. A guardian would have been appointed for the child, when born, and the net income of the estate would have been devoted to its nurture and

education according to its condition in life, as heir of the father. No portion of the rents would have been devoted to the support of his collateral heirs or kin next in degree to his child. If he had continued to be of sound mind, the rents of his property could not have been sequestered and devoted by a receiver to the payment of his debts, without giving him the right to claim personal property exemptions, and the allotment of his homestead. The statute providing for sending persons of sufficient means to asylums outside of the state contemplates that the guardian shall supply funds for supporting them in such asylums so long as their incomes may be sufficient for that purpose, "over and beyond maintaining and supporting those persons who may be legally dependent on the estate of such insane persons." Code, §§ 2273, 2274. The constitution (article 11, § 10) empowers the legislature to "provide that the indigent deaf mute, blind insane of the state shall be cared for at the charge of the state." Construing Code, § 2278, with the other sections already cited, it was plainly the legislative intent to define "indigent insane" so as to include all those who have no income over and above what is sufficient to support and maintain those who may be legally dependent on the estate. Such is the construction that has also been placed upon the law by those charged with the duty of governing our charitable institutions. But, if such interpretation had not been acted upon, there can be no doubt that the framers of the constitution, who provided for the establishment and maintenance of the asylums, intended that no such narrow construction should be given to the word "indigent" as would deprive the family of one stricken with so terrible a visitation of the services of the head of the household, and at the same time divert to his own use the income derived from his property, when it is not more than sufficient for the support, according to their condition in life, of those who had been legally dependent upon him when in his right mind. It is a part of the history of the constitutional convention of 1875 that ordinances were introduced contemplating the application of the profits of the estates of insane persons to the payment of the expenses of maintaining them in asylums, without regard to the necessities of those dependent on them. But, in consequence of the prevalence of a liberal spirit, those measures were defeated, and the constitution was allowed to remain as it was originally framed in 1868.

The condition in life of Della J. Hybart must be determined by inquiring as to the situation and resources of her husband, and not by her own environments or mode of living before marriage. Schouler, Dom. Rel. §§ 61, 413. The husband's obligation, when in his right mind, is to support her in a manner that comports with his circumstances in life,

for her condition is his condition; and this is true, though he may have been induced to marry her by the fear of a prosecution for seduction or bastardy. Id. § 61. Miss Weeks, however worthy she may be, and notwithstanding the fact that Hybart aided her voluntarily when in his right mind, is not one of those that he would, were he restored, be under legal obligation or duty to support; and she is not, therefore, dependent on him, within the meaning of the law. The legislature has made no provision for supporting persons standing in such relations to an insane person as she does, out of their estates, if, indeed, it had the power to make such disposition of his property. The law evidently contemplates giving a wife who lives in the mansion house of her husband the right to remain there, and to use such supplies as have been provided for his family, or a sufficient quantity of them to maintain her and her family according to their condition in life. The superintendents of the asylums and hospitals for the insane in this state, while adopting the construction of the constitution which we have stated, have not, as we are informed, been in the habit of demanding the payment of expenses out of the estates of those unfortunates who have had abundant income to defray them. Our attention has been called to no special provisions of law under which it could be done. Where insane men have families, it is not often they have a sufficient income, apart from their own personal earnings (which cease to come, of course, on their committal to an asylum), to provide for those dependent on them according to their station in life. The danger in the attempt to legislate upon the subject is that, while the stricken man is being treated, it may happen that his family is being starved, and probably for that reason the general assembly has hesitated to take action. The high character of the gentleman who is acting as receiver in the case at bar justifies the conclusion that the solicitor would have approved of the order appointing him. The statute (section 1673) authorizes the clerk to appoint a guardian for any person, on certificate of the superintendent of the asylum that he is of unsound mind. Where no suitable person will act, the clerk shall secure such estate in the same way provided where the guardians of orphans have been removed. Code, § 1676. In such cases the clerk certifies the facts to the solicitor (section 1584), who institutes an action on the bond of the guardian. "The judge of the superior court, before whom the action is brought, shall [says the statute] have power" to appoint the receiver, Section 1585. And it would seem to be contemplated, not that the solicitor shall bring an action, but that he shall take some action in such cases. Interpreting the statutes together, it would seem that it was intended that the solicitor, as the representative of the state, whose office it is to look to the protection of insane persons and infants, and not any person who might by chance hear of

the circumstances, should be the mover. When a guardian is removed the attention of the infants, and those who are near to them, is called sharply to what is being done by the displacement and prosecution that follows in the court. The act of 1889, c. 89, after pointing out the manner of making service on and bringing an insane person into court, provides that, on the trial of any action or special proceeding to which an insane person has been made a party, such insane person shall have the benefit of any defense that might have been made for him by his guardian or attorney, whether it has been pleaded or not, and that the court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of such insane person. Conceding that this power is to be exercised within the discretion of the judge (which we do not determine), if there was ever a time when the family proper of an insane person ought to be heard, it would seem that this is one. In view of all these provisions of the law, it would seem that receivers, in cases like that before us, ought to be appointed by the judge, on motion of the solicitor, either in or out of term time, and certainly that the rule ought to be, if there are any exceptions to it, that the wife and one or more adult children, if there are such, or some near relative or friend, should be brought before the judge at chambers or in term, before any order of this character is made. It is needless to say that a casual mention of the matter to the wife's father is not notice to him. The order of the judge is reversed, and the case is remanded, to the end that the wife be brought in, a receiver appointed, or the appointment of the acting receiver approved, on motion of the solicitor, and that the court shall in other respects proceed in accordance with this opinion. Reversed.

(119 N. C. 214)

#### UNION BANK OF RICHMOND v. COMMISSIONERS OF TOWN OF OXFORD.

(Supreme Court of North Carolina. Nov. 17, 1896.)

ENACTMENT OF STATUTES—JOURNAL ENTRIES AS EVIDENCE—MUNICIPAL BONDS—NOTICE OF INVALIDITY—CONSENT JUDGMENT.

1. Const. art. 2, § 14, providing that no law shall be passed authorizing counties, cities, or towns to pledge the faith of the state for the payment of any debt, or to impose any tax on the people, unless the bill for that purpose shall have been read on three several days in each house, "and unless the yeas and nays on the second and third reading: \* \* \* shall have been entered on the journal," is mandatory, and railroad aid bonds issued by a town under a law not so passed are absolutely void, and incapable of ratification.

2. Where a state constitution requires, in the enactment of certain laws, that the yeas and nays be entered on the journals, such journals are conclusive as against not only a printed statute published by authority of law, but a duly-enrolled act.

3. A purchaser of municipal bonds is charge-

able with notice of any want of power on the part of the municipality to issue them.

4. A town has no power to issue railroad aid bonds in the absence of legislative authority.

5. Payment of interest by a town on void bonds does not constitute a ratification thereof.

6. A consent judgment entered in a suit against town commissioners for a railroad subscription will not estop the town from thereafter setting up want of legislative authority to make such subscription.

Faircloth, C. J., dissenting.

Appeal from superior court, Granville county; Starbuck, Judge.

Mandamus by the Union Bank of Richmond to compel the commissioners of the town of Oxford to levy a tax to pay certain railroad aid bonds. From a judgment for plaintiff, defendants appeal. Reversed.

M. V. Lanier, R. O. Burton, W. A. Guthrie, and Edwards & Royster, for appellants. Shepherd, Manning & Foushee and J. Crawford Biggs, for appellees.

CLARK, J. When this case was here before (116 N. C. 339, 21 S. E. 410) the court set aside the nonsuit taken below, and held that the plaintiff could maintain an action as the case was then presented. The court did so upon the ground that, there being apparently a valid liability of \$40,000 against the town of Oxford, the compromise thereof for the sum of \$20,000 was not necessarily void, and that the court below erred in nonsuiting the plaintiff. The case had been tried upon the view that the charter of the town of Oxford authorized the election under which the \$40,000 indebtedness was contracted. The judge below held that this was not so, and hence that the compromise was not binding. This court sustained the view taken below that the town charter did not authorize the contraction of the indebtedness, but held that on its face the act chartering the railroad (Acts 1891, c. 315, § 10) authorized the election. The question as to the efficacy of that act had not been questioned below, as the plaintiff had rested its claim upon the authority of the town charter to sustain the election. The questions decided before need not be called in controversy. We must take it that our former opinion settles that the town had authority to compromise a valid liability for a smaller sum, and that Act 1891, c. 315, on its face authorized the election. When the second trial was had below, the point was taken for the first time that, conceding, as this court had held, that Act 1891, c. 315, by its terms, authorized the election, that act was invalid, because not passed as required for all acts empowering counties, cities, and towns to issue bonds. Const. art. 2, § 14. This section of the constitution is imperative, and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in the organic law would be converted into a nullity by judicial construction. It was intended as a safeguard, and has been held mandatory in

all other courts in which that question has been presented, as will be seen below. This point was not raised below in the former trial, nor in this court, as the plaintiff was then relying upon the charter of the town, which we held invalid for that purpose. On this second trial, when the plaintiff offered for the first time Act 1891, c. 315, as authority to show a valid election authorizing the indebtedness of \$40,000 as a basis to authorize the compromise (for, except as a compromise, the judgment would be void on its face, being ultra vires), the defendant contended that Act 1891, c. 315, while valid as a railroad charter, was unconstitutional and void so far as authorizing the creation of an indebtedness by the town, because not enacted in the manner required by Const. art. 2, § 14. The journals were put in evidence, and showed affirmatively that the act was not read three several days in each house, and that the yeas and nays were not entered on the readings in the house, as required by the constitution for acts authorizing the creation of public indebtedness. The point, therefore, thus arises for the first time in this case, and was not presented, and could not be presented, in the former appeal, for the reasons above given. The point is one of transcending importance, and is simply whether the people in their organic law can safeguard the taxpayers against the creation of state, county, and town indebtedness by formalities not required for ordinary legislation, and must the courts and the legislature respect those provisions? This safeguard is section 14 of article 2 of the constitution. It provides: "No law shall be passed to raise money, on the credit of the state or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or impose any tax upon the people of the state, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and 'unless the yeas and nays, on the second and third reading of the bill shall have been entered on the journal.'" The journals offered in evidence showed affirmatively that "the yeas and nays on the second and third reading of the bill" were not "entered on the journal"; and the constitution—the supreme law—says that, unless so entered, no law authorizing state, counties, cities, or towns to pledge the faith of the state, or to impose any tax upon the people, etc., shall be valid.

This case has no analogy to Carr v. Coke, 116 N. C. 223, 22 S. E. 16. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house, and ratified. Const. art. 2, § 23. And so it is here; the certificate of the speakers is conclusive that this act passed

three several readings in each house, and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house, and that the yeas and nays were entered on the journals. The journals were in evidence, and showed affirmatively the contrary. The people had the power to protect themselves by requiring in the organic law something further as to acts authorizing the creation of bonded indebtedness by the state and its counties, cities, and towns than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, in addition to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the journals on the second and third reading in each house. It is provided that such laws are "no laws"—i. e. are void—unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journals. This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a state or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 Dill. Mun. Corp. 545, and cases cited. It is certainly in the power of the sovereign people, in framing their constitution, to require as a prerequisite for the validity of this class of legislation these precautions, and the additional evidence of the journals that they have been complied with, over and above the mere certificate of the speakers, which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the journals is plain beyond power of controversy. Accordingly, the law is well settled by nearly 100 adjudicated cases in the courts of last resort in 30 states, and also by the supreme court of the United States, that where a state constitution prescribes such formalities in the enactment of laws as require a record of the yeas and nays on the legislative journals, those journals are conclusive as against not only a printed statute, published by authority of law, but also against a duly-enrolled act. The following is a list of the authorities, in number 93, sustaining this view either directly or by very close analogy. It is believed that no federal or state authority can be found in conflict with them. Decisions can be found, as, for instance, *Carr v. Coke*, supra, to the effect that, where the constitution contains no provision requiring entries on the journal of

particular matters,—such, for example, as calls of the yeas and nays on a measure in question,—the enrolled act cannot, in such case, be impeached by the journals. That, however, is a very different proposition from the one involved here, and the distinction is adverted to in *Field v. Clark*, 143 U. S., on page 671, 12 Sup. Ct. 497. The authorities are as follows: Alabama: *Moody v. State*, 48 Ala. 115; *State v. Buckley*, 54 Ala. 599; *Perry Co. v. Selma*, etc., R. Co., 58 Ala. 546; *Walker v. Griffith*, 60 Ala. 361; *Moog v. Randolph*, 77 Ala. 597; *Hall v. Steele*, 82 Ala. 562, 2 South. 650. Arkansas: *Burr v. Ross*, 19 Ark. 250; *Vissant v. Knox*, 27 Ark. 296; *Worthen v. Badgett*, 32 Ark. 496; *Smith v. Garth*, 33 Ark. 17; *Chicot Co. v. Davies*, 40 Ark. 200; *Gildewell v. Martin*, 51 Ark. 559, 11 S. W. 882. California: *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722; *Well v. Kenfield*, 54 Cal. 111; *Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3. Colorado: *In re Roberts*, 5 Colo. 525; *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444; *Robertson v. People*, 20 Colo. 279, 38 Pac. 328. Florida: *Mathis v. State*, 31 Fla. 291, 12 South. 681. Georgia: *Harper v. Commissioners*, 23 Ga. 568. Illinois: *Spangler v. Jacoby*, 14 Ill. 297; *Turley v. Logan Co.*, 17 Ill. 151; *Board of Sup'rs of Schuyler Co. v. People*, 25 Ill. 163; *People v. Barnes*, 35 Ill. 121; *Railway Co. v. Hughes*, 38 Ill. 174; *Railroad Co. v. Wren*, 43 Ill. 77; *People v. De Wolf*, 62 Ill. 253; *Ryan v. Lynch*, 68 Ill. 160; *Burritt v. Commissioners*, 120 Ill. 322, 11 N. E. 180. Indiana: *Railroad Co. v. Potts*, 7 Ind. 683; *McCulloch v. State*, 11 Ind. 424. Iowa: *Koehler v. Hull*, 60 Iowa, 543, 14 N. W. 738, and 15 N. W. 609. Kansas: *In re Division of Howard Co.*, 15 Kan. 194; *Commissioners v. Higginbotham*, 17 Kan. 62; *State v. Francis*, 28 Kan. 724. Kentucky: *Norman v. Kentucky Board of Managers*, 93 Ky. 537, 20 S. W. 901. Louisiana: *Hollingsworth v. Thompson*, 45 La. Ann. 223, 12 South. 1. Maryland: *Berry v. Railroad Co.*, 41 Md. 446; *Legg v. Mayor*, etc., 42 Md. 203. Michigan: *Southworth v. Railroad Co.*, 2 Mich. 287; *Green v. Graves*, 1 Doug. 351; *People v. Township Board of La Grange*, 2 Mich. 191; *People v. Mahaney*, 13 Mich. 481; *Steckert v. City of East Saginaw*, 22 Mich. 104; *Attorney General v. Joy*, 55 Mich. 94, 20 N. W. 806; *Callaghan v. Chipman*, 59 Mich. 610, 26 N. W. 806; *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203; *People v. McElroy*, 72 Mich. 446, 40 N. W. 750; *Sackrider v. Supervisors*, 79 Mich. 59, 44 N. W. 165; *Auditor General v. Supervisors*, 89 Mich. 593, 51 N. W. 483; *Attorney General v. Detroit & S. Plank-Road Co.*, 97 Mich. 589, 56 N. W. 943. Minnesota: *Board of Supervisors v. Heenan*, 2 Minn. 330 (Gil. 281); *State v. City of Hastings*, 24 Minn. 78; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *Lincoln v. Haugan*, 45 Minn. 451, 48 N. W. 196. Missouri: *State v. McBride*, 4 Mo. 303; *State v. Mead*, 71 Mo. 266. Nebraska: *Hull v. Miller*, 4 Neb. 503; *State v.*

McLelland, 18 Neb. 236, 25 N. W. 77; State v. Robinson, 20 Neb. 96, 29 N. W. 246. Nevada: State v. Tuffy, 19 Nev. 891, 12 Pac. 835. New Hampshire: Opinion of the Justices, 35 N. H. 579; Id., 52 N. H. 622. New York: People v. Supervisors of Chenango, 8 N. Y. 317; People v. Allen, 42 N. Y. 379; People v. Commissioners of Highways of Marlborough, 54 N. Y. 276; Rumsey v. Railroad Co., 130 N. Y. 88, 23 N. E. 763; People v. Purdy, 2 Hill, 81; Purdy v. People, 4 Hill, 384; De Bow v. People, 1 Denio, 9; Bank v. Sparrow, 2 Denio, 97; Warner v. Beers, 23 Wend. 134. Ohio: Fordyce v. Godman, 20 Ohio St. 1. Oregon: Currie v. Southern Pac. Co., 21 Or. 566, 23 Pac. 884. Pennsylvania: Southwark Bank v. Com., 26 Pa. St. 446. South Carolina: Bond Debt Cases, 12 S. C. 200; State v. Hagood, 13 S. C. 46. Tennessee: Williams v. State, 6 Lea, 549; Brewer v. Huntingdon, 86 Tenn. 732, 9 S. W. 166; State v. Algood, 87 Tenn. 163, 10 S. W. 310; Nelson v. Haywood Co., 91 Tenn. 593, 20 S. W. 1. Texas: Ewing v. Duncan, 81 Tex. 230, 16 S. W. 1000; Hunt v. State, 22 Tex. App. 393, 3 S. W. 233. Virginia: Wise v. Bigger, 79 Va. 269. West Virginia: Osburn v. Staley, 5 W. Va. 85. Wisconsin: Bound v. Railroad Co., 45 Wis. 543; Meracle v. Down, 64 Wis. 323, 25 N. W. 412; McDonald v. State, 80 Wis. 407, 50 N. W. 185. Wyoming: Brown v. Nash, 1 Wyo. 85; Union Pac. R. Co. v. Carr, Id. 96. United States: Gardner v. Collector, 6 Wall. 499; Town of South Ottawa v. Perkins, 94 U. S. 260; Post v. Supervisors, 105 U. S. 667. Of these cases, especially pertinent are Town of South Ottawa v. Perkins, 94 U. S. 260; Post v. Supervisors, 105 U. S. 667; People v. Allen, 42 N. Y. 379; Hollingsworth v. Thompson, 45 La. Ann. 223, 12 South. 1; State v. Mead, 71 Mo. 266; and Hunt v. State, 22 Tex. App. 393, 3 S. W. 233. To same purport are Black, Const. Law, §§ 31, 102; Cooley, Const. Lim. (6th Ed.) 156, 163, 168; Smith, Const. Const. 833; Story, Const. 590; Sedg. St. & Const. Law, 539, 551; Cush. Law & Prac. Leg. Assem. § 2211; 1 Whart. Ev. 280; 1 Greenl. Ev. 491.

Constitutional requirements as to the style of acts or the manner of their passage are mandatory, not directory. State v. Patterson, 98 N. C. 660, 663, 665, 4 S. E. 350. The 30-days notice required before the passage of a private act is not required by the constitution to be entered on the journals, as is required as to the readings on several days, and the ayes and nays on each reading, with bills authorizing the contraction of public indebtedness; and hence it may be that the giving of such 30-days notice is conclusively presumed as to such private acts (Harrison v. Gordy, 57 Ala. 49; Walker v. Griffith, 60 Ala. 361), though the contrary was intimated in Gatlin v. Tarboro, 78 N. C. 119. The history of the country at large and of this state as well has shown the necessity of this safeguard as to acts authorizing the creation of public indebtedness, which has been incorporated also into several other state constitutions. We have neither power

nor wish to nullify so plain and mandatory a provision, so carefully and explicitly worded, and which has been held binding by all other courts wherever the question has been presented.

The judgment, on its face, is by consent, and for a railroad subscription. It is, therefore, on its face, to be treated as void, being ultra vires, unless a special authority is shown authorizing the indebtedness for which it was a compromise (Kelley v. Milan, 127 U. S. 150, 8 Sup. Ct. 1101); for, ex virtute officii, town commissioners have no authority whatever to bind the town by submitting to a consent judgment for \$20,000 for a matter appearing on the face of the judgment to be not for town purposes. If the commissioners of the town were vested with no authority to create the debt, they certainly could not acquire such power by entering into a consent judgment. The consent judgment entered into by the town authorities could not bind the town to a subscription to a railroad unless the power to subscribe or donate had been legally granted by the legislature. Consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded. As such they bind the parties themselves thereto as fully as other judgments; but, when parties act in a representative capacity, such judgments do not bind the cestui que trust unless the trustees had authority to act; and when (as in the present case) the parties to the action, the town authorities, had, as appears above, no authority to issue the bonds, their honest belief, however great, that they had such power, would not authorize them to acquire such power, and bind the town by consenting to a judgment. It is not a question of a fraudulent judgment, but a void judgment from want of authority to consent to a decree to bind principals (the taxpayers) for whom they had no authority to create an indebtedness by consenting to a judgment any more than they would have had by issuing bonds. If authorized to create the indebtedness, either the bonds or the consent judgment would be equally an estoppel, but, as they had no such authority, neither bonds nor judgment is binding on the taxpayers. It is not their bond nor their judgment. In Kelley v. Milan, supra, Blatchford, J., says: "The declaration of the validity of the bonds contained in the decree was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor and the officers of the railroad company. The act of the mayor in signing that agreement could give no validity to the bonds if they had none at the time the agreement was made. \* \* \* The adjudication in the decree, under the circumstances, cannot be set up as a judicial determination of the validity of the bonds. This was not the case of a submission to the court of a question for its decision on the merits, but was a consent in advance to a particular decision by a person who had no right to bind the town by such consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally." In Tex-

as & P. Ry. Co. v. Southern Pat. Co., 137 U. S. 48, 56, 11 Sup. Ct. 13, Fuller, C. J., says: "The decrees were entered by consent and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties;" and hence holds that the federal courts, in disregarding such decrees, were not violating the rule that due effect must be given to the determination of the matter by a state court having jurisdiction. In *Lawrence Manufg Co. v. Jonesville Cotton Mills*, 138 U. S. 552, 11 Sup. Ct. 405, Fuller, C. J., again says: "The prior decree was the consequence of the consent [of parties], and not the judgment of the court; and, this being so, the court had the right to decline to treat it as res judicata," citing many cases, among them our own case of *Lamb v. Gatlin*, 2 Dev. & B. Eq. 37, *infra*, and refused to execute a former decree, saying: "As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the circuit court, being correct upon the merits, is also correct in that the court refused to be constrained by the previous erroneous consent decree to decree contrary to the right of the cause." In *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, Miller, J., says (page 698, 106 U. S., and page 472, 1 Sup. Ct.): "Such decree as was had, being dependent upon consent, did not operate as a judicial decision by the court." This treatment of consent decrees prevails thus in law as well as equity; *Kelley v. Milan*, *supra*, being an action at law to recover judgment on bonds issued in aid of a railroad, and the other cases above cited being in equity. In *Commissioners v. Loague*, 129 U. S. 493, 505, 9 Sup. Ct. 327, 331, which is substantially like the present, being an application for a mandamus to compel the levying of a tax to pay a judgment rendered on interest coupons of bonds, Fuller, C. J., says: "The court cannot decline to take cognizance of the fact that the bonds are utterly void, and no such remedy exists. Res judicata may render straight that which is crooked, and black that which is white,—*facit ex curvo rectum, ex albo nigrum*,—but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when, upon the face of the record, it appears, not that mere error supervened in the rendition of such judgment, but that they rest upon no cause of action whatever." So, in the present case, even if the former judgment had not been by consent, it appears that there was no authority to issue the bonds, and the courts will not issue a mandamus to levy a tax to pay such judgment. In *Lamb v. Gatlin*, 2 Dev. & B. Eq. 37 (cited and approved by the supreme court of the United States, *ut supra*), *Gaston, J.*, says, as to the effect of a consent judgment by an executor, that it did not bind the beneficiaries of the estate (as here the taxpayers are not bound by the consent judgment entered into by the town authorities), because "it is not in truth a decree in invitum, and by a judgment of the court to which the defendant was com-

elled to submit, and which, therefore, would not only bind him, but those also for whose benefit he held the estate, unless it can be impeached for fraud; but it is a voluntary settlement between the defendant and the persons then claiming, which the parties to that settlement have chosen to invest with the forms of a judicial determination. The decree . . . was avowedly adopted because it was made by the parties. A decree thus rendered as against the present plaintiffs (who were the principals whom the defendant in the consent judgment represented) has no force except so far as it is seen to be just." There are other authorities to the like effect and purport, but the above will suffice. A recital of facts which the corporate officers had no authority to determine, or a recital of matters of law, do not estop the corporation. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 815; *Northern Bank v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254.

The certificate of the speakers is not good for more than it certified; i. e. that the bill has been read three times in each house, and ratified. And, ordinarily, that makes the bill a law. But for this class of legislation the constitution provides that the facts thus certified by the speakers will make no law unless it further appears that the yeas and nays have been recorded on the journals on the second and third reading in each house. The constitution makes the entry of the journals essential to the validity of the act. If it be conceded that presumption of regularity arises from the publication of the act in the case, it was rebutted, for the journals were offered by the defendant, and showed that no constitutional authority had been conferred to issue the bonds or contract the indebtedness. It is incumbent upon the purchaser of municipal bonds to examine whether the power to issue has been duly granted. *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Township of East Oakland v. Skinner*, 94 U. S. 255; 1 Dill. Mun. Corp. 545. The bonds, having been issued without authority, were absolutely void. *Marsh v. Fulton Co.*, 10 Wall. 676; *Clarke v. Board*, 27 Ill. 308. The payment of interest is no ratification, for there can be no ratification when there is want of power. *Doon Tp. v. Cummins*, 142 U. S. 376, 12 Sup. Ct. 220; *Davless Co. v. Dickinson*, 117 U. S. 657, 665, 6 Sup. Ct. 897, 901; *Norton v. Shelby Co.*, 118 U. S. 425, 451, 6 Sup. Ct. 1121, 1130; *Lewis v. City of Shreveport*, 108 U. S. 282, 287, 2 Sup. Ct. 634, 636.

In instructing the jury upon the evidence to find the issues in favor of the plaintiff, there was error.

FAIRCLOTH, C. J., dissents.

(119 N. C. 300)

JONES v. BRAMAN.

(Supreme Court of North Carolina. Nov. 24, 1898.)

RES JUDICATA.

A judgment against the personal representative of a deceased administrator for a specific

sum due the estate of decedent's testate, as shown by an account returned to the clerk by decedent before his death, but never filed as a final account, is not a bar to the subsequent recovery, in an action for settlement of the whole administration, of a further sum which plaintiff, at the time of the former suit, did not know to be due. 23 S. E. 248, 117 N. C. 259, followed.

Appeal from superior court, Greene county; Coble, Judge.

Action by J. W. Jones, administrator, against R. J. W. Beaman, administrator, for an accounting. From a judgment for plaintiff, defendant appeals. Affirmed.

Shepherd & Busbee, for appellant. Geo. M. Lindsay, for appellee.

**FAIRCLOTH, C. J.** At the argument the plaintiff withdrew his appeal, and the defendant waived all his exceptions, except the question of estoppel on his appeal. This case was before this court at September term, 1895. 117 N. C. 259, 23 S. E. 248.

**Facts:** R. O. D. Beaman, defendant's intestate, was administrator d. b. n. of A. W. Jones, and upon the death of said Beaman the plaintiff became administrator d. b. n. of said Jones. Said Beaman, before his death, placed in the hands of the clerk an account of his dealings with said estate, but the same was never filed nor audited by the clerk as a final account, because the vouchers were incomplete. This account showed a balance of \$500 in administrator's hands. Plaintiff brought an action for that specific sum without taking an account, and recovered it. The referee finds that plaintiff did not know that anything more was due. Plaintiff brought the present action, and demanded an account of the whole administration, and the referee finds that \$604.74 is due the plaintiff in addition to the \$500 recovered in the former suit, and judgment was rendered accordingly, and defendant appealed.

The defendant pleaded the former judgment as an estoppel, and relied upon it in this action. In the former opinion (117 N. C. 259, 23 S. E. 248) we decided, upon the facts then appearing, against the plea. The facts now are not materially different from the former case; certainly no more favorable to the defendant. We have no reason to change our former conclusion on this question, and we refer to that case for our reasons, without repeating them here. Affirmed.

(119 N. C. 307)

NATIONAL CITIZENS' BANK OF NEW YORK v. CITIZENS' NAT. BANK OF RALEIGH et al.

(Supreme Court of North Carolina. Nov. 24, 1896.)

BANKS — COLLECTIONS — INSOLVENCY OF INTER-MEDIARY.

Plaintiff bank forwarded a check to its correspondent, indorsed for collection. The correspondent also indorsed it for collection, and forwarded it to defendant bank. Defendant credited the amount on its account with such

correspondent, and collected the check. Subsequently to the entry of the credit, the correspondent bank made an assignment. The correspondent bank was at the time indebted to the defendant. Held, that the defendant was liable to plaintiff for the amount collected by it on the check.

Appeal from superior court, New Hanover county; Starbuck, Judge.

Action by the National Citizens' Bank of New York against the Citizens' National Bank of Raleigh and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Battle & Mordecai, for appellants. Iredell Meares, for appellees.

**MONTGOMERY, J.** The drawer of the check lived in Raleigh, N. C., and the payees lived in New York City. The check was deposited by the payees in the plaintiff bank, in New York, and by the plaintiffs sent on to the Bank of New Hanover, at Wilmington, N. C., with indorsement, "For collection for account of National Citizens' Bank of New York," the plaintiffs. The check was sent by the Bank of New Hanover to the defendant bank, at Raleigh, with the additional indorsement, "For collection, account of Bank of New Hanover, Wilmington, N. C." The defendant bank entered a credit on its books to the Bank of New Hanover, for the amount of the check, 15 minutes before the registration of the deed of assignment made by the Bank of New Hanover on account of insolvency. The money was collected on the same day the credit was given. The balance on the reciprocal accounts between the New Hanover Bank and the defendant bank, after the credit of the amount of the check, was in favor of defendants. The plaintiff bank and the Bank of New Hanover kept no reciprocal accounts. On the contrary, the plaintiffs would send to the Bank of New Hanover matters for collection, and, when collected, the New Hanover Bank would remit the proceeds to the plaintiffs. The New Hanover Bank did not have on its ledger any account with the plaintiff bank. It kept only the record of its transactions with the plaintiffs on its collection register. Upon the facts (which his honor found by agreement), judgment was entered for the plaintiffs, and the defendants appealed from the judgment.

There was no error in the rendering of the judgment. The defendant saw, from the indorsements on the check, that it was the property of the plaintiffs, and that the New Hanover Bank was merely an agent to collect it for the plaintiffs. *Boykin v. Bank*, 118 N. C. 568, 24 S. E. 357. If there ever had been any conflict in the decisions of this court on the subject-matter embraced in this opinion before the case of *Boykin v. Bank*, supra, was decided, that opinion would seem to have resolved the doubt. It was held in that case, in substance, that, wherever it appeared on the face of a paper that it was in the possession of a bank for collection, the proceeds

of the collection were the property of the owner, and that the actual collecting bank is liable to the owner in case of the insolvency of any intermediary bank which has received it for collection, unless the actual collector had remitted the proceeds, or its equivalent, to the bank from whom he received it, before he had knowledge of that bank's insolvency. Simply entering credits on mutual accounts between the actual collecting banks and their intermediaries will not protect the actual collector of such drafts and checks from the demands of the owner, under the circumstances of this case. For their own convenience, it may be well for the banks and collecting agencies to observe such rules; but they will not be allowed to work injury and loss to owners of checks and drafts, who send them out to be collected and the proceeds returned to them. Of course, a bank which had received a check or draft from an agent bank of the principal would be protected, if it had sent to the agent, before the agent's known insolvency, or the principal's demand, the funds, or their equivalent, collected on the paper. We are aware that this is not the rule in all the states of the Union. The counsel of the defendants read to us the opinion of the supreme court of Tennessee in the case of *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897, in which the opposite view of this subject is taken, but we will abide by our own decisions. The contention of the defendants that the check was not the property of the plaintiffs cannot be sustained. The complaint alleged that it was the property of the plaintiffs, and it was not denied in the answer, except by legal inference. The defendants averred that the title to the check, as a matter of law, passed out of the plaintiffs to the Bank of New Hanover, when the former sent it to the latter for collection. This is not a sound proposition of law; for, as we have seen, the indorsement was restricted. The plaintiffs having been in possession of the check, and having alleged in their complaint that they were the owners of it, the presumption is that it was their property; and, this presumption not having been rebutted, the finding of his honor was correct. No error.

(119 N. C. 150)

**HOLLEMAN v. HARWARD et al.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**SALE OF OPIUM TO WIFE — RIGHT OF ACTION BY HUSBAND.**

An action for damages will lie at the suit of a husband against a druggist who, in violation of the express orders of the husband, has sold laudanum and similar preparations to the wife, in consequence of which she has become a confirmed subject of the opium habit, resulting in the loss of her services and companionship.

Appeal from superior court, Wake county; McIver, Judge.

Action by Nathan Holleman against W. H. Harward and others. A demurrer to the com-

plaint having been sustained, the plaintiff appeals. Reversed.

The following is the complaint: "(1) That the defendants are residents of Wake county, and the town of Apex, and are now doing business under the name of Harward & Hunter, and have been so trading for the last ten or twelve years, keeping a general stock of goods, including drugs, poisons, opium, laudanum, etc. (2) That plaintiff is a resident of said town of Apex, and has been, with a short interval, since 1875; that he has a family, consisting of a wife and six children,—four boys and two girls,—some of whom are of tender years, and all of whom are minors; that he is a poor man, dependent entirely upon his labor to secure a support for himself, his wife, and his children; and for the regulation and disposition of his household affairs, and the supervising and direction of his children during his absence from home at his labor, he has been and is wholly dependent upon his wife. (3) That about the year 1880 his wife became temporarily afflicted, was forced to take preparations of opium for relief, and so began the habit of using opium in its different forms, principally laudanum; that, so soon as the plaintiff discovered that his wife was contracting the habit, he set himself to work to cure her, and prevent the further use of it, and in pursuance of this purpose and endeavor informed the defendants of the fact, and forbade their selling his wife opium in any form or combination, except upon his own order; and that theretofore the defendants had been selling laudanum to the plaintiff's wife, and knew that she was addicted to the undue use thereof as a beverage. (4) That, notwithstanding the protest and warning which the plaintiff has from time to time and frequently made to and given the defendants against selling or furnishing his wife laudanum or opium in any form or combination, the said defendants have knowingly, willfully, persistently, unlawfully, and in utter disregard of the plaintiff's rights and the welfare of his wife, continued up to the beginning of this action and since,—that is, up to April, 1895,—to sell and furnish to the said wife laudanum in large quantities, almost daily, for a beverage. (5) That defendants well knew at the time they were so selling and furnishing the plaintiff's wife, Mary S. Holleman, with the said laudanum and opium, that she had become what is termed and known as an opium or morphine eater, and that through the constant use of the same she was wrecking both her mind and body, and that the plaintiff was striving earnestly, anxiously, and constantly to counteract the effects of the dreadful and ruinously disastrous habit. (6) That by the use as a beverage of opium, mostly in the form of laudanum, sold knowingly, willfully, constantly, unlawfully, and persistently against the protest of the plaintiff, furnished

the plaintiff's wife by the defendants, she has become a mental and physical wreck, and almost deprived of moral sensibility, and has become unfitted and disqualified to attend to her household duties, or the care and nurture and direction of her children, and that by the means aforesaid so furnished by the defendants knowingly, willfully, and unlawfully, the plaintiff has been deprived of the society of his wife, of her service in her home, his children have suffered from neglect and want of motherly care, and his home has thereby and by the instrumentality of the defendants been rendered a waste, and a place of suffering and distress, instead of a joy and comfort. (7) That, but for the action of the defendants in selling and furnishing the plaintiff's wife laudanum and opium as aforesaid, the plaintiff would have been able to have counteracted the habit, which was only forming at the time the defendants began to furnish her with the said deadly drug, and his said wife, instead of being a burden from mental and physical and moral imbecility, would have been a joy, a comfort, and a helpmeet for him. (8) That by the means aforesaid, and the knowing, wilful, and unlawful violation of the plaintiff's rights as aforesaid, the plaintiff has been greatly damaged, to wit, to the amount of \$3,000. Wherefore the plaintiff demands judgment (1) that he recover of the defendants the sum of three thousand dollars; (2) for costs, and other and further relief."

Judgment: "This action coming on for trial, and the defendants demurring ore tenus on the ground that the complaint does not state facts sufficient to constitute a cause of action, after argument by counsel for both sides, it is considered and adjudged that the demurrer be sustained, and that the defendants go without day." From this judgment the plaintiff appealed.

Argo & Snow, for appellant. Battle & Mordecai and H. E. Norris, for appellees.

MONTGOMERY, J. This action was brought to recover of the defendants damages for injuries alleged to have been sustained by the plaintiff in consequence of the defendants having sold laudanum to his wife, the defendants being druggists, and knowing that the plaintiff's wife was using the same in large quantities, and as a beverage, to the injury of her health. A demurrer ore tenus on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained by his honor. The defendants had answered, denying all the material allegations of the complaint, but, for the purposes of this action, the demurrer having been entered and sustained, the matters alleged in the complaint are to be taken as true. The complaint shows that the plaintiff's wife, many years before this action was brought, while suffering from some temporary illness, was forced

to take preparations of opium for relief, and from this was formed the habit of taking laudanum. The plaintiff, as soon as he discovered the habit, set to work to cure or prevent it, and so informed the defendants, who lived in the same town with him, and forbade them to sell to his wife opium in any form, except upon his own order, the defendants then and before having sold her the laudanum knowing that she was addicted to the use of it as a beverage. It is further alleged in the complaint that, notwithstanding these protests and orders to the contrary of the plaintiff, the defendants have almost daily, through a series of years, against the frequent protests and warnings of the plaintiff, sold to the plaintiff's wife large quantities of laudanum, which they knew she was using as a beverage; that the defendants knew that at the times when they were selling the laudanum to the plaintiff's wife she was using it as a beverage; that she was becoming, and had become, what is known as an "opium eater"; that she was, through the use of the drug, wrecking her mind and body; and that the plaintiff was doing his utmost to prevent such use, and to counteract the effects of the ruinous drug. The plaintiff alleges in his complaint "that his wife, by reason of the use of the drug as a beverage, had become a mental and physical wreck, and almost deprived of moral sensibility, unfitted and disqualified to attend to her household duties, or to the care and nurture and direction of her children; and that by the means aforesaid so furnished by the defendants knowingly, willfully, and unlawfully, the plaintiff has been deprived of the society of his wife, of her services in her home, and his children have suffered from neglect and want of motherly care"; that the plaintiff's family consists of his wife and six children, some of them very young, and all under age; that the plaintiff himself is dependent on his daily toil for a living, and the care of his household and children is dependent upon the services and attention of his wife; and that by the sale and use of the laudanum she has become physically and mentally incapable of attending to her duties. The complaint further alleges that, but for the conduct of the defendants in selling and furnishing the plaintiff's wife laudanum, the plaintiff would have been able to have counteracted the habit, which was only forming at the time the defendants began to furnish her with the said deadly drug; and his said wife, instead of being a burden from mental and physical and moral imbecility, would have been a comfort and a helpmeet. The question, then, is, can the plaintiff, upon the facts set out in the complaint, maintain an action? The action is a novel one. With the exception of the case of *Hoard v. Peck*, 56 Barb. 202, which, in its most important aspects, resembles the one before us, we have been able to find no precedent in the English common-

law courts or in the courts of any of our states. It does not follow, however, that because the case is new the action cannot be maintained. If a principle upon which to base an action exists, it can be no good objection that the case is a new one. It is contended for the defendants, though, that there is no principle of the common law upon which this action can be sustained, and that our own statutory law gives no such remedy as the plaintiff seeks in this action for the wrong done to him by the defendants, and that the novelty of the action, together with the silence of the elementary books on the subject-matter of the complaint, while not conclusive, furnishes strong countenance to their contention. It is claimed for the defendants that while, in the abstract, such facts as are stated in the complaint would make the parties charged guilty of a great moral wrong, there would be no legal liability incurred therefor. It was argued for the defendants that there was no legal obligation resting upon themselves not to sell the drug, as is alleged, to the plaintiff's wife, or upon the wife not to use it; that many of the ancient restrictions upon the rights of married women had been repealed by recent legislation, or modified by a more liberal judicial construction; that a married woman was ordinarily free to go where she would, and that the husband could not arbitrarily deprive her of her liberty, nor use violence against her under any circumstances, except in self-defense, and that, if he could not restrain her locomotion and her will, he could not prevent her from buying the drug and using it; that the wife's duty to honor and obey her husband, to give to their children motherly care, to render all proper service in the household, and to give him her companionship and love, was a moral duty, but that they could not be enforced by any power of the law, if the wife refused to discharge them. But, notwithstanding the claim of the plaintiff, we think this action rests upon a principle,—a principle not new, but one sound and consistent. The principle is this: "Whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property, or the rights, or the reputation of another." Story, J., in *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867. And also in the third book of Blackstone's Commentaries (chapter 8, p. 123) it is written: "Wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action." A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship, and of rendering all such services in his home as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill, and industry. He may contract to furnish her services to others, and may sue for them,

as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband. The defendants and the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug; for they had their part in forming the habit in her, and continued the sale of it to her after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband. There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife. That assaults and batteries are made criminal offenses makes no difference, the foundation of the husband's suit being, not for the public offense, but, for damages,—compensation for the injury which he has sustained on account of the loss of his wife's services. The sale of the laudanum by the defendants to the plaintiff's wife, under the circumstances set out in the complaint, was willful and unlawful, and the husband's injury is just as great as if his wife had been disabled from a battery committed on her, although the unlawful act is not indictable.

The defendants' counsel also insisted that the selling of laudanum is a lawful business, that it is on the same footing as the sale of spirituous liquors unrestrained by the statute. It is true that there is no statutory provision in North Carolina prohibiting the sale of laudanum as a beverage or as a medicine, but it does not therefore follow that a sale of it under all circumstances is lawful. As is well said in *Hoard v. Peck*, supra, "Its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied." It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action. We have in our state (Code, § 1077) a statute which makes it unlawful to sell liquor in any quantity to a minor (except he is a married man); and section 1078

gives to the person injured damages therefor. But suppose we had no statute on the subject of liquor selling to minors, would the law permit with impunity a dealer or other person to sell liquor to a man's child, without his knowledge or consent, in such quantities as to produce habitual intoxication, or to render him unfit for employment? But laudanum is well known to be a poisonous drug. As a beverage, it cannot be drunk without injury to the body, affecting the health of the physical and moral powers, and this is known to most persons of ordinary intelligence and to all druggists. The defendants knew, taking the complaint in this appeal to be true, that the plaintiff's wife did not buy the laudanum for medicine. They knew that she was buying it as a beverage; that she was violating her duty to her husband in destroying her health, and thereby rendering herself unfit as a companion for him, and to render proper service in the household. They assisted her, and encouraged her, for gain, with the means of doing all this in face of his frequent protests and warnings. The habit she had formed was the direct result of the use of the drug, which the defendants sold to her in such large quantities, and they knew it, and persisted in it, although repeatedly warned and entreated by the husband not to do so. His honor erred in sustaining the demurrer. It ought to have been overruled. Error.

(119 N. C. 323)

# CAROLINA INTERSTATE BUILDING & LOAN ASS'N v. BLACK et al.

(Supreme Court of North Carolina. Nov. 24, 1896.)

## MORTGAGE OF MARRIED WOMAN—ESTOPPEL—SUBROGATION.

1. A married woman, who was at the time a minor, executed a note and a mortgage purporting to convey her separate real estate to secure the note. The mortgage was void because not executed in accordance with the statute. *Held*, that fraudulent representations made by her at the time the mortgage was executed, that she was 21 years of age, would not estop her to assert the invalidity of the mortgage, though the representations were material inducements towards the making of the loan.

2. Where a married woman obtains a loan, and gives a mortgage, to discharge a lien then on her separate estate, and such mortgage is void, the lender is not entitled to be subrogated to the lien.

Appeal from superior court, Moore county; Starbuck, Judge.

Action by the Carolina Interstate Building & Loan Association against William E. Black and Emma C. Black, his wife, on notes signed by defendants, and to foreclose mortgages executed by them on the separate real estate of the feme defendant. There was a judgment in favor of plaintiff against defendant William E. Black only, for the amount of the debt, and declaring void and ordering canceled the notes and mortgage as to the wife, and plaintiff appeals. Affirmed.

Black & Adams, for appellant. Douglass & Spence, for appellees.

AVERY, J. This action is brought to recover judgment for the amount of two notes signed by William E. Black and his wife, Emma C. Black, and to foreclose two mortgages executed at the respective dates of the two notes, and purporting to convey the separate real estate of the wife to secure them. The answer sets up as a defense that the feme defendant was under the age of 21 when she signed the notes and mortgage, and was then, and has continued up to the present to be, under the additional disability of coverture. The jury found these averments of the answer to be true. The plaintiff relies, by way of replication, upon the facts afterwards found by the jury,—that the feme defendant signed an application for the loan of the money that was the consideration of the note sued on, knowing that it contained a representation that she was 21 years old, and that her representation operated as a material inducement to plaintiff to make the loans. The jury further found, in response to an issue, that \$175 of the money loaned on the notes and mortgages was expended in discharging the lien of a mortgage of D. A. McDonald on the land embraced in the description in the mortgages sued upon. The main contention of the plaintiff is that the feme defendant has become liable, and has subjected her property to the lien of the mortgages, not by force of the agreement to pay, but because she is estopped to deny the false and fraudulent representations that were the means of procuring the plaintiff's money. The plaintiff is the actor in this suit, and seeks to recover on an alleged contract entered into by one at the time both an infant and a feme covert, and to subject her real property conveyed under a deed executed while both disabilities existed.

1. If the feme defendant had been 21 years old, she would have been incapable of entering into any "contract to affect her real and personal estate except for her necessary personal expenses, or for the support of her family, or such as were necessary in order to pay her debts existing before marriage without the written consent of her husband" unless she was a free trader, under the provisions of the statute (Code, § 1826). The consent of the husband is not required at all where the obligation falls within the three foregoing exceptions. *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567.

2. In order to charge the wife's separate property, where the assent of the husband is given, the intent to charge it must appear on the face of the instrument creating the liability, though the property to be subjected need not be specified. The assent of the husband, when given, does not enable the wife to make a contract, but to enter into an agreement in the nature of an executory contract. *Wilcox v. Arnold*, 116 N. C. 710, 21 S. E. 434;

*Bank v. Howell*, 118 N. C. 268, 274, 23 S. E. 1006, 1008.

3. The wife cannot subject her land, or any separate interest therein, in any possible way, but by a regular conveyance executed according to the requirements of the statute. The law will not allow her, even though she be 21 years of age, to dispense with these necessary forms, and accomplish indirectly, either by silence or active participation in a fraud, what the constitution, as construed by the courts, prohibits her from doing directly. *Thurber v. La Roque*, 105 N. C. 801, 311, 11 S. E. 460, 463; *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 898; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Lambert v. Kinnery*, 74 N. C. 348; *Littlejohn v. Egerton*, 76 N. C. 468.

It follows from the principles already stated, and which are sustained by abundant authority, that if the feme defendant had been of full age her agreements to pay money, embodied in the notes, would have been void; and, had she been discoverd, and under 21, those stipulations would have been, in the view most favorable to their enforcement, voidable. She could not have ratified a void agreement, and, if either of them had been voidable only, the jury have found as a fact that there has been no attempt at affirmance since she attained her majority. There was no error, therefore, in refusing to render a personal judgment against her as an obligor to the notes. In *re Freeman*, 116 N. C. 200, 21 S. E. 110. When the wife is of full age she may, by joining her husband in a deed executed as prescribed by law, subject her land to a lien to secure the husband's debt. *Jeffrees v. Green*, 79 N. C. 330; *Newhart v. Peters*, 80 N. C. 166; In *re Freeman*, *supra*. But, where her deed is void for failure to comply with the requirements of the constitution, she cannot, "by the indirect medium of an estoppel" created by her conduct, in pais, impart validity to it. *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706; *Lambert v. Kinnery*, *Hughes v. Hodges*, and *Thurber v. La Roque*, *supra*.

The feme defendant is not an actor here. The controversy hinges mainly upon the questions whether she has entered into a contract upon which a personal judgment can be recovered against her, and whether her separate real estate can be subjected under the mortgage deed. The prayer in the answer that the notes and mortgages be ordered to be surrendered and canceled does not give character to the action. That prayer is predicated upon the idea of a previous holding that these instruments are void as contracts or conveyances, and it could be withdrawn, if necessary. The contention which confronts us before reaching that question is that the feme defendant is estopped by her conduct from setting up her disability in avoidance of her deed. If she had come into a court where both the principles of law and equity are administered, seeking to repudiate her

own promise because it was invalid as a contract, and at the same time refusing to surrender what she acquired as a consideration for that promise, the principle enunciated in *Walker v. Brooks*, 99 N. C. 207, 6 S. E. 68, and in *Burns v. McGregor*, 90 N. C. 222, would apply; and she would fail to find protection in the perpetration of the fraud, by permitting her to retain the fruits of it, while she repudiated the supposed obligation incurred in order to acquire the money. The courts are not at liberty to violate the constitution, even for the purpose of rectifying what is morally wrong, and restoring to the rightful owner property acquired by resorting to unconscionable methods. Where the constitution has imposed well-defined limits to the capacity of married women to contract, they cannot by their own acts enlarge their powers. *Bigelow, Estop.* (3d Ed.) p. 51.

We have discussed the exceptions upon the theory that the plaintiff set up the fraud in the pleadings by way of estoppel, though there seems to be some dispute as to whether the amendment to the replication relating to the infancy of the feme defendant was ever allowed by the court. The plaintiff contends that, apart from the effect of coverture upon the validity of her promises and deeds, the female defendant was estopped, as an infant, from avoiding and repudiating the obligation of those instruments, because she misled the plaintiff by the representation that she was 21 years old. It is a principle as old as the common law that agreements or attempted contracts of infants are voidable, at the option of the infant, on attaining his majority. It is expressly found here that there was no ratification, if such a thing had been possible where the double disability existed. But it is insisted that, because she obtained money by false representations as to her age, she was estopped from denying her obligation to pay. If the courts should sanction this doctrine, the result would be that the ancient rule, established as a safeguard to protect infants from the wiles of designing rascals, would be abrogated, and the way opened to reckless youths to evade the law by lying. The courts would thereby put a premium upon falsehood, and hold out the temptation to infants, and to others who hope to profit by debauching them, to resort to this disreputable method of enabling the one to squander, and the other to extort, the patrimony intended to prepare a child for future usefulness. On the other hand, considering the defendant as a feme covert only, the fund expended in payment of a mortgage, of which we have no history, but which is found to have constituted a lien on her land, could not be followed, upon the principle of subrogation, or any other principle, so as to subject her land. Where the wife is silent when the husband expends money on her separate real estate, that fact in no way affects her title. *Thurber v. La Roque*, *supra*. If, however, it were conceded that she could not

be protected, on account of the disability of coverture, against the claim of the plaintiff to be subrogated to the rights of the older mortgage, her position as an infant who had neither ratified an express or implied promise, if made, to reimburse the plaintiff for any such expenditure, if made, would be impregnable. No person can compel an infant, who has not agreed to do so after attaining full age, to repay money expended for him officiously in the improvement of his land, no matter what the effect may have been. For the reasons given, the judgment is affirmed.

(48 S. C. 65)

**POLLOCK et al. v. CAROLINA INTER-STATE BUILDING & LOAN ASS'N et al.**

(Supreme Court of South Carolina. Nov. 27, 1896.)

**FOREIGN CORPORATIONS—SERVICE—LOCAL AGENT—RECEIPT—COMPLAINT—JURISDICTION—STATEMENT OF CAUSE OF ACTION—MISJOINDER.**

1. Under Code Civ. Proc. § 155, providing that summons shall be served by delivering a copy thereof as follows: "If the suit be against a corporation, to the president, \* \* \* a director, or agent thereof. \* \* \* Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, \* \* \* or any resident agent thereof,"—jurisdiction of a foreign corporation may be had, without attachment, by service in the state, personally, on a resident agent.

2. Under Code Civ. Proc. § 155, allowing service on a foreign corporation by the service of the summons within the state, personally, on "any resident agent" thereof, service may be had on a local soliciting agent of a foreign building and loan association, who receipts for and remits installment fines and dues, is paid a regular commission, has a standing advertisement in a local paper, over his name as agent, which is paid for by the association, and who negotiated the loan out of which the action arose.

3. Service of a summons on a foreign corporation by delivery of copy to a resident agent is not invalid because of prior appointment of a temporary receiver of the corporation by the courts of the state incorporating it.

4. A complaint in a court of general jurisdiction is not demurrable on the ground of want of jurisdiction because of nonresidence of plaintiff, it not appearing therefrom what his residence is.

5. A complaint alleged that a subscriber for 15 shares of stock in defendant building and loan association borrowed \$1,500 from it, on the assignment of the shares and the giving of a bond secured by mortgage on a house, the bond being conditioned for payment of \$25 per month till the shares should mature to their par value, of \$100 each, "provided that, if she failed to pay said monthly installments for 90 days from the time they become due, then the whole \* \* \* \$1,500 should become due, with interest at the rate of 6 per cent. per annum"; that she conveyed the mortgaged property to plaintiff, who assumed her contract; that, prior to the loan, plaintiff's assignor paid into the association \$88.50, and thereafter she and plaintiff paid on bond and mortgage \$535.50; that thereafter the house burned, and the insurance money was deposited in defendant bank, on its agreeing with plaintiff and the insurance company to hold enough thereof to pay the balance

due defendant association, when the amount was determined, and to pay the balance to plaintiff; that the association demanded of the bank \$1,286.43 in satisfaction of the bond and mortgage, which was largely in excess of the amount due, and the bank, without plaintiff's knowledge, and in violation of its agreement, paid the association such amount 27 months after the loan was made, and 7 months after the last payment made by plaintiff. *Held*, that though plaintiff could not plead usury, and the prayer was framed on the theory of usury, the complaint set up a cause of action against the association for excessive collections, and against the bank for being aider therein in violation of the trust it assumed.

6. A complaint against a bank and an association, alleging that plaintiff deposited money with the bank on its agreeing to retain enough thereof to pay the balance due the association, when the amount was determined, and to pay the balance to plaintiff; that the association demanded a sum largely in excess of what was due it; and that the bank paid the same, without notice to plaintiff, and in violation of its agreement,—does not misjoin causes of action, as the causes of action against the two defendants arise out of "the same transaction" (Code Civ. Proc. § 188), the payment of the money by the bank, and the receipt thereof by the association.

7. Where plaintiff deposited money in a bank on its agreeing to retain enough thereof to pay balance due from plaintiff to an association, when the amount was determined, and to pay the balance to plaintiff, and the bank, without any notice to plaintiff, adjusts and determines for itself the amount, and pays the association an amount greater than what plaintiff claims was due, he has a cause of action against the bank prior to the adjustment of the accounts between him and the association.

Appeals from common pleas circuit court of Chesterfield county; R. C. Watts, Judge.

Action by W. P. Pollock and another, as assignee of Mrs. R. J. Pollock, against the Carolina Interstate Building & Loan Association and another. From orders in favor of plaintiffs, defendants appeal. Affirmed.

W. F. Stevenson and R. T. Caston, for appellants. Edward McIver, Pollock & Pollock, and E. J. Kennedy, for respondents.

BUCHANAN, Special Judge. This was an action begun on the 29th day of July, 1895, by the service in Cheraw of the summons and complaint on A. G. Pollock, who, it is contended, was the resident agent of the Carolina Interstate Building & Loan Association of Wilmington, N. C., and by service on the same day on the Bank of Cheraw. The Bank of Cheraw demurred to the complaint, and the building and loan association, appearing only for that purpose, served a notice on the attorneys for the plaintiffs of a motion to set aside the service of the summons and complaint and dismiss the proceedings as to it, on the ground that it had not been brought under the jurisdiction of the court by proper service. At the September term, 1895, of the court of common pleas held for Chesterfield county, this motion was heard by his honor Judge Ernest Gary, and refused. Notice of intention to appeal was duly served, but, under agreement of counsel, it was agreed that pending this appeal the building and loan association might "make and argue any de-

mands, oral or written, which it may be advised to make, at the February term for 1896 of this [circuit] court, without prejudice to any of its rights under said appeal." At the February term, 1896, both the Bank of Cheraw and the building and loan association interposed and argued demurrers and motions to dismiss the complaint. The demurrers raised the question of the alleged misjoinder of two distinct causes of action, and the motions to dismiss the complaint were made on the ground that it did not state facts sufficient to constitute a cause of action, in that the plaintiffs, as purchasers of land covered by mortgage, could not plead usury in the terms of the mortgage; and further, by the Bank of Cheraw, that the complaint showed that no cause of action could arise against it until the cause of action against its co-defendant was adjudicated. His honor Judge Watts overruled the demurrers and motions to dismiss; holding that the plaintiffs could not plead usury, not being parties to the original contract, but that there were sufficient allegations in the complaint to show, if true, that the building and loan association had collected too much money from the plaintiffs, under the contract made by said association with Mrs. R. J. Pollock, the grantor of plaintiffs, when the contract was properly construed and the debt properly computed, and that the complaint charged that the Bank of Cheraw was a participant in such collection. Both defendants appealed. By consent of counsel, all the appeals growing out of this case were heard together.

The appeal from the order of his honor Judge Ernest Gary is brought upon the following exceptions: (1) Because the court erred in holding that the court had obtained jurisdiction of the Carolina Interstate Building & Loan Association by mere service on A. G. Pollock. (2) Because the court erred in holding that the agreement constituting A. G. Pollock agent to solicit stock was a valid agreement made by said association, and constituted him such a resident agent as could be served. (3) Because the court erred in holding that said so-called agreement had not terminated when the association ceased to issue stock. (4) Because the court erred in construing the by-laws of said association to mean that A. G. Pollock, as treasurer of the local branch association, was agent of the said defendant association, in the face of section 5 of article 9 of said by-laws. (5) Because the appointment of a receiver by the court of North Carolina for said corporation, and the taking possession of the assets of said corporation by said receiver under said order, terminated the right of A. G. Pollock to act as said agent of the corporation, even if he had been such agent, and the court erred in not so holding. (6) Because the court erred in holding that any agent of the said corporation (being a foreign corporation) could be served, if he resided in this state, and the service would be legal. (7) Because the court erred in holding that service could be made here on a foreign corporation, through any resident agent of the same, without the attachment of any property. (8) Be-

cause the court erred in holding that A. G. Pollock was the resident agent of the said corporation at the date of the service of the summons. (9) Because the court erred in holding that the said defendant could be served here, although it had no property here in this state, and the cause of action did not arise in this state, without serving the agent specially appointed by said defendant to accept service. (10) Because it does not appear that the court has acquired jurisdiction of the defendant corporation, or that plaintiffs have a right to sue said corporation in this state, and the court erred in not so holding. (11) It does not appear that the plaintiffs are residents of this state, or that the cause of action arose in this state, and the court erred in not dismissing the action for want of jurisdiction. (12) Because the court erred in holding that A. G. Pollock had been properly appointed local agent of said association; and said appointment was signed by E. S. Tennant, notary, and he had no authority to appoint any agent, as appears from article 7, § 1, of the articles of incorporation of said corporation.

The grounds of appeal from the order of Judge Watts, on behalf of the building and loan association, are as follows: (1) Because the circuit judge erred in holding that the complaint in this action could be construed to be for money wrongfully collected, in violation of a contract of the Carolina Interstate Building & Loan Association with R. J. Pollock, not collected as usurious interest, when plaintiffs expressly alleged that all the money claimed by them to have been wrongfully collected was collected as usurious interest. (2) Because the court erred in holding that the complaint contained sufficient allegations as to this defendant to show, if true, that more money had been collected by the Carolina Interstate Building & Loan Association than was due on its contract, even if the plea of usury was not allowed. (3) Because the court erred in holding that plaintiffs, in their complaint, stated, or attempted to state, any other cause of action against this defendant than one to recover usurious interest paid, and the penalty therefor, and in not dismissing the complaint when he held that these plaintiffs could not plead or set up usury. (4) Because no cause of action was stated as to this defendant, and the court erred in not dismissing the complaint on its motion on that ground. (5) Because the court erred in not holding that that complaint showed on its face that the said building and loan association had accepted less than was actually due it under its contract, and in not dismissing the complaint on that ground. (6) Because the court erred in holding that the two causes of action attempted to be stated in the complaint were properly joined. (7) Because the court erred in holding that both of the alleged causes of action affected all the parties to the said action, or all the defendants. (8) On behalf of the Bank of Cheraw, the fol-

lowing grounds of appeal from the order were taken: (1) The circuit judge erred in holding that the alleged cause of action against its co-defendant and that against this defendant were properly joined in the complaint. (2) He erred in not holding that it appeared from the face of the complaint that no cause of action arose against this defendant until the liability of its co-defendant, the plaintiff, had been first "determined and adjusted." (3) He erred in holding that as the complaint charges the Bank of Oheraw with being a participant, "to a certain extent," in the collection of the money received by the co-defendant, it states a present cause of action against it. (4) He erred in holding that the complaint stated a cause of action against this defendant, when no legal obligation is alleged, no demand made, or refusal on its part, and no obligation in the complaint that this defendant was not ready and able to respond to any liability it had assumed, whenever same accrued. (5) Having eliminated the question of usury from the case, he erred in not holding that the complaint does not state any liability on the part of the Carolina Interstate Building & Loan Association to the plaintiffs, and consequently could allege no cause of action against this defendant. (6) He erred in refusing to sustain the demands of this defendant, and in not dismissing the complaint.

The appeal from Judge Gary's order raises substantially two questions: (1) Can the court of common pleas acquire jurisdiction of a foreign corporation without attachment? (2) Was the service upon the person of A. G. Pollock a valid service upon the Carolina Interstate Building & Loan Association? We will discuss these questions in their order.

Can jurisdiction be obtained over a foreign corporation without attachment? Section 155 of the Code of Civil Procedure provides for service against a corporation by delivering a copy of the summons "to the president or other heads of the corporation, secretary, cashier, treasurer, a director, or agent thereof." The second paragraph thereof provides for service in respect to a foreign corporation "only when" such corporation "has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any resident agent thereof." Let us analyze these alternative services: (1) Such service can be made, in respect to a foreign corporation, when it has property within the state; (2) such service may be made, in respect to a foreign corporation, when the cause of action arose within the state; (3) and such service shall be made, in respect to a foreign corporation, where such service is made in this state, personally, upon the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof. It is to be noted that only in one of these modes of service does the matter of property

figure as an essential. In that one it gives the power to make such service, rather than specifies the particular manner of effectuating the purpose. It merely declares that service may be made when such foreign corporation has property within the state. The manner of such service, by attachment and advertisement, or otherwise, is not material. In the second division the manner of service is also not mentioned. Remembering that at common law there was no actual service on a foreign corporation, the legislature clearly contemplated, the manner of service that at the adoption of the Code was usual and appropriate in such cases (see section 156), unless personal service within the state could be made "upon the president, cashier, treasurer, attorney or secretary or any resident agent thereof." Plainly, therefore, the manner of service was extended. It became no longer necessary, although permissible, to serve by publication and attachment, if the president, cashier, treasurer, attorney, or secretary, or any resident agent of the defendant foreign corporation, could be served within the state. Personal service upon such officers within the state was to be considered as personal service upon such corporation, to the same binding effect and force and efficacy as if the defendant had been a domestic corporation served within the state. This view is supported by the cases of *Hester v. Fertilizer Co.*, 33 S. C. 609, 12 S. E. 563; *Tillinghast v. Lumber Co.*, 39 S. C. 484, 18 S. E. 120; and the recent case of *Littlejohn v. Railroad Co.* (S. C.) 22 S. E. 761. It is noted that the complaint here alleged that the defendant building and loan association was owning property and doing business in the state. There was no error here.

Was the service by delivering a copy of the summons upon A. G. Pollock, at Oheraw, on the 29th day of July, 1895, a valid service upon the Carolina Interstate Building & Loan Association? Was the said A. G. Pollock a resident agent of the said corporation? If the said Pollock was a resident agent of the said corporation, therefore, did the appointment of a receiver of such building and loan association by the courts of North Carolina terminate such agency? The complaint alleges "that the Carolina Interstate Building & Loan Association is now, and was at the time hereinafter mentioned, a corporation duly chartered under and by the laws of the state of North Carolina, and owning property and doing business in the state of South Carolina, county of Chesterfield, and that A. G. Pollock, of Oheraw, is the duly constituted and appointed resident agent thereof, as plaintiffs are informed and believe." The Code of Civil Procedure (section 155) provides that "the summons shall be served by delivering a copy thereof as follows: \* \* \* Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state per-

sonally upon the president, cashier, treasurer, attorney or secretary, or any resident agent thereof." The trial court found, as a matter of fact, that A. G. Pollock was a resident agent of the defendant association, and his finding on this question cannot be reversed by this court. *Hester v. Fertilizer Co.*, 33 S. C. 609, 12 S. E. 563.

The Code does not draw any distinction between the different classes of agents. It contemplates "any resident agent" as an appropriate one to be served. In this case, Pollock was a soliciting agent, a director in the local board in Cheraw, receipted for and remitted installments, fines, and dues, and was paid a regular commission. He had a standing yearly advertisement in the Cheraw Reporter, over his signature as agent, and the association paid him each year for the same. The very negotiations for the loan out of which this case arose were had with Pollock. Having held Pollock out as its resident agent with full powers, it would be monstrous to now permit it to set up the plea that, if he was an agent at all, it was an agency of limited powers, and did not extend to the transaction out of which this case arose. The court will not give its sanction to the doctrine that a corporation, in such a manner, can deny the power of an agency, when an advantage is to be obtained by such denial, and there is the fruit of a contract when it is to its interest to consider such contract binding. "Generally service on an agent may be sufficient, if the person was the agent conducting the transaction out of which the suit arose." Again: "Generally service may be made on a local agent of a foreign insurance company, whose business it is to issue policies, collect premiums, pay losses, etc." See 22 Am. & Eng. Enc. Law, 130, 131. Certainly the circuit judge was amply justified by the evidence. It is only necessary to say here, in passing, that the designation of a particular person, as required by Rev. St. § 1466, upon whom service may be made, and service upon the same, is not exclusive of, but in addition to, the other modes of service. *Littlejohn v. Railroad Co.* (S. C.) 22 S. E. 761.

Did the appointment of a temporary receiver of the defendant association by the North Carolina state court, a few days before, render the service in this state invalid? Such a receiver has, says the United States supreme court in *Booth v. Clark*, 17 How. 338, "no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court, or another jurisdiction." "Receivers appointed before jurisdiction are not entitled, as of right, to recognition in other jurisdictions, and courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers." 20 Am. & Eng. Enc. Law, 65, 66. "The power of a receiver only extends to the boundaries of the territorial

jurisdiction of the court appointing him." *Gluck & B. Rec. p. 3.* In *Dial v. Gary*, 14 S. C. 573, our court held that an administrator appointed by the courts of Massachusetts had no legal capacity to sue in this state, and that his assignment of the bond and mortgage to a citizen of this state did not give the latter capacity to sue. See *Patterson v. Pagan*, 18 S. C. 584. This is supported by reason, and the jurisdiction and the power exercised by courts. A court deriving its power from the laws of North Carolina cannot confer any greater power than it is given. Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator. The stream cannot rise higher than its source. If a corporation is not dissolved *ipso facto* by the appointment of a permanent receiver, with how much greater force does it apply to the appointment of a temporary receiver!

Exceptions 10 and 11 allege that, inasmuch as the complaint does not show that the plaintiffs are residents of this state, the court did not acquire jurisdiction of the cause. As preliminary to the consideration of this ground, it should be remembered that the court of common pleas is a court of record, of general jurisdiction, of full and ample powers, and in no sense a court of inferior or limited powers. Certain presumptions attend the record and proceedings of the former, while, to give jurisdiction to the latter, their jurisdictional facts must affirmatively appear. The record does not show that the plaintiffs are residents of this state, nor does any matter appear negating the presumption in the premises. Plaintiffs have a right to bring their action, without amending the complaint exhibited by them, to show that they are residents within the state. *Chafee v. Telegraph Co.*, 35 S. C. 372, 14 S. E. 764. To sustain a demurrer upon such grounds, the proof of want of jurisdiction must appear on the face of the complaint. Here the complaint certainly does not show that the plaintiffs are not residents of the state. See *Drake v. Steadman*, 46 S. C. 490, 491, 24 S. E. 458. We think that Pollock was a resident agent of the defendant association, and that such corporation was properly served, and that such service was binding upon it. Judge Gary's order is sustained.

#### Second Appeal.

The exceptions of the building and loan association to Judge Watts' order (seven in number) and the exceptions of the Bank of Cheraw (six in number) raise three questions, and, for convenience, will be considered under as many headings:

1. Admitting that the plaintiffs cannot recover on the ground of usury alone, does the complaint state facts sufficient to constitute a cause of action against either or both of the defendants? Let us examine the allegations of the complaint. Upon this inquiry, all the allegations are admitted to be

true. Has any fact been omitted, the insertion of which was necessary to constitute a cause of action? It appears that on the 5th day of February, 1892, Mrs. R. J. Pollock, the assignor of the plaintiffs, became a stockholder in the defendant association, having subscribed for 15 shares of its investment stock, and from that time to the 10th day of September, 1892, paid into the association the sum of \$88.50. On the 5th day of October, 1892, she borrowed from the association, on the assignment of her shares, and her bond secured by a mortgage of her house and lots in Cheraw, the sum of \$1,500. The condition of her bond was that she should pay to the association the sum of \$25 per month until the said shares of stock should have matured to their par value of \$100 each, "provided that if she failed to pay said monthly installments for ninety days from the time they have become due, then the whole of said borrowed sum of \$1,500 should become due, with interest at the rate of 6 per cent. per annum." On the 8th day of February, 1893, she conveyed the property mortgaged to the plaintiffs, who assumed her contract. Plaintiffs insured the property for \$2,500. From the 5th day of October, 1892, to the 15th day of June, 1894, plaintiffs and their assignor paid to the association, on the bond and mortgage, \$535.50. On the 10th day of October, 1894, the house was burned. The agent of the insurance company thereafter soon called on plaintiffs' attorney in fact with a check in favor of plaintiffs for \$2,500. The plaintiffs' attorney in fact and the insurance agent went to the Bank of Cheraw, and, by the binding agreement of all parties, the check was, upon the surrender of the insurance policy by the bank, indorsed by the plaintiffs' attorney in fact, and deposited in the Bank of Cheraw, with the distinct understanding and agreement on the part of the bank to hold enough of the same to pay the balance due to the association, when the amount due was determined, and to pay the balance to the plaintiffs. The association immediately demanded of the bank the sum of \$1,233.43 in satisfaction of its bond and mortgage, although that was largely in excess of the amount due; and the bank, without plaintiffs' knowledge, without waiting to ascertain the amount due, and in plain violation of its agreement to hold the same until it could be definitely ascertained what amount was due, paid the defendant association, on the 14th day of January, 1895, the sum of \$1,233.43, and delivered the bond and mortgage up to plaintiffs. The association has collected on the bond and mortgage the sum of \$1,917.43, including interest on payments made, and the same is in excess of the amount due on the bond. The money was borrowed on the 5th day of October, and the last payment was made on the 14th day of January, 1895. The plaintiffs stand here in the place of Mrs. Pollock, and they must comply

with her contract. While they cannot plead usury against it, having alleged that the amount collected was largely in excess of the amount due, are the allegations and general scope of the complaint broad enough for them to obtain other relief? Under this complaint, can they demand a proper consideration, and by such consideration, if favorable, cannot judgment be entered up for the amount claimed to be due? Presumably, the complaint was drawn principally to recover usury paid. Notwithstanding this fact, however, if, under this complaint, any cause of action is stated, the court below will be sustained. Surely it cannot be successfully contended that the plaintiffs would have no remedy if the association had obtained possession of \$5,000, \$10,000, or any amount in excess of the amount due, and applied it to the satisfaction of the bond and mortgage. No monthly payment was made by the plaintiffs after the 15th day of June, 1894. Payments then stopped. Who could take advantage of the forfeiture on failure to make these payments for 90 days? Did the association have this right? If, so, why did they allow 6 months to pass? If they had the right to insist on such forfeiture, was it not to be exercised within a reasonable time? Had they not the right to waive this condition? If, so, did they waive it? Did this provision mean that the whole sum borrowed should be returned, without giving credit for the payments already made? Suppose the plaintiffs had made all the payments required, except the last; could it be contended that the whole amount borrowed would become due, without giving credit for the payment made? Would any court enforce so unconscionable a contract? The courts of North Carolina (*Rowland v. Association*, 22 S. E. 8, and 18 S. E. 965) and of South Carolina (*Blust v. Bryan*, 21 S. E. 537) have spoken in no uncertain terms, and have denied that upon such default the association may consider the whole amount forfeited, in face of the fact that payments have been made. Now, with this in view, is it not possible—is it not probable—that plaintiffs may have paid \$2,300 for the \$1,500 borrowed, which is probably about the amount that would be due, at 7 per cent. interest, 90 days before the time the association estimated that the bond would be paid, then defaulted, and the whole amount of \$1,500, with interest, would become due? The prayer of the complaint is no part of the cause of action, nor, indeed, is it considered a part of the complaint, in setting out the supposed relief which the plaintiff deems himself entitled to. The bank undertook the confidence or trust of holding the money as specially agreed. Now, in plain violation of the assumed trust, and to the alleged damage of the plaintiffs, the money was paid over. Can it be successfully contended that, if these facts be true, a cause of action is not made out? We are not prepared to say that

the circuit judge was in error in holding that the allegations of the complaint were sufficient to set up a cause of action against the association for excessive collections, and against the bank for being an active aider, and in violation of the trust it assumed.

2. Was there a misjoinder of two separate and distinct causes of action? Section 188 of the Code of Civil Procedure declares that: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of (1) the same transaction or transactions connected with the same subject of action," etc. " \* \* \* But those causes of action so united must all belong to one of these classes, and \* \* \* must affect all the parties to the action, and not require different places of trial, and must be separately stated." Now, did the cause of action against the defendant association and the cause of action against the Bank of Cheraw arise out of "the same transaction," or "transactions connected with the same subject of action." We find that the text writers upon the construction of this seemingly simple provision have not laid down any inflexible rule to determine its meaning and application. There is no comprehensive rule, it would seem, by which cases that may arise under this section may be decided. Mr. Pomeroy, in his work on Remedies and Remedial Rights (page 487), says: "The most incongruous and dissimilar causes of action may be joined, if they arise out of the same transaction, or transactions connected with the same subject of the action." Actions arising on contract may be joined with actions arising out of tort. Pom. Rem. & Rem. Rights, § 463. It would seem that, while the causes of action must affect all the parties to a suit, it is not necessary that they should affect all of them equally, or in the same manner. It seems to us that the "transaction" out of which both causes of action arise in this case was the alleged wrongful payment by the bank to the association of the funds, or part of them, left there on deposit. The association wrongfully collected from the plaintiffs more than was due on the bond, and the bank participated in and aided such collection by paying to the association the money of the plaintiffs so deposited. The first cause of action is the wrongful collection of the money by the association from the bank; the second cause of action is the wrongful paying of the money by the bank to the association; both arising out of the same transaction, i. e. the payment and receipt of the \$1,233.43. We think there was no error in the order appealed from on this ground.

3. It is claimed that there could be no cause of action against the Bank of Cheraw until the accounts between the plaintiffs and the defendant association are adjusted. Without again repeating the facts of the trans-

action out of which this cause arises, it is sufficient to say that such contention would probably be true, if the Bank of Cheraw had not adjusted and determined for itself the amount due, and, in violation of the agreement, paid the money out to the association. The judgment of the circuit court is affirmed.

(48 S. C. 40)

STATE ex rel. SOUTHERN RY. CO. v.  
TOMPKINS, Secretary of State.

(Supreme Court of South Carolina. Nov. 25, 1896.)

FOREIGN RAILROAD COMPANIES — INCORPORATION FEES.

1. Act March 9, 1896, providing that a foreign railroad corporation, by filing a copy of its charter with the secretary of state, shall become a domestic corporation, with all the rights and liabilities thereof, does not violate Const. art. 9, § 8, prohibiting the granting of a license to a foreign corporation to build or operate a road within the state, and providing that, where a railroad is partly within the state, the owners shall first become incorporated under the laws of the state.

2. Act March 9, 1896, providing for domestication of a foreign railroad corporation by filing a copy of its charter with the secretary of the state, and paying therefor "the fees required by law," does not require payment of the charter fee, graded according to the amount of the capital stock of the charter, provided for in another act of the same date, authorizing the creation of a corporation by a board of corporators applying for and obtaining a charter from the state.

Petition of the Southern Railway Company for mandamus to D. H. Tompkins, secretary of state of South Carolina. Granted.

W. G. Henderson, J. S. Cothran, and B. L. Abney, for Southern Ry. Co. Wm. A. Barber, Atty. Gen., for secretary of state.

WITHERSPOON, Special Judge. The petitioner, the Southern Railway Company, to this court, in the exercise of its original jurisdiction, for a writ of mandamus to compel the respondent Hon. D. H. Tompkins, as secretary of state, to file in his office a copy of the charter given to the petitioner under the laws of the state of Virginia, in compliance with the provisions of an act of the legislature entitled "An act to provide the manner in which railroad companies, incorporated under the laws of other states or countries may become incorporated in this state," approved March 9, 1896. In his return the respondent admits that the relator, the Southern Railway Company, did tender to relatee, as secretary of state, to be filed in his office, as stated in the petition of relator, a duly-authenticated copy of its charter, granted by the state of Virginia, in compliance with the provisions of the act of March 9, 1896, aforesaid. The respondent also admits that he declined to receive and file in his office the copy so tendered, upon the ground that the act of March 9, 1896, is unconstitutional, being in conflict with section 8, art. 9, of the constitution of

this state, ratified December 4, 1893. If the aforesaid act of March 9, 1896, should be held to be constitutional, the respondent submits that he is entitled to the fees fixed by the ninth section of an act entitled "An act to provide for the formation of certain corporations and to define the powers thereof," also approved March 9, 1896, in addition to the fees allowed under the first section of the act first above mentioned.

It appears that the Richmond & Danville Railroad Company, organized under the laws of Virginia prior to June 30, 1894, operated, as owner and under leases, connecting lines of railroads in different states, including the lines of railroads in this state mentioned in the petition. It also appears that the said respective lines of railroads, including those mentioned in this state, were sold on or about June 30, 1894, under foreclosure proceedings, in the United States circuit court, and purchased by the bondholders, who subsequently reorganized, under a charter granted by the state of Virginia, as the Southern Railway Company, and have ever since operated said lines of railroads in different states, including the roads in this state mentioned in the relator's petition. The relator, being desirous of becoming a domestic corporation under the provisions of the act of March 9, 1896, tendered the secretary of state, an authenticated copy of its Virginia charter, to be filed in his office, and offered to pay said secretary of state \$13 fees for filing same. The secretary of state declined to file said copy in his office for the reasons stated in his return.

Section 8 of article 9 of the constitution provides: "The general assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this state, but in all cases where a railroad is to be built or operated or is now being operated, in this state and the same shall be partly in this state and partly in another state, or in other states, the owners or projectors thereof shall first become incorporated under the laws of this state; nor shall any foreign corporation or association lease or operate any railroad in this state, or purchase the same, or any interest therein. Consolidation of any railroad, lines and corporations in this state with others shall be allowed only where the consolidated company shall become a domestic corporation of this state. No general or special law shall be passed for the benefit of any foreign corporation, operating a railroad under any existing license of this state or under an existing lease, and no grant of any right or privilege and no exemption from any burden shall be made to any such foreign corporation, except upon the condition that the owners or stockholders thereof shall first organize a corporation in this state under the laws thereof, and shall thereafter operate and manage the same and the business thereof under said domestic charter." The first section of the act of March 9, 1896, entitled "An act to provide the manner in which rail-

road companies incorporated under the laws of other states or countries may become incorporated in this state," provides as follows: "That each and every railroad company or railroad corporations created or organized under or by virtue of any government other than that of this state desiring to own property or carry on business or exercise any corporate franchise in this state of any kind whatsoever shall first file in the office of the secretary of state a copy of its charter, paying therefor such fees as may be required by law and cause a copy of such charter to be recorded in the office of the register of mesne conveyance or clerk of court of common pleas in such county in which such company or corporation desires or proposes to carry on its business, or to acquire or own property. Such copy of the charter shall be authenticated in the manner directed by law for the authentication of the statutes of the state or country under whose laws such corporation is chartered or organized." The third section of said act provides that where any foreign corporation complies with the requirements of said act "it shall ipso facto become a domestic corporation, and shall enjoy the rights and be subject to the liabilities of domestic corporations, and shall be subject to the jurisdiction of this state as fully as if it were originally created under the laws of this state."

The duty imposed upon the secretary of state of filing an authenticated copy of the charter granted by another state to a railroad under the aforesaid act is ministerial; and but two questions are before the court for consideration: First, Is the act of the legislature unconstitutional? Second, If not, has the relator complied with the terms of said act? As the legislature is invested with general authority to enact such laws as do not violate the provisions of the constitution, its action is presumed to be constitutional until it is made to appear beyond a reasonable doubt that the act in question violates some provision of the state or federal constitution. When such reasonable doubt arises, it should be solved in favor of the legislative authority. What was the intention of the framers of the constitution in adopting section 8 of article 9. The main object was to require foreign railroad companies operating or seeking to operate railroads in this state to be placed on the same footing with domestic corporations as to their rights and liabilities under the jurisdiction of the state courts. The mode by which foreign corporations might become domestic corporations was left to the legislature, which could either require an application for a charter under the laws of this state or could prescribe terms upon the compliance with which a foreign corporation would be adopted as a domestic corporation. In the case of *Stout v. Railroad Co.*, 8 Fed. 793, in considering a statute of the state of Nebraska somewhat similar to the act under consideration, the court say:

'It is entirely competent for the state by its legislature to determine the mode of creating corporations within its limits, and if it sees fit to declare that a foreign corporation may become a corporation of the state by building a railroad therein, and filing a copy of its articles of incorporations with the secretary of state, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation with respect to all of its transactions within such state.' A state, by its legislature, may impose upon foreign corporations which seek to come within its limits to conduct their business the condition that they shall be subjected to the duties and obligations of domestic corporations. In short, that they shall be, when so acting within the territorial limits of the state, domestic corporations for the purpose of jurisdiction. The question whether the legislature of a state has adopted and domesticated a corporation created by another state is in every case purely a question of legislative intent. 6 Thomp. Corp. § 7890; Murfree, Foreign Corp. § 455. It was competent for the legislature of this state to provide by the act under consideration for the adoption of foreign corporations as domestic corporations, without violating the section of the constitution above quoted. The title of the act under consideration and the third section thereof clearly show that such was the intention of the legislature. Under the third section of said act, a foreign corporation complying with the provisions of said act ipso facto becomes a domestic corporation, enjoying the rights and subject to the liabilities of domestic corporations, "as fully as if it were originally created under the laws of this state." The act is a general law relating to foreign railroad corporations as a class. It grants no special rights or privileges, and does not exempt foreign corporations from any burden. We conclude that the act entitled "An act to provide the manner in which railroad companies incorporated under the laws of other states or countries may become incorporated in this state," approved March 9, 1896, is not repugnant to the provisions of section 8, art. 9, of the constitution of this state.

Has the relator complied with the terms of said act? The act provides that the foreign corporation shall pay the secretary of state, for filing a copy of its charter, "such fees as may be required by law." As this act makes no further reference to said fees, the respondent contends that he is entitled to the fees as provided under the ninth section of an act entitled "An act to provide for the formation of certain corporations and to define the powers thereof," approved March 9, 1896. Under this last-mentioned act a corporation can only be created by a board of incorporators applying for and obtaining a charter from this state. The ninth section of said act provides for a charter fee, graded

according to the amount of the capital stock of the charter granted by this state. The two acts relate to different subjects, and impose different duties upon the secretary of state. It is stated in the railroad petition that the capital stock of the Southern Railway Company exceeds \$300,000,000. It would be unreasonable to suppose that the legislature intended to exact from foreign corporations several thousand dollars as fees to the secretary of state for the mere filing in his office of a copy of the charter granted by another state in order to domesticate such foreign corporation. Such would be the case if respondent's contention be sustained. Fees are fixed and regulated by statute for services to be performed. The legislature has failed to provide for and fix this amount of the fees claimed by the respondent. We conclude that the relator, the Southern Railway Company, has complied with the terms of the statute, and the relator's petition for a writ of mandamus is granted.

GARY, J., being disqualified, did not hear this case.

(48 S. C. 55)

#### BASCOM et al. v. OCONEE COUNTY.

(Supreme Court of South Carolina. Nov. 25, 1896.)

#### COUNTIES—CONTRACT FOR BRIDGES—LIABILITY FOR PRICE.

A contract was made with the commissioners of O. county, S. C., and with the ordinary of a county in Georgia, whereby plaintiffs, who owned a bridge across the river between said counties, were to sell them the bridge jointly, each county to pay for a one-half interest, provided a road in O. county leading to the bridge could be established as a public highway. At a meeting of the O. board, the commissioners refused to make the road public, there being opposition to its establishment; but said board subsequently joined in a petition to the legislature, then in session, and upon this petition an act was passed authorizing and requiring the board to establish such road as a public highway. Held, that the passage of such act was a substantial compliance with the condition of the executory contract, and entitled plaintiffs to recover from O. county its share of the agreed price to be paid for the bridge. McIver, C. J., and Jones, J., dissenting, on the ground that the contract of the commissioners was ultra vires.

Appeal from common pleas circuit court of Oconee county; W. C. Benet, Judge.

Claim by H. M. Bascom and others against Oconee county for money alleged to be due on a contract with the board of county commissioners for the purchase of a part interest in a bridge. A judgment of the board refusing to audit the claim was reversed on appeal to the circuit court, and defendant appeals. Affirmed by a divided court.

J. R. Earle, for appellant. Jaynes & Shelor, for respondents.

POPE, J. The separate opinion of Mr. Justice JONES has so fully stated the his-

tory of the facts underlying the contention here involved that I deem it unnecessary to restate them. I have been unable to agree that the principles of law laid down in the separate opinion are applicable and controlling in this contention, though I am free to confess that they are sound in themselves and strongly stated. My difficulty lies in the fact that no such questions were agreed upon before Judge Benet, who heard the case on the circuit, nor have such views been prescribed to this court. While I recognize the power in this court to suggest questions of jurisdiction of our own motion, I do not regard the case at bar as calling upon us to exercise such power. The contention, as made, has largely consisted in the question of law and fact growing out of an allegation by one party that the board of county commissioners of Oconee county had made their contract for the purchase of the bridge from the plaintiffs to depend upon their ability, under the law, to open, as a public road, the road to this bridge and that, when opposition was offered thereto by some of the citizens of Oconee county, their contract to purchase the bridge was declared by them rescinded. On the other hand, it was alleged by the plaintiffs that the said board of county commissioners prevailed upon them to open the bridge to the free use by the public, which has never been changed, and also that the said board applied to the legislature to grant them power to open, as a public road, a road that already existed, and that this power was granted by the general assembly. About this phase of the contention testimony was offered by both sides to the controversy and agreement had. And that this issue was decided by the circuit judge in favor of the plaintiffs. This is now a public road and a public bridge, and used as such by the citizens of this state and the state of Georgia. It is no longer a question of power to open a road or build a bridge, for the road is open and the bridge is built. The serious question is, who shall pay for this public benefit? Shall the plaintiffs be made to do so, or shall the people of Oconee county do so? The very act of the general assembly not only authorizes, but directs, the county commissioners of Oconee to open up the road to the New Bridge as a public road. It seems to me that the county of Oconee is now estopped to deny this contract. But I hold that the questions of law discussed in the separate opinion of Mr. Justice JONES are not involved here. In these views Mr. Justice GARY concurs, while Mr. Chief Justice McIVER and Mr. Justice JONES do not concur; and, as it is provided in the present constitution of this state that, when there is an equal division of the members of the court, the circuit court judgment is affirmed, therefore, it is the judgment of this court that the judgment of the circuit court stand affirmed, under the constitution of this state.

GARY, J. (concurring). The question of jurisdiction in this case is based on the ground that the action of the board of county commissioners of Oconee county, in entering into the agreement with the plaintiffs relative to the bridge, was ultra vires, and not a lack of jurisdiction on the part of the authorities of Oconee county to adjudicate plaintiff's claim; therefore, there is doubt whether the question of jurisdiction is properly before this court for consideration. But, waiving such objection, we will proceed to show briefly why, in our opinion, said action of the board of county commissioners was not ultra vires. A familiar maxim of law is, "Omnia præsuntur rite esse acta," and the presumption is that the action of the board in entering into said agreement was proper and right. It is also to be presumed, until the contrary is made to appear, that officers, in acting officially, had before them such facts as justify their action. There was no testimony offered for the purpose of showing that Chattooga river was not a navigable stream, and, if it is necessary to presume that it was navigable, so as to show that the action of the board was valid and legal, it certainly is in the interest of the orderly administration of justice to make such presumption, and it will be made. It is also but a matter of justice to the board to presume that it intended to purchase that half of the bridge lying within the territorial limits of Oconee county, if it can be shown that one-half of said bridge lies within such territorial limits and is over a highway. We will now attempt to shew, in view of these presumptions, (1) that by reason of the fact that the bridge was built over the Chattooga river, in Oconee county, where the river is the dividing line between this state and Georgia, one-half of said river was within the territorial limits of Oconee county; and (2) that so much of said bridge as covered that part of the river within the territorial limits of Oconee county was the subject of agreement, within the powers and jurisdiction of said board.

At the time when said agreement was made the following statutory provisions were in force: Section 1, Gen. St. 1882: "From the state of Georgia, South Carolina is divided \* \* \* by the Chattooga river, to the North Carolina line, \* \* \* the line being low-water mark at the southern shore of the most northern stream of said rivers, where the middle of the river is broken by islands; and middle thread of the stream where the rivers flow in one stream or volume." Section 802, Id.: "County commissioners, elected in pursuance of section 19, of article 4, of the constitution, shall have jurisdiction over roads, highways, ferries, and bridges, and all matters relating to taxes and disbursements of money for county purposes, in accordance with the provisions of law, and in every other case that may be necessary to the internal improvement and local concerns in their respective coun-

ties." In construing section 19, art. 4, of the constitution in connection with section 1062 of the General Statutes of 1882, hereinafter mentioned, the court, in *Walpole v. City Council*, 32 S. C. 554, 11 S. E. 393, said: "Under these provisions, we cannot doubt that the county commissioners of Charleston county have exclusive jurisdiction over all the highways, ferries, bridges, and cuts, which are within the territorial limits of the county, and that the joint resolution of 1885, appointing the plaintiffs commissioners of Newtown cut, was inconsistent with that jurisdiction, so far as it affected Charleston county, and was, therefore, unconstitutional and void." Section 1096, Gen. St. 1882: "The county commissioners of the several counties of this state, shall have and exercise the same powers over the navigable streams, water-courses, and cuts within the limits of their respective counties, as they have over the highways and bridges therein," etc. Section 1097, Id.: "The said navigable streams, water-courses, and cuts, shall be taken and deemed as highways, and the superintendent of highways, appointed for the several highway districts, shall take charge of and keep the same in repair at all times." Section 1062, Id.: "All streams which have been rendered or can hereafter be rendered capable of being navigated by rafts of lumber or timber by the removal therefrom of accidental obstructions, and all navigable water-courses and cuts, are hereby declared navigable streams, and such streams shall be common highways, and forever free, as well to the inhabitants of this state as to the citizens of the United States." The foregoing authorities satisfy us that the river where the bridge was built was a highway; that the bridge was built where the river was partly within the territorial limits of Oconee county; that so much of the bridge, to wit, one-half, was within the exclusive jurisdiction of the county commissioners of Oconee; and that the agreement touching the purchase thereof was not *ultra vires*. I therefore concur in the opinion of Mr. Justice POPE that the judgment of the circuit court should be affirmed.

JONES, J. (dissenting). This is an action commenced before the county board of commissioners for Oconee county on a claim for \$400 for one-half interest in a bridge called "New Bridge" near W. G. Russell's, over Chattooga river, the boundary between Oconee county, S. C., and Rabun county, Ga. The claim was filed with the board for audit April 1, 1896; and the matter came up for hearing before the board July 22, 1896. The claim is based upon an alleged contract, made April 12, 1894, between the plaintiffs, the owners of the bridge, on the one part, and the then county commissioners of Oconee county and the ordinary of Rabun county, Ga., on the other part. After hearing evidence on both sides the county board refused to audit the claim. The claimants appealed to the circuit

court, and his honor, Judge Benet, reversed the judgment of the county board, and ordered the board to audit said account, and to pay the same out of proper funds for the fiscal year of 1894-95. His honor found, as matter of fact: "That on the 12th day of April, 1894, there was a meeting, at the bridge, by and between the plaintiffs, representing themselves and other owners and stockholders of said bridge, and J. M. Hunnicut, J. L. Reeder, and Nathaniel Phillips, the then county commissioners of Oconee county, S. C., and F. A. Bleckley, ordinary of Rabun county, in the state of Georgia. The purpose of the meeting was to treat with each other concerning the purchase from plaintiffs of said bridge by the counties of Rabun, Ga., and Oconee, S. C. The bridge had been built by plaintiffs as a private enterprise, and was just nearing completion at that time. But it had been suggested to plaintiffs that the public ought to have the use of the bridge, and it was proposed that the counties of Rabun and Oconee buy it from the owners, and open the bridge to the public travel. It appears that the parties came to an agreement for the sale by plaintiffs to the said counties, jointly, for the sum of \$800, each county to pay \$400 for a half interest therein, provided the road leading from the public highway at Mill creek to the New Bridge could be established as a public highway." It seems that, after the alleged contract of April 12, 1894, some steps were taken to establish the said road as a public road, but it does not appear in the record whether compliance was made with the statute regulating the opening of new roads. At any rate, it seems that, at a meeting of the board in August, 1894, the time fixed for the hearing and consideration of the matter of establishing said road as a public road, there was opposition to the establishment of the road, and the board refused to make the road a public road. At this meeting, Mr. Hunnicut, a member of the board, in the presence of Mr. W. G. Russell, one of the representatives of the bridge owners, said to the board, "That ends it, as it is out of our jurisdiction to go any further under the law." So far as the record shows, no appeal was taken from this action of the board. On December 4, 1894, the board of county commissioners joined with other citizens in a petition to the legislature, then in session, to empower the county commissioners to open and make public said road, and on December 24, 1894, an act was approved, authorizing and requiring "the county board of commissioners to open and establish as a public highway the road leading from the public highway at Mill creek to the Chattooga river at New Bridge near W. G. Russell's in said county" (Oconee). It does not appear that any action has been taken under this act by the county board of commissioners. The circuit court held "that the testimony, both on the part of the plaintiffs and defendant, establishes an executory contract with a condi-

tion precedent, the condition being the opening and establishing of a road from Mill creek to the New Bridge as a public highway. It is claimed, on the part of the defendant, that this condition failed because the said road was not established as a highway by the former board of county commissioners, but that it was made a public road by the legislature by act approved December 24, 1894, and the latter was not a compliance with the condition contained in said executory contract. I do not think this position is tenable, for the reason that the establishment of said road as a public highway by the legislature on petition of the former board of county commissioners is a substantial compliance with the condition contained in said contract of purchase."

The defendant appeals, alleging six grounds of error; but we will not consider the first, second, third, fourth, and fifth exceptions, as they relate, either in whole or in part, to alleged errors in findings of fact; but we will proceed to consider at once the real and serious ground of appeal. The sixth exception alleges error in the circuit court decree on the ground "that the subject-matter of the agreement was not within the jurisdiction of the county commissioners, not being on a public highway." This is, substantially, as we understand it, the ground upon which the county board refused to audit the claim. In the report of the case to the circuit court the board said "that the plaintiffs had failed to establish any contract on the part of Oconee county, of the proper authorities of same, to bind this board to audit the claim." In other words, the question is raised as to whether the old board of county commissioners had power to make the contract relied on by plaintiffs. It is well settled that whoever deals with the agents of a municipal corporation must, at his own peril, take notice of the limits of the powers of the corporation and its agents. Mr. Dillon, in his work on Municipal Corporations (3d Ed., § 457), says: "The general principle of law is settled beyond controversy, that the agents, officers, or even city council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which, not being in terms authorized, is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators. The officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statutes or charter, which all persons not only may know but are bound to know. \* \* \* It results, from this doctrine, that unauthorized contracts are void, and, in actions thereon, the corporation may successfully interpose the plea of ultra vires, setting up as a defense its own want of power under its charter, or constituent statute, to enter into the contract." This is a sound defense, even against municipal bonds in the hands of innocent parties, and no acts of the agents of the corpora-

tion will estop the corporation from disputing their validity. *Feldman v. City Council*, 23 S. C. 69. This principle was applied in the case of *Hill v. Laurens Co.*, 34 S. C. 144, 18 S. E. 318, where, in a suit against the county for damages for injury sustained while traveling along the alleged highway, it appeared that the alleged highway, where the injury occurred, was a bend or departure from the regular highway, cut out by the overseer, at the instance of neighbors, to avoid a rough place. It was held that the injury did not occur on a public highway; that the overseer made the change in the road without authority, the act regulating the laying out of roads or changing an old road not having been complied with; and that the county of Laurens was not bound by the unauthorized action of the overseer, even though the county commissioners approved the change in the road.

Now, what was the power of the county commissioners of Oconee county, April 12, 1894, as to the purchase of a new bridge over Chattooga river, which is one of the boundaries between this state and Georgia, the bridge not being on any public highway within Oconee county? Rev. St. 1898, § 645, gives the county supervisors general jurisdiction over all public highways, roads, bridges, ferries, etc., in their respective counties. This is substantially the provision as to county commissioners in section 602, Gen. St. 1882, in force April 12, 1894, since the new county government act took effect January 1, 1896. They were required to take charge of and repair the highways in the county. Gen. St. 1882, § 618. They were authorized and empowered to have special supervision of the building of new bridges over the rivers and creeks of this state. Id. § 1094. If any bridge over waters of this state which constitute a boundary line between counties in this state is necessary, provision is expressly made how it is to be done, how the expense is to be paid, and how the bridge is to be thereafter maintained. Id. We find nothing in the statutes giving county commissioners power to buy or build bridges over rivers separating this state from another state, and it is impossible to suppose that the legislature meant to confer such power, without some express provision to that effect, when it is as explicit as to building bridges over streams separating counties in this state. Nor can such power be inferred from a grant of general jurisdiction over highways and bridges within their respective counties. But, besides this, the bridge sought to be purchased was not on any public highway at the time of the contract set up in this case, and, for all that appears, is not on any highway now, since it does not appear that action making this road a public road has been taken by the county authorities of Oconee under the act of December 24, 1894, above referred to. It seems too clear for argument that county commissioners had and have no power to buy a private bridge on a private road. This road had been discontinued as a public road pursuant to an act of the legislature approved December 4, 1882.

We cannot assent to the proposition that the

county commissioners, on April 12, 1894, had power to make an executory contract as to the purchase of a bridge not part of a highway or public road within Oconee county, conditioned on their establishing a public road to the bridge, for two sufficient reasons—First, for want of statutory authority to buy or build a bridge not a part of a highway within their county, or not a part of a highway leading from their county to another in this state; and, second, because it would be contrary to public policy to sustain such a contract. The duty of county commissioners to hear and determine a petition for the opening of a public road, upon evidence submitted for and against the application, pursuant to the statute (Section 1172, Rev. St. 1893), is of a judicial nature. The impartiality and freedom from bias or prejudice which should characterize tribunals established to hear and determine issues would be destroyed or endangered if the board or court charged with this duty were permitted to make contracts conditioned upon their own judicial acts. The alleged contract was ultra vires, and Oconee county is not bound thereby. While thus vindicating a sound and salutary principle of law, we are gratified that no harm is done to the plaintiffs. They still own their bridge, which they built as a private enterprise, and such use as the public has made of the bridge since the time of the alleged contract was with their full consent, which, as owners, they had a perfect right to give or withhold, as they saw fit. For these reasons I think that the judgment of the circuit court should be reversed, and that the judgment of the county board of commissioners for Oconee county should be affirmed.

McIVER, C. J., concurs.

(98 Ga. 599)

CHATTANOOGA, R. & C. R. CO. v.  
WARTHEN.

(Supreme Court of Georgia. June 18, 1896.)

RAILROADS—SUBSCRIPTIONS—ASSIGNMENT—CONDITIONS—PAROL EVIDENCE—FRAUD—AMENDMENT OF CHARTER—CHANGE OF ROUTE—RECEIVERS—STOCK—DELIVERY.

1. A subscription to the capital stock of a railroad company, being a chose in action, and assignable, the assignee can enforce its payment under any circumstances where the company could do so. The question of the defendant's liability in the present case is dealt with as if the action had been brought by the company for its own benefit, instead of for the use of the assignee.

2. A written contract of subscription to the capital stock of a railroad company, which provides that it shall be null and void "unless the main line of said railroad, when built, shall pass through the corporate limits" of a named town, confers upon the company the right to construct the road upon any line or route through the town.

3. Though it may have been the right of the defendant against whom an action was brought upon such a contract to plead that the company had agreed with him to locate and build its railroad upon a specified and described route through the town, but had failed to do so,

building it instead upon another and different route within the corporate limits, the defense thus made could not be supported by parol evidence of conversations or interviews had with the company's officers or agents before the execution of the contract, such evidence being inadmissible to contradict, vary, or explain the written instrument, which, as to this matter, was plain and unambiguous.

4. Mere statements or promises by the company's officers or agents, made before the contract of subscription was signed, to the effect that the railroad would be built upon a certain line, and a failure to so build it after the contract was executed, would not constitute a fraud upon the subscriber, or afford him any ground for avoiding payment, there being no contention that anything was omitted from the writing which was intended to be inserted therein. In the present case, there was no evidence of any fraud whatever.

5. The subscription being payable to the railroad company, "its associates, successors, or assigns," and it having the right, under its charter, to sell all its property and franchises to any other railroad company, it was the right of the subscriber, in case of such sale, and upon payment of his subscription thereafter, to receive stock in the successor company; and, even were it otherwise, if such a sale was made, and afterwards rescinded, it would count for nothing upon the question of the subscriber's liability.

6. Where the company's property and franchises had been placed in the hands of a receiver, a delivery by the latter of the stock upon payment of the subscription would be valid; and it was competent for the plaintiff, whose use held the subscription contract under successive assignments, to prove that the stock was ready for delivery, and would be delivered on payment for the same. That the stock had no value was immaterial.

7. Although a legislative amendment to the charter of a railroad company may contain provisions making radical and material changes therein, this affords no reason for avoiding payment of a stock subscription when there is no evidence that this amendment was ever accepted or acted upon by the company; and especially is this so when it appears that, before the trial of the action, this amendment had by its own terms become inoperative.

8. Where a railroad company, by its existing charter, had authority to build numerous, important, and costly extensions, and to construct branch lines without limit as to number, provided no one of them should exceed 20 miles in length, its acceptance, under the act of December 29, 1890, of the provisions of sections 16391-16399 of the Code was not such a variation of its charter as would release a subscriber for its stock from his contract to pay for the same. Section 1639m would not authorize the removal of a railroad track already constructed in a town entirely beyond the corporate limits thereof.

9. In so far as the trial judge, in his rulings upon demurrers to pleas, in admitting or rejecting evidence, or in charging the jury, failed to conform to what is above announced, error was committed. The next trial should be had in accord with what is here laid down as the law applicable to this case.

(Syllabus by the Court.)

Error from superior court, Walker county; T. W. Milner, Judge.

Action by the Chattanooga, Rome & Columbus Railroad Company, for the use of J. U. Jackson, against N. G. Warthen, on a subscription to stock. On defendant's death, S. M. Warthen, administrator, was substituted. From a judgment for defendant, plaintiff brings error. Reversed.

The following is the official report:

The plaintiff by its petition alleged: N. G. Warthen is indebted to Jackson \$2,900, besides interest, upon a written promise to pay the same, copy of which is attached. Warthen therein subscribed \$2,900, being the par value of 29 shares of the capital stock of the Chattanooga, Rome & Columbus Railroad Company, and promised to pay the same, as set forth in said contract. Other citizens also signed the contract, agreeing to pay other and various amounts set opposite their names. The Chattanooga, Rome & Columbus Railroad Company, formerly the Rome & Carrollton Railroad Company, for value received, transferred and assigned said contract and subscription to C. M. Hillman, in writing, who afterwards transferred and assigned the same, for a valuable consideration, to the Rome & Carrollton Construction Company, a corporation duly incorporated under the laws of Connecticut, which, on February 13, 1891, being in embarrassed circumstances, in pursuance of the statutes of Connecticut made an assignment for the benefit of its creditors to E. T. McDonald, trustee. On February 20, 1892, the latter was duly authorized to sell and transfer said contract, along with other property of the construction company, by the court of probate for the district of Stamford, Conn., which court had jurisdiction of said matters. On March 30, 1892, in pursuance of said authority, he sold the same at public auction, and on the same day, in writing, transferred and assigned the same to J. F. Underhill, the highest bidder, for \$150. On June 24, 1892, in writing, Underhill for a valuable consideration transferred and assigned said contract to Jackson. The main line of the said railroad company was built, and passes through the town of Lafayette and the corporate limits thereof. In June, 1888, the cars commenced running from a point at or near Rome, through the counties mentioned in said contract, to Chattanooga, Tenn., over a road built by said company. Defendant refused to pay 25 per cent. of said sum subscribed by him upon November 15, 1888, or to give his notes for the remaining 75 per cent., one-third of which to become due every six months after November 15, 1888, and continues to refuse to pay said sums, or any part thereof, or to give his notes therefor, although duly demanded. Said railroad company complied with every condition precedent in the contract, in accordance with the terms thereof, and stood and stands ready to comply with all other conditions therein specified. It appears, from the exhibit attached, that Warthen subscribed for 29 shares of the capital stock of the railroad company, "said shares being of the par value of \$100 each, and on the 15th day of November, after the cars commenced running from a point at or near the city of Rome, Ga.," through certain counties named, to Chattanooga, Tenn., "over a road built by said company, we promise to pay to said company, its associates, successors, or assigns, 25 per cent. of our sub-

scription in cash, and will at the same time give our several individual promissory notes for the remaining 75 per cent., one-third of which shall become due every six months after said 15th day of November. \* \* \* And when any subscription is fully paid the subscriber shall be entitled to a certificate of stock in said company, upon the basis of the capital stock of the company as then fixed and existing at the time of said full payment: Provided, however, that each subscription hereto shall be null and void, and of no force or effect whatever, unless the main line of said railroad, when built, shall pass through the corporate limits of the town of Lafayette, Georgia; and provided, further, that these subscriptions are in lieu of all other subscriptions heretofore made by us to the stock of said company." Defendant filed a general denial of the allegations of the declaration, and also nine special pleas. Plaintiff demurred to these nine pleas, and the pleas numbered 2 and 3 were stricken, but the demurrer was overruled as to the other pleas. To the refusal to strike said other pleas plaintiff excepted pendente lite, and as to it assigns error in its final bill of exceptions.

The pleas not stricken were as follows: "(1) The subscription was to be null and void unless the main line of the railroad, when built, should pass through the corporate limits of Lafayette. This condition was not complied with, and the railroad does not pass through the corporate limits, as understood and agreed to by defendant. It was understood and agreed by and between the railroad company and the defendant that the railroad should be built upon the grade of an old railroad which passes near the center of the town, and the condition above quoted was understood and agreed upon by the parties as meaning that the road should be located upon said old grade, or upon a line equally near the center of the town. The road was constructed outside the corporate limits, or, if within the limits, upon the very edge thereof, and this was only a colorable compliance with said conditions, and fraudulent, and in violation of the terms of said agreement and subscription, and this fraudulent conduct of the railroad company releases defendant." "(4) After the alleged transfer by Hillman to said construction company, said construction company, by its contract and agreement with the railroad company for the building and equipment of said railroad, had the sole and exclusive right and power granted it by said railroad company to locate the railroad at such place or places as it (the construction company) saw proper. After having this right so given it, and after the alleged transfer by Hillman, the construction company contracted with Robert Daugherty and A. L. Snow that the main line of the railroad should be located in the extreme western limits of the town, or without the limits of the town, for a valuable consideration, and this contract was made to defraud defendant, and to build up a sec-

tion not then included in the corporate limits, and to lessen the market value of defendant's property, which was located centrally and east of the town. By this contract the construction company became the owners of fifty-five one-hundredths of about 300 acres immediately west of the town, and half of 350 acres south of the first tract, worth some \$25,000. The construction company, wholly regardless of defendant's right under the contract sued on, located its line on the property west of the town, thereby fraudulently and knowingly violating [the contract sued on] and damaging defendant \$5,000. By reason of said location he is put to great inconvenience, and is damaged by the reduction in the market value of his property. (5) The subscription sued on is conditional upon the railroad company issuing to him stock, in the sum of \$100 per share, to the amount of \$2,900, when the subscription is paid and at the time of its payment. The contract sued on is for the purchase of stock, and no other consideration, except as above set forth. On May 5, 1891, the railroad company, by proper deed, made in pursuance of a directors' meeting and stockholders' meeting, sold and conveyed to the Savannah & Western Railroad Company, a Georgia corporation, its entire line of road and all its property, including its franchises, for a valuable consideration, and said railroad company has no rightful or legal existence, and cannot now issue its stock, having sold and conveyed the same as aforesaid, and there is now in fact and in law no longer any such corporation. (6) Since the subscription was made the railroad company has procured an amendment to its charter, materially and fraudulently altering the charter, by legislative act of September 26, 1888, authorizing it to extend its road to Atlanta, Augusta, Macon, and Savannah, and to increase its capital stock to \$15,000,000, to none of which changes of charter did defendant agree, having no knowledge of such change of charter until long after its procurement. He does not agree to any of said changes, or to any other amendment to the charter, and is released from his subscription by reason of said radical changes of charter. (7) [Since] the time the subscription was made said railroad company has procured an amendment to its charter, materially and fraudulently altering the charter. About March 2, 1891, it procured an amendment to the charter under the general law for amendments of railroad charters of December 29, 1890, authorizing and empowering the railroad company to increase its stock to any amount deemed proper by it, extend its line to any point in the state it may desire, change the route thereof, make contracts with other roads, sell its property and franchises to other roads, purchase other roads, and build branch roads from said railroad to any point. To none of these changes of charter did defendant agree, having no knowledge thereof until long after their procurement, and he does not agree thereto, or to any other amendment of

the charter, and he is thereby released from said subscription. (8) The clause in the original subscription, containing the condition that the main line should pass through the corporate limits of Lafayette, was before and at the time defendant subscribed definitely and positively understood to mean, both by defendant and the railroad company, that the railroad would be built on what is known as the 'Old Railroad Bed,' west of the courthouse in said town, and east of the present line of the railroad, as built by the Chattanooga, Rome & Columbus Railroad Company. It was distinctly understood at the time that a definite description of location of the railroad would put defendant and others who had guaranteed the right of way to said road to greater expense than to leave the exact location indefinite, and defendant signed the subscription with the positive understanding and agreement that the road would be constructed on said old railroad bed, and he would not have made the subscription if he had not been so assured. In the location of the railroad by said town he was misled and deceived by the railroad company. He acted on said agreement, made as above stated, and was deceived, in that the railroad company did not follow the old roadbed, but constructed its road, for its own benefit, and to his injury, and in defiance of said original contract and agreement, several hundred yards further west from the old railroad bed and from the town, where defendant then and now resides, and then and now owns property. The railroad company fraudulently concealed its real purpose, in that it and its promoters, after leading defendant to believe that it would come through the town on the old railroad bed, and after deceiving him as to the real purpose in leaving the location in the original subscription doubtful and indefinite, as above stated, adopted the other route mentioned above, to which defendant then objected. He was deceived and defrauded, in that he acted upon the representation that the clause meant, and was understood to mean by both parties at the time of signing the contract, that the railroad would be constructed on the old railroad bed. The railroad company did not at the time intend to so construct the railroad, but, in order to deceive and defraud defendant, left the location indefinite, as above stated. He had confidence in said company, confided in said representations, and was induced thereby to subscribe, by which he was defrauded. (9) The stock subscription was never legally transferred to Hillman nor to the construction company, and the transfer could not legally be made, separate and apart from the conveyance of the property upon which the stock is based, and which is represented by the stock of the company. Whoever holds and seeks to enforce said subscription, must be in condition to comply with the terms of the subscription, and able to issue and furnish the stock subscribed for. This Jackson cannot do, nor can the railroad. It has parted

with its property and franchises; and cannot now issue the stock certificates. If it could now issue the stock it would be valueless. The railroad company has parted with all its property, and rendered any stock now issued by it wholly valueless, and cannot comply with its obligation; and the railroad company is now insolvent, and cannot respond in damages to defendant for failure to comply with its contract, if he be compelled to pay the subscription. The railroad company and all its property and franchises are in the hands of a receiver, and it cannot now deliver certificates of stock to defendant, or anything else of value, in accordance with the terms of the stock subscription."

The demurrer to the pleas was on the following grounds: To the first plea because it set forth no sufficient and valid defense, and also specially to strike therefrom all words relating to an old grade, or a line equally near the center of the town, on the ground that it seeks to ingraft a parol condition upon a written contract; also, all portions of said plea except the allegation that the main line does not pass through the corporate limits of Lafayette. To plea No. 4 generally, and especially because it does not set forth clearly and distinctly wherein the alleged contract affects defendant's interests, nor that said contract was not perfectly consistent with its obligation to defendant to locate the road so that the main line would pass through the corporate limits of Lafayette, nor does the plea allege wherein or how the railroad company was under contract or obligation to build the road for the benefit of defendant's property. To plea No. 6 generally; and because the condition to issue a certificate of stock is a condition subsequent, and not to be performed until full payment of the sum subscribed, and after payment defendant has his remedy against the Chattanooga, Rome & Columbus Railroad Company, and not by defense against plaintiff, who is a transferee; and because defendant does not allege whether said railroad company had authority to sell its road or not. If it had such authority in its charter prior to defendant's subscription, defendant is barred by its acts, and, if it was wrongfully sold them, it is a nullity, and cannot be pleaded against plaintiff's right of action; and because said plea does not allege that defendant did not acquiesce in the sale, nor what his knowledge or conduct touching the sale was; and because it appears that said sale was long subsequent to the transfer of the contract sued on, and to the time when said subscription was due, to wit, November, 1888, and cannot affect plaintiff Jackson's right of action. To plea No. 6 generally; and because it is not alleged that said amendment was ever accepted by the railroad company, or acted upon, nor that 10 miles of the same have ever been built, nor that defendant did not acquiesce in said amendment; also, because said amendment was passed after the transfer by the railroad company of the contract sued on, and cannot

affect Jackson, the plaintiff. To plea No. 7 generally; and because said amendment is not alleged to have been accepted by all the stockholders of the railroad company, nor that any act has been done by virtue of said amendment that could not have been done under its original charter; also, because the amendment was granted long after the transfer of the contract sued upon, and does not affect rights of plaintiff. To the eighth plea, on the same grounds as were set forth in reference to the first plea, and to the eighth plea generally. To the ninth plea generally, and specially because the value of the stock is immaterial.

There was a verdict for the defendant, and plaintiff's motion for a new trial being overruled, it excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the verdict fails to specify the plea or pleas of defendant upon which the jury found the same, defendant having filed six special pleas.

Error in charging: "If you find that he, the defendant, was by any fraudulent representations induced to sign the subscription list, then he would not be bound by it. Fraud vitiates all contracts, and it vitiates this contract." Alleged to be error, because without evidence to warrant it, and because a mere general statement which did not elucidate any issue in the case; further, because the contract was clear and without ambiguity, and it was the duty of the court to construe it, and not leave its construction to the jury.

Error in charging: "If you find, on the other hand, that he signed this contract with his eyes open, with a full knowledge of the terms of the contract, and understood what it meant, and there was no fraud practiced on him at the time he signed, then parol evidence and evidence going to show what the contract was, not on its face, would not be admissible for changing or altering its terms." Alleged to be error, because the contract was clear and unambiguous, and it was the duty of the court to interpret it, and it was error to admit a mass of testimony, and then leave it to the jury to say whether the circumstances justified the alteration of the plain statement of the contract; further, because there was no testimony to warrant it; further, because, before the contract could be altered, it must appear from the evidence that some material matter was omitted therefrom by fraud, accident, or mistake, or there must have been fraud in the procurement of the contract. Plaintiff contends that the court did not here, nor elsewhere in this charge, fully submit this issue to the jury. The court should have told the jury that, before this contract could be set aside for fraud in its procurement, it must have appeared that material representations were made by the railroad company or its authorized agent to defendant before he signed the contract; that said representations were relied upon, and deceived defendant; and that said representations, if of a future undertaking, must have been falsely and deceitfully

made by said agent, knowing at the time that they had no intention of carrying out such representations.

Error in charging: "If you find that there was no fraud acting on Warthen at the time he signed the contract, but it was stated to him, and so he would understand it, and if there was no fraud in it, and the other party did not make it for the purpose of deceiving, that the road was to be located on the old grade located in the corporate limits,—as I stated, if you find that there was no such false and fraudulent statement of that sort, and Warthen signed the contract with the understanding that that was the contract, if he did not see that that contract did not express that,—it would not be such a contract as to allow parol testimony to come in for the purpose of adding to or varying the terms of the contract." Alleged to be error, for the reasons stated in the ground last above; also, because it left the jury to say when a contract could be changed by parol evidence, and because it gave them no clear and distinct rule of law governing such cases; further, because it allowed the jury to set aside the contract unless defendant understood it, and made the binding force of it conditional upon his understanding its terms.

Because the court failed fully and correctly to charge the law on the subject of fraudulent representation, in this: He failed to tell the jury that no condition not expressed in the contract could be ingrafted thereon by verbal testimony, unless it appears to have been omitted by fraud, accident, or mistake. He failed to charge them that, if defendant sought to set aside the contract upon the ground that he had been deceived into signing it, it must appear that representations of material matters were falsely made to deceive the defendant, and if of matters not then in existence, but to be undertaken in the future, they must have been deceitfully made, and solely for the purpose of inducing defendant to sign the contract, the agent making them knowing at the time that the company did not intend to comply with them. To charge otherwise was, in effect, to allow parol testimony to vary a written contract.

Error in refusing to strike the first special plea, and in allowing evidence thereunder, because it sought to ingraft a parol condition upon a written contract and substitute the understanding of one of the parties for the plain provisions of the contract, and for the reasons set forth in the demurrer.

Error in refusing to strike the fourth special plea for the reasons set forth in the demurrer; and because, even if a fraud, it could not be set up against plaintiff Jackson; also, because, in effect, it sought to ingraft a new condition upon the contract.

Error in refusing to strike plea No. 8, upon the grounds urged in the demurrer; also, because the first part of said plea is an effort to alter the plain written conditions of the contract, and therefore invalid; and because

the second part of the plea seeks to allege fraud, and on its face shows that each party to the alleged understanding was equally guilty of an understanding to deceive other third persons.

Error in charging: "If you believe that, after the defendant's subscription for the stock of the railroad company, the charter of the company was by an agreement materially, fraudulently, and radically changed, without the consent of the subscriber, he is released from his subscription." Alleged to be error (1) because the court ignored the hypothesis of James U. Jackson, transferee, being an innocent holder, and that nothing that was done subsequent to the transfer of said contract could affect it; (2) because the contract itself contemplated certain changes; (3) because James U. Jackson, and those under whom he claims, were, and stood in the place of, creditors of the railroad company, and this defense was not available against him; (4) because all the changes made were contemplated by the contract, or by the charter as it stood at the time of signing subscription, and, if not, then such changes, amendments, etc., were unauthorized and void, and they would not avail as a defense.

Error in charging: "If you find that by any such amendment the company was authorized to extend its road or branches thereof to any point or points to which they [could not] under the charter as it existed when the subscription was made, or if it could increase its capital stock beyond the amount it was limited to under the charter as it existed at the time the subscription was made, such enlarged powers would be a material, fundamental, or radical change." Alleged to be error, because these amendments and changes were not an available defense against James U. Jackson and those under whom he held, he and they being creditors and also innocent holders. Said charge neither here nor elsewhere made any exception to said Jackson as an innocent holder, or as a creditor, or upon a like footing. Also, because said contract of subscription contemplated a change in the capital stock to any extent. Also, because the court should have limited said charge, and told the jury that it would not avail unless said change, either by extending its road, or by a change in capital stock not warranted by its existing charter, was and had been actually made. This charge was error because, under the powers existing at the date of contract of subscription, said company could increase its capital stock to not exceeding \$10,000,000. The evidence shows it was never increased beyond \$2,800,000; that, in fact, said road was never extended, after being completed as provided for in the contract of subscription and its then existing charter. This was error, also, because, if any fundamental change, either as to increase of capital stock or extension, was allowed, it was

vold as against the subscriber, and he could not set aside the same, and could not avail himself of it as a defense. Also, because there was no evidence to warrant it. The amendment of 1888 was never authorized nor accepted, and lapsed by its own terms and limitations because no extensions at all were made under it. The acceptance of the general law was illegal and invalid because not accepted by all the stockholders unanimously. Moreover, under the law as it existed railroad companies could not extend their lines in any direction without amendment to their charters.

Error in charging: "Now, you will find whether the Chattanooga, Rome & Columbus Railroad Company accepted the general railroad law as an amendment to its charter since the defendant subscribed for the stock, and without his consent. If the company did so accept the general law as an amendment to its charter, and if you find that the power of the company to extend its road beyond point or to other points not authorized by its charter, as it existed on the 4th of September, 1887, was given by this general law, then the subscriber is released." Alleged to be error, because the court had previously told the jury that the general law authorized the railroad company to extend its line from any point named in its charter, and also increase its stock to any amount. This, in effect, directed the jury to find for defendant if they believed the Chattanooga, Rome & Columbus Railroad Company had accepted the general law. This was error, because, under the law and its charter, said company already had these powers; also, because, even if fundamental changes, they could not be pleaded against a creditor or an innocent transferee; also, because of the reasons set forth in the ground last above.

Error in charging: "You will find in evidence an act approved the 26th of December, 1888, as an amendment to its charter. You will determine by the evidence whether that amendment was accepted by the railroad company. If it was, then see whether that amendment authorized the company to extend its road to a point or points to which they could not extend it under the charter as it existed when the defendant subscribed for the stock; and, if the defendant did not consent to such amendment, then the subscriber will be released." Alleged to be error, because this defense could not avail against J. U. Jackson, transferee, nor against his assignors, because he and they were innocent purchasers and creditors of the Chattanooga, Rome & Columbus Railroad Company; also, because the evidence did not warrant such charge, the evidence showing conclusively that no such amendment was authorized or accepted or acted upon by the Chattanooga, Rome & Columbus Railroad Company; and also, because said amendment, if ever in force, had lapsed before the trial of said case, by reason of the failure to

build any portion of the extension contemplated within ——— years as provided therein; also, because of the reasons set forth in the ground preceding that last above.

Error in charging: "On the subject of whether or not the plaintiff has placed himself, or the party in whose name he brings this suit has placed itself, in a position where he cannot comply with the terms of this contract, and deliver to the defendant, upon payment of his stock subscription, stock in the company, I read you this, as applicable to that point in this case: This subscription is for shares of the stock of the railroad company. The plaintiff in this case sued for the use of James U. Jackson. The contract evidenced by the subscription of stock sued on shows two concurrent and dependent provisions, one on the part of the defendant to pay \$2,900, and the other on the part of the company to furnish the stock or certificate of stock upon the payment. Neither party can require the other to perform without being able to perform his part of the contract. If the railroad company has placed it beyond its power to comply with its part of the contract, or to enable the plaintiff to comply with his part of the contract, he cannot enforce the contract; and if the railroad company has parted with all the property and franchises upon which the value of its stock depended, and voluntarily destroyed the value of the stock when issued, neither the railroad company, nor Jackson, the usee, could compel the subscriber to pay for the stock." Alleged to be error, because nothing that transpired after the assignment of the stock subscription to an innocent purchaser could affect his right to recover; because the obligation to issue stock was a condition subsequent, and not to be performed until the payment was made; also, because the railroad company still has the right to issue stock after a sale of its property, etc., and the value of its stock was immaterial.

Error in charging: "If the company's assets are in the hands of a receiver, and it is out of the power of the railroad company to furnish the stock, there can be no recovery in this case." Alleged to be error, for the reasons set out in the ground last above; also, because the fact that the company was in the hands of a receiver, or was insolvent, could not affect its right to issue stock.

Error in allowing B. F. Thurman to testify, over plaintiff's objection: "They said, if we would take that stock, they would give us the benefit of the location of the road wherever we wanted it, and locate the depot. In other words, we consider it buying the rights, privileges, and benefits of this railroad. It originated first with Mr. Williamson. I don't remember the dates. I think it was in the spring of 1887 that the statement was made. We were assured that the railroad would come into town on the old roadbed by Mr. Lumpkin acting for Mr. Williamson. He

told me that was the positive understanding. The reason he told me that, I objected to signing that subscription book until that was put in the subscription, and I am sorry to this day that it was not done. He said he was positively instructed by Williamson not to do that, and that; he had letters in his pockets from Williamson that it was positively to be located there, and it was not to be known to these people, because it would cause them to charge them too much for the roadbed." This evidence was objected to because it sought to and did vary a written contract with previous parol stipulations. Further, because defendant was no party to this understanding, the contract in writing was complete and unambiguous, and all previous stipulations and conversations and understandings were merged into the writing. Further, because neither Williamson nor Lumpkin had authority, as plaintiff contents, to make any such stipulation. Further, that it was error to admit what Lumpkin stated. Also, because plaintiff contends that Lumpkin's evidence shows that the letter in question was written confidentially to him upon a restricted and definite subject, viz. to enable him to obtain the right of way, and had no reference to inducing subscription, and, in fact, he did not represent Williamson in getting subscriptions, but only in obtaining rights of way. Further, because it could not affect Jackson, who claimed under creditors and innocent purchasers, and was himself an innocent purchaser and holder.

Error in allowing the same witness to testify that Williamson "said he (Williamson) had a controlling interest in that land, lying near freight depot, over there, for the control of that location and the freight depot." This evidence was objected to as irrelevant; that it sought to go behind and vary a written contract, and was the mere sayings of Williamson after the location was complete; that the location of the freight depot was not a material issue, and so the railroad ran through the corporate limits every other issue was immaterial; and because it could not affect plaintiff, Jackson.

Error in allowing the same witness to testify, "They built the first depot down near the Russell place, down nearly at the line," over plaintiff's objection that the location of depot was not material; and that because after complaint "lay before this case was filed," the passenger depot or a freight depot was located on Patton avenue, the nearest point on railroad opposite the center of the town.

Error in admitting, over plaintiff's objection, a certified copy of an act to amend the charter of the Chattanooga, Rome & Columbus Railroad Company, so as to authorize said company to extend its railway lines to Atlanta, Augusta, Macon, and Savannah, and also to the Florida line, and providing, in section 3 of the act, that the capital stock of

the company might be increased to \$15,000,000, and, in section 5, that unless at least 10 miles of the road authorized by this act should be actually built and equipped within 5 years from the passage of this act, then the privileges therein granted should lapse and become of no effect. Attached to said certified copy, containing the above alleged amendments and others, was the following certificate: "Rome, Ga. Feb. 11, 1890. I, Robert Fouché, do hereby certify that the foregoing — pages contain and are a true copy of the charter of the Chattanooga, Rome & Columbus Railroad Company, and also of the amendments thereto, and that the officers of said company are: J. D. Williamson, Pres.; R. T. Fouché, secretary; J. H. Rhodes, cashier. Witness my hand and seal of said company the day above written. R. T. Fouché, Secretary." Also, following entry: "Office of Secretary of State. Atlanta, Ga. Filed in office February 12, 1890. H. W. Thomas, Clerk." Also, a certificate from the secretary of state that the foregoing pages were a correct copy of charter and amendments, filed by the company on the 12th day of February, 1890. This evidence was objected to on the ground that said amendment was not admissible, because, if made and accepted, it was after said subscription was executed and transferred; also, because, although the amendment was allowed, it was never acted upon, there was no extension of road under it, nor change of capital stock, nor any other material change, and, even if made and accepted, and fundamental, it could not affect Jackson, the plaintiff, because he and those under whom he claimed were creditors and innocent purchasers; also, because a certified copy by the secretary of state of a copy certified and filed by the company for other purposes was not competent evidence of such amendment, and a certified copy by the secretary of state of a certificate of the secretary of the company was not competent, nor best, evidence of the acceptance of said amendments by the company; also, because there was no evidence that 10 miles of the road had been built and equipped under the amendment, and therefore the amendment had lapsed, and become of no effect, more than five years having elapsed, the evidence affirmatively showing that the road as originally built extended from Chattanooga to Carrollton, had never been changed or altered, nor a single additional mile constructed, and the capital stock, as fixed at \$2,800,000, had never been changed.

Error in admitting, over plaintiff's objection, the deed from the Chattanooga, Rome & Columbus Railroad Company to the Savannah & Western Railroad Company, dated May 5, 1891, conveying all its railroad property and franchises of every sort. The objection made was that the sale was authorized by the charter and laws in force at the date of the subscription, or, if not, then the

sale was made under amendments contemplated by the existing charter and laws, or else was illegal and void, and could not avail as a defense; that it was illegal because the general law was not adopted by all the directors, nor by all the stockholders, but by only two-thirds of the stockholders, and the sale was only authorized by two-thirds of the stockholders; and, as this defendant did not consent, it was null and void as to him; also, because plaintiff and those under whom he holds were and are creditors of the company and innocent holders, and could not be affected by said amendment, or sale made afterwards; and because the contract of subscription contemplated the most radical changes in the corporation.

Error in admitting the interrogatories of D. C. Sutton, over plaintiff's objection that the commission under which they purported to have been executed was not issued nor directed to any special commissioners, the blanks for names of commissioners never having been filled, and therefore there was no commission nor authority to execute the interrogatories.

Error in admitting the testimony of Sutton, over objections filed to the questions and urged at the trial by plaintiff. The motion does not set forth what these objections were, and no evidence of Sutton appears in the record.

Error in allowing J. C. Clements to testify, over objection of plaintiff, as follows: "Dr. Holmes and I went on to New York in the spring of 1889, and had a conversation with Borg, Sully, and Dow. Borg and Dow had large interests in the construction company. We made complaints of J. D. Williamson's management, and they said they would come to Georgia and investigate. They came by Lafayette on the train, and I pointed out the objectionable location, and, between Lafayette and Rock Springs, in conversation with Mr. Dow, he said that he thought he could say that this matter could be arranged to the satisfaction of the people here, and the location could be made satisfactory to them, if they would pay their subscriptions. We told him that it was useless to insist on these subscriptions, for nobody would pay them under the circumstances." This testimony was objected to because irrelevant and immaterial. Further, because it was sayings and admissions of parties without authority, and, if with authority, long after the road was constructed. Further, because it sought to vary a written instrument by parol. Further, because mere conversations looking to a compromise.

Error in allowing the same witness to testify, over objection of plaintiff, that his recollection was that Borg, Sully, and Dow were acting as directors of the Chattanooga, Rome & Columbus Railroad Company. This evidence was objected to because the minutes of the company were the best evidence, and were introduced by defendant, and none of

their names appear on the records as directors, and because the minutes showed that other parties were the directors. Also, because witness was the president of the company, and testified that these parties were never in a meeting acting as directors with him. He stated that he drew his impression that they were directors from the conversations with J. D. Williamson, and from his management of the road.

Error in allowing H. P. Lumpkin to testify, over plaintiff's objection: "I received a letter from Williamson while I was at Dade superior court. I don't know whether it was before the subscription contract was signed, or after. It said: 'Railroad located from Rock Springs into the town of Lafayette on old grade. Get right of way as soon as possible.' I have lost this letter and can't find it." This testimony was objected to because an attempt to vary the terms of a written contract. Further, because it was a mere statement made to an employé, not meant to influence subscribers if made before, and, if after, was immaterial. Further, because it was confidential, and the witness was not competent to testify. He stated that he was in Williamson's employ to get right of way. Supposes Williamson employed him because he (witness) was an attorney at law, but don't know. He stated, also, that this letter contained information that was to be kept secret from public until right of way was obtained, and was secret except to those on the inside.

Error in refusing to allow W. W. Brookes to testify: "We stand ready to deliver this stock to these people whenever they pay their subscription." The court ruled out this evidence, holding that it was not a proper tender, if a tender was necessary.

Because the court refused to allow W. W. Brookes, who had testified that he was secretary of the Chattanooga, Rome & Columbus Railroad Company, and that there had been set aside and was held for the benefit of the subscribers of the stock \$235,400 of the capital stock of the Chattanooga, Rome & Columbus Railroad Company, —\$100,000 of it for the Chattanooga subscription, and the remainder for subscribers along the line,—and that his clients stand ready to deliver this stock whenever the subscriber pays his subscription. The court erred in holding that the certificate of stock, and what it purported to be issued for, was the necessary and best evidence, and in ruling out the above testimony. This was error because W. W. Brookes was secretary, and knew, of his own knowledge, that this stock was for this purpose; the minutes of the company not disclosing anything on this subject.

Error in allowing defendant to testify, over plaintiff's objection: "It was the understanding at that time [when I signed subscription] that it [the railroad] would some in on the old grade. I think I got this un-

derstanding from Mr. Williamson himself, from parties that were with him at the time the conversation was going on." The objection made to this evidence was that it varied the written contract by parol; also, because, "if made by Williamson, were vague, indefinite, and unauthorized."

Error in allowing defendant to testify, over plaintiff's objection: "I would not have signed unless it was understood to go through the town, and satisfactory to the subscribers." This evidence was objected to because it sought to vary a written contract by parol.

W. W. Brookes and W. T. Turnbull, for plaintiff in error. R. M. W. Glenn and McCutchen & Shumate, for defendant in error.

**SIMMONS, C. J.** The Rome & Carrollton Railroad Company obtained an amendment to its charter, in 1886, authorizing it to extend its line from the city of Rome in a northerly direction through the counties of Floyd, Chattooga, and Walker, to any point on the line dividing the states of Georgia and Tennessee, in Walker or Catoosa county. Two routes were in contemplation, one of which ran through the town of Lafayette, the county seat of Walker county, and the other through another part of the same county; and the citizens of Lafayette, in order to induce the railroad company to select the route running through their town, held a meeting and appointed committees to obtain subscriptions to the stock of the company. Sufficient subscriptions were obtained to induce the company to select that route. The paper signed by the subscribers was as follows: "The undersigned hereby subscribe for the number of shares of the capital stock of the Chattanooga, Rome & Columbus Railroad Company set opposite our respective names, said shares being of the par value of one hundred dollars each; and on the 15th day of November, after the cars commence running from a point at or near the city of Rome, Ga., through the counties of Floyd, Chattooga, and Walker, in Georgia, to the city of Chattanooga, Tennessee, even a road built by said company, we promise to pay to said company, its associates, successors, or assigns, 25 per cent. of our subscription in cash, and will at the same time give our several individual promissory notes for the remaining 75 per cent., one-third of which shall become due every six months after said 15th day of November; said notes not to bear interest until maturity, but from and after maturity to bear interest at the rate of 6 per cent., per annum until paid. And, when any subscription is fully paid, the subscriber shall then be entitled to a certificate of stock in said company, upon the basis of the capital stock of the company as then fixed and existing at the time of said full payment. Provided, however, that each subscription hereto shall be null and void, and of no force or effect whatever, unless the main line of said railroad, when built, shall pass through the corporate limits of the town of

Lafayette, Georgia, and provided, further, that these subscriptions are in lieu of all other subscriptions heretofore made by us to the stock of said company." N. G. Warthen was one of the subscribers. In June, 1888, the railroad was completed from Rome to Chattanooga, Tenn., and cars were run thereon on regular schedules. The road was built by a construction company, under a contract with the railroad company, and the latter assigned to the construction company a certain amount of its bonds and stock, and the subscriptions already obtained, and these that were to be obtained. Warthen's subscription was of the latter class. His subscription was regularly transferred and assigned, and finally by assignment came into the hands of Jackson. In June, 1892, Jackson made a demand upon Warthen for the payment of his subscription, which was refused; whereupon the Chattanooga, Rome & Columbus Railroad Company, for the use of Jackson, commenced suit against Warthen. To this action the defendant filed several special pleas, which will be found in the report. On the trial of the case the jury rendered a verdict for the defendant, and the plaintiff made a motion for a new trial, which was overruled, and it excepted.

1. We will say at the outset that the paper sued on, although assignable, is not such a negotiable instrument as would protect the holder from equities or defenses that the maker thereof might have against the original holder. It is simply a contract assigned by the railroad company to the construction company. Our Code (section 2244) provides that "all choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." The paper sued on being one to which the maker can set up any defense, as against the assignee, that he could have set up against the original holder, we will deal with the case as if the original holder were the plaintiff.

2. The paper sued on provides that the subscription shall be null and void "unless the main line of the said railroad when built shall pass through the corporate limits of the town of Lafayette." In one of his pleas the defendant set up that the railroad did not pass through the corporate limits of the town of Lafayette, and that, under this proviso in the contract, the subscription was null and void; also, that it was understood and agreed between the railroad company and the defendant that the railroad should be built upon the grade of an old railroad, which passed near the center of the town, or upon a line equally near the center, but that the road was constructed outside the corporate limits, or, if within the limits, upon the very edge thereof, and this was only a colorable compliance with the conditions, and was fraudulent, and in violation of the terms of the agreement and subscription, and this fraudulent conduct released the defendant. This plea was demurred to, and the demurrer was

overruled, and to this ruling the plaintiff excepted. Under the contract of subscription, we think the railroad company had a right to run its track anywhere within the corporate limits. The contract did not specify any particular line or route through the town, nor did it provide how far it should run from the corporate limits. It simply provided that it should run through the corporate limits. If that was done, it was a sufficient compliance with the contract, so far as the location of its route was concerned.

3. This contract could not be varied, or new terms added to it, as the defendant sought to do, by proof of conversations with officers or agents of the company showing an understanding with him that the road was to be built on a particular route within the corporate limits. If, at the time of making his subscription, he desired that the road should be built upon the old grade, he ought to have had a stipulation to that effect embodied in the writing. If he had done this, and the railroad company had failed to comply with the stipulation, such failure would have constituted a good ground of defense. But, having signed a contract which contained no such stipulation, and which was unambiguous, he could not show by parol evidence that the agreement was that the road should be built upon the old grade without pleading that the agreement to that effect was omitted from the writing by fraud, accident, or mistake. See *Bell v. Railroad Co.*, 76 Ga. 755; *Weston v. Railway Co.*, 90 Ga. 289, 15 S. E. 773. And it is not pretended that any part of the contract was thus omitted.

4. Mere statements or promises by the company's officers or agents, made before the contract of subscription was signed, to the effect that the railroad would be built upon a certain line, and a failure to so build it after the contract was executed, would not constitute a fraud upon the subscriber, or afford him any ground for avoiding payment, there being no contention that anything was omitted from the writing which was intended to be inserted therein. In this case there was no evidence of any fraud whatever, and it was error for the court to charge the jury upon the hypothesis that there was. Mr. Lumpkin, an attorney at law in the employment of Williamson, the president of the construction company, was allowed to testify, over objection, that he received a letter from Williamson in which it was stated that the railroad would be laid upon the old grade, but he could not say whether this letter was dated before or after the defendant's subscription was made. Of course, if it was made subsequently, it would not amount to anything; if made before, it is very doubtful whether declarations of the president of the construction company as to where the road would be located would bind the railroad company. Even if admissible, it does not appear that the defendant knew of the statement before he signed the contract, for Mr. Lumpkin testified that he spoke of this letter only to those who were, as he expressed it, "on the inside." He

kept it a secret, because he was the agent of Williamson to secure the right of way, and because he feared that, if he mentioned it before the right of way was secured, the landowners would charge large prices for the right of way through their land. The defendant himself does not testify to any positive promise or statement of any officer or agent of the railroad that the track would be laid upon the old grade. In his testimony he says: "I think I got that understanding from Mr. Williamson himself, and from parties that were with him at the time the conversation was going on." But there is nothing in his evidence more definite than this. Thurman, one of the defendant's witnesses, who was also a subscriber to the stock of the company, testified that he insisted that this stipulation as to the location of the railroad upon the old grade should be inserted in the contract, but that Lumpkin refused to insert it, saying that he was positively instructed not to put it in.

5, 6. Another defense set up by the defendant was that he subscribed to the stock of the Chattanooga, Rome & Columbus Railroad Company, and that it had sold out its franchises, railroad, and other property to another railroad company, and the purchaser could not issue him the stock subscribed for, and for that reason he should not be compelled to pay his subscription. The charter of the Chattanooga, Rome & Columbus Railroad Company authorized it to sell its property and franchises to any other company, and the exercise of this power would not affect the subscription. See *Thomp. Corp.* § 1291. If the plaintiff company had made a valid and legal sale of its franchises and property to another company, the defendant, under his contract, could have insisted on receiving the stock from the purchasing company when he paid the subscription. It appears, however, from the record, that the sale was set aside by a court of competent jurisdiction, and that the plaintiff company was, at the time of the trial, still in existence. It is true, the company was in the hands of the court, through its receiver, but that did not destroy the corporation. It still lived, and on the payment of the subscription it had the power and right to issue its stock to any subscriber who was entitled thereto. Admitting, for the sake of the argument, that this plea had merit in it when it was filed, it had no merit in it at the trial; and it was competent for the plaintiff company to prove that the stock was ready for delivery, and would be delivered on payment of the subscription. That it had no value was immaterial.

7. The subscription contract was signed in September, 1887. In 1888 the legislature amended the charter of the plaintiff company, thereby making material and fundamental changes. Among other things, it was provided in the amendment that "unless ten miles of road authorized by this act shall be actually built and occupied within five years from

the passage of this act, then the privileges herein granted shall lapse and become of no effect." Acts 1888, p. 171, § 5. There is no evidence in the record showing that this amendment was ever accepted by the company or its stockholders. At the time of the trial, which was more than five years after the act was passed, no part of the 10 miles had been actually built and equipped, and the amendment had therefore lapsed, and become of no effect. The defendant set up in one of his pleas that the amendment was made without his consent, and that it effected fundamental change in the charter, and he was therefore released from his subscription. The court charged that, if the change was fundamental, and made without his consent, he was released. Under the facts above recited, we think the charge was erroneous. It will be observed that the amendment is not mandatory, but merely permissive. It authorizes and empowers the plaintiff company to build new roads, and to increase its capital stock, but it does not require it to do so. Whatever may be the law as to the necessity of a company or its stockholders accepting a mandatory amendment, made by the legislature in the interest of the public, it is well settled that a mere permissive amendment to a charter must be accepted by the stockholders of the company. See, generally, on this subject, 1 Beach, Pub. Corp. § 36 et seq.; 1 Thomp. Corp. § 52 et seq.; 4 Thomp. Corp. §§ 53, 80, et seq.; 11 Am. Law. Reg. (N. S.) 1. And see *Snook v. Improvement Co.*, 83 Ga. 65, 66, 9 S. E. 1104, and cases cited. The stockholders of the plaintiff company never having accepted the amendment to its charter, nor acted under it, the amendment, although authorized by the legislature, would not release the defendant from his subscription. Not having been accepted, it did not become a part of the charter, and he cannot complain. 1 Beach, Pub. Corp. § 42, p. 80, note 1; *Railroad Co. v. Irick*, 23 N. J. Law, 321.

8. The charter of the plaintiff company, at the time the defendant made his subscription, authorized it to increase its capital stock to \$10,000,000, to issue income bonds, and pledge its property and franchises, or pledge the income to redeem them. It also had power to extend its line from Rome, Ga., to the state of Tennessee, and consolidate with any other railroad authorized to be built by any state in the United States, to build a line of railroad from Cedartown, in Polk county, to Columbus, in Muscogee county, and to build a branch railroad from any point on its line to Montgomery, Ala., with the privilege of connecting with any other railroad in the state of Alabama, and to build such other branch roads as it might see fit from its main line to any places or points not exceeding 20 miles distant therefrom. It also had authority to purchase or lease any other railroad chartered by the laws of any other state in the Union, and to sell or lease its railroad franchises and property to any other railroad company, and

also to consolidate its railroad with the railroad of any other company. In 1890 the legislature passed a general law for the uniform amendment of special charters of railroad companies which had been granted or might thereafter be granted, and provided that a railroad company which had been chartered might apply to the secretary of state and have incorporated into its charter a portion of the general railroad law of the state from section 1689i to section 1689gg of the Code, inclusive, and the acts amendatory thereof. Under this act, the plaintiff company had these different sections of the Code included in its charter. The defendant insisted that this was a material and fundamental change in the charter, and that, as it was made after he became a stockholder or subscriber, he was thereby released from his subscription. We have carefully read the sections of the Code which were incorporated into the charter by this amendment, and they do not differ materially from the charter as it stood before they were incorporated therein. They do not enlarge the undertaking, so far as it entails new responsibilities or new hazards upon the company. They merely enlarge the powers or privileges of the company, without materially changing its original purpose. Nor do they authorize a material departure from its original design. See *Thomp. Corp.* § 1278. The charter before it was amended gave the company substantially the same powers as to extension of its road that section 1689j of the Code gives. Nor would the latter part of section 1689m authorize the railroad company to remove its track from the town of Lafayette. That part of the section means that, after the track has been laid within the corporate limits of a town or city, it shall not be changed within the corporate limits without the sanction of the mayor and council, or other governing body of the town or city.

9. In so far as the trial judge, in his rulings upon demurrers to pleas, in admitting or rejecting evidence, or in charging the jury, failed to conform to what is above announced, error was committed. The next trial should be had in accord with what is here laid down as the law applicable to this case. Judgment reversed.

ATKINSON, J., providentially absent, and not presiding.

(93 Va. 729)

#### DELLINGER et al. v. FOLTZ.

(Supreme Court of Appeals of Virginia. Nov. 12, 1896.)

BILL OF REVIEW—WHEN LIES—PETITION TO REHEAR IN TRIAL COURT—VENDOR'S LIEN—PERSONAL DECREE BEFORE SALE—GUARDIAN'S DEED—VALIDITY—RATIFICATION.

1. A bill of review will not lie to modify a decree of sale in an action to enforce a vendor's lien, since a bill of review is a proper remedy only where a final decree is to be corrected, the decree of sale being interlocutory only.

2. In an action to enforce a vendor's lien on

land deeded to defendants in exchange for other land and certain bonds reserving a lien, two of the defendants filed a petition to enjoin the execution of a decree entered by default for the unpaid purchase money, and appointing commissioners to sell the land, on the ground that the bonds and deed were executed by their guardian during their infancy, and praying that such decree be set aside and reheard, that the deeds of exchange be vacated, and that petitioners be restored to their original rights, etc. *Held*, that such petition should have been treated as a petition to rehear, and not as a bill of review.

3. In an action to enforce a vendor's lien, there may be a personal decree for the purchase money before the sale.

4. A deed by a guardian of his infant ward's land is void, and does not affect the ward's rights; and this though the guardian acts with the approval, and as the alleged agent, of the ward.

5. A contract for the exchange of an infant's land, and bonds and a deed of the infant, executed on his behalf by his guardian, either as agent or as guardian, as a part of the transaction, cannot be ratified by the infant after becoming of age, since they are void.

Appeal from circuit court, Shenandoah county; Thomas W. Harrison, Judge.

Bill by Isaac Foltz against Dilman P. Dellinger and others to enforce a vendor's lien, in which the bill was taken as confessed, and a decree was entered against defendants for the unpaid purchase money, and commissioners were appointed to sell the land; and defendants Charles P. and John H. Dellinger filed a bill to enjoin the execution of such decree, on the ground that the contract, bonds, etc., which plaintiff sought to enforce, were executed on their behalf by their guardian during their infancy, and they were not bound thereby. From a decree merely modifying the decree of sale in so far as it operated as a personal decree, defendants Charles P. and John H. Dellinger appeal. *Reversed*.

M. L. Walton, for appellants. Williams & Bros., for appellee.

**HARRISON, J.** The appellants, Charles P. and John H. Dellinger, owned, jointly with their brother, Thomas A. Dellinger, certain real estate in the county of Shenandoah, as heirs of their deceased mother, subject to the rights of their father, Dilman P. Dellinger, as tenant by the curtesy. On the 22d day of March, 1889, Dilman P. Dellinger, the father, and Thomas A. Dellinger in his own right, and as guardian of his infant brothers, Charles P. and John H. Dellinger, united in a deed conveying this land to William J. and Jacob K. Coffman; receiving in exchange therefor a deed of conveyance for another tract of land, and agreeing to pay, as the difference in value between the two tracts, the sum of \$1,750, in five equal annual payments, of \$350 each, evidenced by bonds executed by Dilman P. Dellinger, the father, and Thomas A. Dellinger in his own right, and as guardian of the appellants. To secure these five deferred purchase-money bonds, a vendor's lien was reserved in the deed from William J. Coffman and others to the Dellingers.

Three of these bonds were assigned to Isaac

Foltz, who instituted this chancery suit, to March-rules, 1895, in the circuit court of Shenandoah county, to enforce their payment by a sale of the land. Among others, the appellants, who had reached their majority, were made parties defendant. The bill sets forth the facts already stated as to the exchange of lands, alleges the infancy of appellants at the time of the transaction, and charges that the exchange was made and the bonds executed by their guardian with their consent, and at their request; that, since their majority, appellants had approved and ratified the exchange and execution of the bonds by their guardian and agent; that they, along with their father and guardian, were put in possession of the land, and have used, occupied, and enjoyed the same since the date of the purchase; and that they have made payments on the bonds given therefor since attaining the age of 21 years.

On the 6th day of April, 1895, the bill was taken for confessed as to all the defendants, and a decree entered for the balance of unpaid purchase money against Dilman P. Dellinger, Thomas A. Dellinger, and each of the appellants, and commissioners appointed to sell the land.

On the 7th day of June, 1895, the appellants obtained an injunction restraining the execution of this decree. In their bill for an injunction they set forth the facts as already stated in regard to the sale and exchange of their lands and the execution of the bonds during their infancy by their guardian, and charge that, for some reason unknown to them, their brother Thomas A. Dellinger had qualified as their guardian. They allege that the exchange of their land, and the execution of the bonds by Thomas A. Dellinger as their guardian, was done without consultation with them, that they had never ratified or approved of the exchange, that it was not to their advantage, that they had never paid one cent on the bonds executed by their guardian, that they utterly repudiated the contract, that their guardian had no right, under the law, to make any disposition of their interest in the land, and prayed that the decree of April 6, 1895, be reheard and set aside, that the deeds of exchange be vacated, that they be restored to their original rights, and for general relief.

On the 10th day of September, 1895, both causes were brought on to be heard together,—the original cause upon the papers formerly read, and the injunction bill upon demurrer thereto and motion to dissolve,—when a decree was entered dissolving the injunction and dismissing the bill; having first, however, treated the injunction as a bill of review for the purpose of modifying the decree of sale in so far as it operated as a personal decree, upon the ground that there could be no personal decree before the sale, the court holding that the appellants, although minors at the time of the sale and exchange of the land, had reached their ma-

majority prior to the institution of the suit by Isaac Foltz, and were made parties thereto, and had made no defense, by plea, answer, or otherwise, and were therefore concluded by the decree of sale of April 6, 1895.

It was error to treat the injunction bill as a bill of review for the purpose of modifying the decree of sale, a bill of review being the remedy when a final decree is to be corrected. The decree of sale in this case was not final, but interlocutory, much remaining to be done to give completely the relief contemplated by the court. *Coke's Adm'r v. Gilpin*, 1 Rob. (Va.) 22; *Ryan's Adm'r v. McLeod*, 32 Grat. 367; *Rawlings' Ex'r v. Rawlings*, 75 Va. 76. To correct any error in that decree, the bill of injunction should have been treated as a petition to rehear. It was, however, error to correct the decree in the particular mentioned for the reason given by the court; it being settled that there may be a personal decree for the purchase money before the sale, and not merely for the balance remaining due after crediting the proceeds from the sale of the land. *Fayette Land Co. v. Louisville & N. R. Co.* (Va.) 24 S. E. 1016.

The bill filed by the appellee, Isaac Foltz, sets out a transaction void on its face, so far as the appellants are concerned.

Charles P. and John H. Dellinger were not parties to the contract relied on. They did not execute the deed by which their interest as remainder-men in the land of their deceased mother was sold and conveyed, and the deed executed by their guardian cannot have the effect of divesting them of that interest. The deed of the guardian was unwarranted, and is of no obligatory force upon the appellants. *Healy v. Rowan*, 5 Grat. 414.

The bill alleges that the guardian was acting with the consent and approval of appellants, and as their agent, in making the deed and executing the bonds, and it is contended that this makes the contract voidable. On the face of the deeds and the bonds, which are filed as exhibits with the bill, Thomas A. Dellinger appears to have acted alone in his capacity as guardian, and there is no proof that he was acting otherwise; but if he had, as alleged, been acting as agent, the transaction would still be void as to appellants, and their rights unaffected by it, for, if it be true that one who deals with an infant in his own proper person does so at his peril, a fortiori is it true when he deals with one who represents himself as agent of the infant, it being well settled that an infant cannot empower an agent or attorney to act for him, and that such an appointment would be void. Nor can he affirm what one has assumed to do for him, for he cannot ratify what he could not authorize. 1 Minor, Inst. 516; *Mustard v. Wohlford's Heirs*, 15 Grat. 329; *Thomas v. Roberts*, 16 Mee. & W. 778; *Dexter v. Hall*, 15 Wall. 9; *Fonda v. Van Horne*, 15 Wend. 631; *Armi-*

*tage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 195.

The bill further alleges that, after appellants reached their majority, they approved and ratified the exchange and purchase entered into by their guardian.

In order that a contract made during infancy may be ratified after full age, it must, of necessity, be a contract merely voidable. The contract under consideration, being void, cannot be confirmed. Nothing but a new agreement, made after full age, could operate to deprive the appellants of their land, and none such is alleged.

The court is therefore of opinion that the contract set forth in the bill, by which Thomas A. Dellinger undertook to sell and convey the interest of appellants in the land of their deceased mother, is void and of no effect so far as appellants are concerned.

The court is further of opinion that the circuit court erred in sustaining the demurrer to the bill of injunction filed by appellants, and dismissing the same. The bill ought to have been treated as a petition to rehear and correct the decree of April 5, 1895, so far as the interest of appellants was prejudiced thereby; and the decree of September 10, 1895, after setting forth that appellants were not bound in any way by the deeds and the bonds executed by their guardian, should have dismissed the bill of complaint as to them.

This court, not being called upon to do so, expresses no opinion as to the propriety of the decree of sale so far as the other defendants to appellee's bill are concerned. His rights as against them are left for such action as he may be advised he is entitled to.

For the foregoing reasons the decree appealed from must be reversed and set aside, and the cause remanded to the circuit court, to be there proceeded with in accordance with the views expressed in this opinion.

#### WILCOX v. HUNTER, Treasurer.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

MANDAMUS—To COMPEL ACCEPTANCE OF COUPONS FOR TAX.

In view of the provisions of the act of May 12, 1887, requiring a proceeding in court to be instituted for the collection of a tax where payment has been tendered in detached coupons from state bonds, in which proceeding the defendant can plead his tender and file his coupons, and shall have judgment if their validity is established, mandamus will not lie against a treasurer, at the suit of one liable for a tax, to compel the acceptance of a tender of such coupons in payment.

Petition by J. W. Wilcox against W. W. Hunter, treasurer of Norfolk, for a writ of mandamus. Denied.

Maury & Maury, for petitioner. B. Taylor Scott, Atty. Gen., and H. R. Pollard, for respondent.

**KEITH, P.** The petition of J. W. Wilcox, a resident of the city of Norfolk, represents to this court that he is an attorney at law, duly licensed to practice in the courts of the state; that the tax imposed upon him for that privilege is \$25 per annum; that, desiring to procure a license, he tendered to W. W. Hunter, treasurer of Norfolk, an officer appointed by law to receive said tax, 75 cents in money, being the amount of the fee of the commissioner, and \$25 in tax-receivable coupons issued by the state, which by law are receivable in payment of said tax; that the coupons were past due, and bore upon their face stipulations that they are receivable for all taxes, debts, and demands due the state; that they were issued under the acts of the general assembly of March 30, 1871, and March 28, 1879. He avers that they are genuine, legal coupons cut from the bonds of the state, and that he has been ready at all times since said tender to deliver the money and coupons to the treasurer in payment of the tax, and is now ready to do so; that the treasurer refuses to receive the coupons in payment of the tax, and to give him the proper certificate thereof, which it is necessary for him to have in order that he may procure his license from the commissioner of the revenue, and that without such license he is liable to indictment for practicing his profession; that he has no other mode of relief in the premises save a writ of mandamus commanding Hunter, treasurer, to receive the coupons, and to pay the costs of this writ. To this petition Hunter filed his demurrer and answer. In Hunter's demurrer Wilcox joins, and demurs to Hunter's answer, in which Hunter joins, and the case is before us upon these pleadings.

The argument of counsel invites us to reconsider the case of *Com. v. McCullough*, 90 Va. 597, 19 S. E. 114, in which this court held that the acts of March 30, 1871, and March 28, 1879, were unconstitutional and void so far as they authorized the issue of bonds by the state with coupons attached, receivable at and after maturity for all taxes, debts, dues, and demands due the state. We do not think that it is necessary to discuss the question there decided. The writ of mandamus issues to compel the performance of a duty which results from the official station of the party to whom the writ is directed, or from operation of law. See *Spell*, Extr. Relief, § 1363. There is no law which imposes upon the respondent the duty which the petitioner seeks to enforce. By an act approved May 12, 1887, it is provided that when coupons detached from bonds of this state shall have been tendered, and the tax not otherwise paid, it shall be the duty of the attorney for the commonwealth to proceed by motion upon 10 days' notice in the circuit court having jurisdiction over the county or corporation in which said taxes shall have been assessed to recover the amount of the taxes. Upon the trial of such motion the defendant may

plead the tender of coupons in payment of the taxes demanded, and file with his plea the coupons averred therein to have been tendered. If the tender and the genuineness of the coupons are established, judgment shall be for the defendant on the plea of tender. If he fails in his defense, and the taxes claimed are found to be due the state, the coupons filed by him, and not found to be spurious, shall be returned, and there shall be judgment for the aggregate amount of taxes due, and the interest from the time they became due to the date of judgment. So far, therefore, from its being the duty of the treasurer upon the tender of coupons being made to him by the taxpayer to issue a certificate therefor, it is his duty under the law to sue for and recover the taxes, unless the defendant, the taxpayer, makes good his plea of tender. This involves no hardship. It is a simple and inexpensive mode by which the right of the coupon holder to pay in genuine coupons is preserved, and the treasury of the state is protected from having spurious coupons foisted upon it. There is no danger that the petitioner will be prosecuted for practicing his profession without a license. If he has tendered genuine coupons in payment of his tax, and those coupons are, as he avers, receivable by the state in payment of taxes, then he may safely rely upon his tender in any suit or prosecution that may be instituted against him for the recovery of the tax or for pursuing his lawful vocation. We are therefore of opinion that the prayer of the petition should be denied, with costs to the defendant.

(88 Va. 711)

## CITY OF WINCHESTER v. REDMOND.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

## MUNICIPAL CORPORATIONS — POWERS — OFFERING REWARD FOR CRIMINALS.

1. In the absence of express authority conferred by its charter or by general law, a municipal corporation has no power to offer and pay a reward for the apprehension and conviction of persons violating the criminal laws of the state.
2. Authority to a council of a city to offer a reward for the detection of criminals cannot be inferred from a "general welfare" clause of its charter, the matter being properly a subject of state, and not municipal, jurisdiction.
3. The offer by a city council of a reward which it has no authority to pay is ultra vires, and creates no obligation enforceable against the city.

Error to circuit court, Frederick county; Thomas W. Harrison, Judge.

Action by Redmond against the city of Winchester. Judgment for plaintiff, and defendant brings error. Reversed.

R. M. Ward, for plaintiff in error. William R. Alexander and R. T. Barton, for defendant in error.

**RIELY, J.** This case is before us upon a writ of error to a judgment of the circuit court of Frederick county, rendered against

the city of Winchester, for the amount of a reward offered by its common council for the apprehension and conviction of incendiaries. The main and important question for our determination is: Did the council have the power, under the law, to offer the reward, and bind the city for its payment? A municipal corporation, as well as other corporations, is, in this country at least, the creature of the legislative power of the state, and its charter is its constitution and fundamental law. Upon the provisions of its charter and such other statutes of the state as are applicable to cities and towns depend the powers that are conferred upon the corporation, and that may be exercised by its council, which is its legislative body. It possesses no powers except those conferred upon it, expressly or by fair implication, by the law which created it and other statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It can do no act, nor make any contract, nor incur any liability, that is not thus authorized. These principles lie at the foundation of the law of municipal corporations, and are the guides in the construction and adjudication of their powers. "It is a general and undisputed proposition of law," says a distinguished jurist and eminent commentator in his excellent treatise on this subject, "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *Dill Mun. Corp.* (3d Ed.) § 89. The city of Winchester is a municipal corporation chartered by the legislature of the state. An inspection of its charter discloses that no express power was given to the corporation to offer a reward for the detection, apprehension, or conviction of offenders against the criminal laws of the state. Nor does any statute of the state confer upon municipal corporations such authority.

But it is claimed that the exercise of such power is authorized by section 9 of the charter of the city, which, after conferring upon the council a number of particular powers, authorizes it "to do all such things as it may deem proper for the prosperity, quiet, and good order of the city." This language, though very broad, is yet not without its proper limitation. It is to be construed with reference to the object contemplated by the state in the grant of the charter, and the extent of the power it confers is to be measured and limited by the purposes for which the corporation was created. A municipal corporation is a local and subordinate gov-

ernment, created by the sovereign authority of the state, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the state. And it is only in regard to the local and internal affairs of the city or town that its council, unless expressly authorized, has the right to legislate. To this end, specific powers are usually given in express words; and when a general and indefinite power, as the one under consideration, is superadded, it is to be confined in its exercise to the ordinary objects and purposes of municipal corporations, and not to be construed to comprehend a matter which is common to the state, and affects its people at large. The line of distinction may not always be perfectly clear. Cases doubtless do sometimes arise when it is not readily perceived whether the power exercised by the council of a city or town is implied in the powers expressly given, or is necessary to the accomplishment of the objects and purposes of the corporation, or whether it is wholly a state power, and only to be exercised by its legislature; but, as respects the particular case before us, there is no such difficulty. Here the line of distinction is clearly and broadly marked.

Crime is an offense against the state, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the state. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the state are concerned in the punishment and suppression of crime. And the state, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws. The state constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform within the corporate limits duties not strictly or properly local or municipal in their nature. In the performance of such duties, they exercise state powers, and are in that respect state officers. As was said by Judge Staples in *Burch v. Hardwicke*, 30 Gratt. 24, 34: "When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city, but against the state. When they are detected and arrested, it is by the chief of police and his subordinates, under the authority of the state laws, and as an officer of the state; and, when they are tried and convicted, it is by officers representing the state and her sovereign power." Municipal corporations are chartered, as we have seen, to regulate and administer the local and internal concerns

of the people of the particular locality which is incorporated. They are not created to execute the criminal laws of the state. That is a matter for which the state has made ample provision by general statutes, and with which the corporation, as such, has nothing to do, unless expressly authorized by its charter or by statute. Hence the offer of a reward for the apprehension and conviction of an offender against the criminal law of the state is the exercise of a state power, and is foreign to the objects and purposes of a municipal corporation. It is not an ordinary corporate power, nor incident to it. Such power was not expressly conferred upon the common council of the city of Winchester; nor is it comprehended by the "general welfare" clause of its charter, heretofore quoted.

When a crime has been committed, and there is reason to fear that the person charged therewith cannot be arrested in the common course of proceeding, or when an offense has been committed, but the person guilty thereof is unknown, the legislature has conferred upon the executive of the state the authority to offer a reward for apprehending and securing, or for the detection and conviction of, such person, as the case may be. Code Va. § 4197. This is as far as the legislature has deemed it wise or expedient to confer such authority. It might sometimes be convenient and expedient for municipalities and the authorities of a county to possess such power, but it is a power that would be liable to great abuse. However, with its convenience or expediency we have nothing to do. That is a matter solely for the consideration of the legislature. Our duty is confined to the interpretation of the charter of the city and the statutes which confer any powers upon it, and their adjudication. If the power has not been expressly granted, or is not necessarily implied, it does not exist. If it be even doubtful, the doubt must be resolved against the existence of the power. The legislature has not expressly given such authority to the city of Winchester. It is not necessarily or fairly implied in any express power granted to it; and its possession is not indispensable to the performance of its corporate duties, or the accomplishment of the purposes of its incorporation. Consequently, the offer of the reward by its common council for the apprehension and conviction of incendiaries was beyond its power. It was an act *ultra vires*, and void.

The decisions upon this question have not been uniform. It has been held by some courts (*Crawshaw v. City of Roxbury*, 7 Gray, 374, and *Borough of York v. Forscht*, 23 Pa. St. 391) that municipal corporations possess the authority to offer rewards for the apprehension and conviction of offenders against the criminal law; but the existence of the power has been oftener, and we think correctly, denied by courts of equal dignity and respectability (*Croft v. City of Danbury*, 65 Conn. 204, 32 Atl. 305; *Hanger v. City of Des Moines*, 52 Iowa, 198, 2 N. W. 1105; *Abel v.*

*Pembroke*, 61 N. H. 359; *Gale v. Inhabitants of South Berwick*, 51 Me. 174; *Butler v. City of Milwaukee*, 15 Wis. 498; *Patton v. Stephens*, 14 Bush, 324; *Murphy v. City of Jacksonville*, 18 Fla. 318; and *Baker v. City of Washington*, 7 D. C. 134).

The reward claimed by the defendant in error, being a contract in excess of the powers of the council of the city of Winchester, constituted no ground of action against the city, and it was not liable for its payment. "The general principle of law is settled beyond controversy," says Judge Dillon, "that the agents, officers, or even city council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers. \* \* \* And, again: 'It is a general and fundamental principle of law that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation.'" 1 Dill. Mun. Corp. (3d Ed.) §§ 457, 447. See, also, *Bunch's Ex'r v. Fluvanna Co.*, 86 Va. 457, 10 S. E. 532. The demurrer to the declaration should have been sustained, and the suit dismissed. This being our conclusion, any consideration of the other interesting questions raised and discussed by counsel is rendered unnecessary. For the reasons given in this opinion, the judgment of the circuit court must be reversed.

(92 Va. 678)

# KAUFMAN v. CHARLOTTESVILLE WOOLEN MILLS CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

## SALE OF STOCK—RESERVATION OF DIVIDEND.

One who sells stock, reserving the dividend that may be declared at a certain date, cannot claim the stock dividend then declared, but only the cash dividend.

Appeal from circuit court, Albemarle county; Daniel A. Grimsley, Judge.

Action by M. Kaufman against the Charlottesville Woolen Mills Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Duke & Duke, for appellant. George Perkins, for appellee.

**HARRISON, J.** This controversy grows out of an exchange of stock, reserving dividends.

On the 3d of January, 1896, William Hotopp sold to M. Kaufman 30 shares of the capital stock of the Monticello Wine Company, par value \$100 per share, for 40 shares of the capital stock of the Charlottesville Woolen Mills Company, par value \$50 per share; it being understood and agreed between the parties that Hotopp was to receive whatever dividend was declared on the stock of the Monticello Wine Company for January, 1896, and Kaufman was to receive whatever dividend was declared on the stock of the Charlottesville Woolen Mills Com

pany for January, 1896. Each received from the other the scrip representing the stock purchased in the exchange, and the stock was duly transferred to the parties on the books of the companies.

On the 14th day of January, 1896, the Charlottesville Woolen Mills Company held its regular annual stockholders' meeting, and declared a cash dividend of 10 per cent.; and there being an accumulated surplus in the treasury, and the stockholders deeming it expedient, the following resolution was unanimously adopted: "Resolved, that the capital stock of said company, both common and preferred, be increased to a total sum of \$200,000; said increase to be made by capitalizing so much of the surplus of this company as will be sufficient to accomplish the above purpose, and issuing therefor common stock of the company, pro rata, among the present holders of both common and preferred stock, according to their respective holdings." In pursuance of this resolution the capital stock of the company was increased 27 per cent., and new certificates issued to the stockholders in proportion to the interest of each. Hotopp received the dividend reserved by him on the wine company stock, and Kaufman received the 10 per cent. cash dividend which was distributed to the stockholders on the stock of the Woolen Mills Company. Kaufman, however, claims that under his contract he is also entitled to the 27 per cent. surplus earnings in the treasury which was capitalized by the company. That inasmuch as the cash was in the treasury, representing this 27 per cent., and could have been distributed as a dividend to the stockholders, therefore the stock dividend of 27 per cent. represented profits of the company, and constituted part of the dividend to which he was entitled under his contract. Hotopp disputes this claim, and contends that the stock dividend did not pass; that all Kaufman was entitled to under the contract was the cash dividend of 10 per cent. declared by the company, which was paid to him.

A stock dividend is not, in the ordinary sense, a dividend; the latter being the distribution of profits to stockholders, as income from their investment. A stock dividend is merely an increase in the number of shares, the increased number representing exactly the same property that was represented by the smaller number of shares. The corporate property remains the same after the stock is increased as before, and the interest of each stockholder in the corporate property is also unchanged. He merely holds a new representative or evidence of that interest. Kaufman sold and Hotopp bought the interest of the former in the corporate property of the Woolen Mills Company represented by a certificate for 40 shares. Hotopp, after the shares were increased, owned no greater interest in the corporate property than he bought from Kaufman. The same interest, after the increase, was represented by a certificate for 51 shares, instead of 40.

Corporate earnings are, until distributed by

the company, part of the corporate property. The stockholder has an interest in such earnings, as he has in all the other corporate property, in proportion to his stock; but he is not entitled to the control or use of the same, except such portion thereof as the corporation, acting in good faith, may separate from the corporate property, and distribute to the stockholders as dividend or income.

The accumulated profits of a corporation belong to the company, and acting in good faith, and for the best interests of all concerned, the corporation may capitalize the surplus, or it may invest it in its work and plant, so as to secure and increase the permanent value of its property, or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may distribute its earnings at once to its stockholders, as income.

Which of these courses is to be pursued must be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud and bad faith on their part, their discretion in this respect cannot be controlled by the courts. *Gibbons v. Mahon*, 128 U. S. 549, 10 Sup. Ct. 1057. The case cited is analogous to that at bar, being a controversy between a life tenant and remainderman, the former claiming the right to enjoy as income a stock dividend declared from the accumulated earnings of the company; but the court, after reviewing the authorities, both English and American, reaches the conclusion that the new shares issued in pursuance of the stock dividend must be treated as capital, the income therefrom alone being payable to the life tenant.

In the case at bar it is clear, on reason and authority, that the proper construction of the contract between the parties is that Kaufman retained to himself whatever dividend was declared in January, 1896, as the ordinary and usual fruit of the investment he was parting with. This he received when the cash dividend of 10 per cent. declared for the stockholders was paid to him.

The stock dividend of 27 per cent. represented part of the corporate property sold to Hotopp, in which Kaufman reserved no interest, and was therefore not entitled to the whole or any part thereof.

The judgment of the court below is correct, and must be affirmed.

(93 Va. 698)

SPILMAN et al. v. GILPIN.

(Supreme Court of Appeals of Virginia. Sept. 26, 1896.)

BILL OF REVIEW—WHAT CONSTITUTES — REHEARING IN TRIAL COURT.

In an action to enforce purchase-money bonds due for lots sold, after a decree for want of answer was entered against the latter for the amount due, and a commissioner was appointed to make sale, defendants filed a paper

alleging that the decree was a surprise, into which they were misled by an agreement supposed to exist with their counsel that the cause was not to be heard at the time it was, and that they had a complete defense, etc. *Held*, that such paper could not be treated as a bill of review, since the decree attacked was interlocutory, and a bill of review will only lie to review or set aside a final decree.

#### On Rehearing.

In an action to enforce payment of purchase-money bonds, after a decree for want of answer, entered when defendants were present in court, appointing a commissioner to make sale of the lots, and after the sale, but before confirmation, defendants filed a paper alleging facts constituting a complete defense; that there was an understanding between the counsel that the suit was not to be heard until certain other suits involving the same question were decided, and, when heard, the depositions in the other suits were to be used so far as applicable; that, when the decree was entered, they were so taken by surprise that they did not recall, in such manner as to present them to the court in proper form, the facts which would have entitled them to a continuance. At the time of the decree, defendants did not make objection to the cause being heard, and to the court's refusal to continue a part of the record. *Held*, that such paper, treated as a petition for rehearing, was sufficient. Harrison and Buchanan, JJ., dissenting.

Appeal from circuit court, Page county; Thomas W. Harrison, Judge.

Action by A. G. Gilpin against Spilman, Adams & Co. to enforce the payment of certain purchase-money bonds due and held by plaintiff for lots sold to defendants, in which there was a decree against defendants for want of answer, for the amount due, and a commissioner was appointed to make sale of the lots unless such sum was paid in 30 days. After the sale was made and reported for confirmation, defendants filed a paper, in which they complained of the decree rendered against them, on the ground of surprise, and asked that such paper be treated as a bill of review or petition for rehearing, and that they be allowed to make their defense, etc. From a decree denying the relief prayed by defendants, and dismissing their bill of review or for rehearing, and confirming the report of sale, defendants appeal. Reversed.

Marshall McCottrick, for appellants. Barton & Boyd, for appellee.

. HARRISON, J. In March, 1892, A. G. Gilpin instituted suit in the circuit court of Page county against Spilman, Adams & Co., to enforce the payment of certain purchase-money bonds due, and held by him, for two lots sold to Spilman, Adams & Co. by the Valley Land & Improvement Co. On the 22d day of April, 1892, a decree was entered, giving the defendants, on their motion, 90 days in which to file their answer. The cause was continued from time to time without further action until January 20, 1894, when, no answer being filed, a decree was entered against the defendants for the amount due, as shown by their bonds filed with the bill, and a commissioner appointed to make sale of the lots,

unless the sum decreed was paid in 30 days. The sale was duly made, and reported to the court at the April term, 1894, for confirmation. At the same time, Spilman, Adams & Co., the defendants, appeared, and filed a petition in said cause, in which they complain of the decree rendered against them, and charge that they will sustain irreparable injury if said decree is enforced. They insist that the decree complained of was a great surprise, into which they were misled by an agreement, supposed to exist with their counsel, that the cause was not to be heard at the time it was; that they had an ample and complete defense, which they could have made to the demand against them, and which they could then make if an opportunity was afforded. They further ask that the petition filed by them be treated as a bill of review or petition for rehearing, as the nature of the case may require; that they be allowed to prepare their defense by such pleas, answers, and depositions as they may be advised are necessary. Affidavits were filed with the petition in support of its allegations, and a decree was entered, bringing the cause on to be heard upon the report of sale, the petition and affidavits filed by the defendants, and submitting the cause to the judge to be decided in vacation, with leave to the plaintiff to file in 20 days affidavits in reply to those filed by the defendants. On the 20th day of June, 1894, a decree was entered, denying the prayer of the bill of review or petition for rehearing, dismissing the same, and confirming the report of sale. From this decree an appeal was allowed by one of the judges of this court.

There are but two circumstances which are proper grounds for a bill of review. It must allege either error of law on the face of the record, or newly-discovered evidence; and it will only be received when it seeks to review or set aside a final decree. 4 Minor, Inst. pt. 2, p. 1268; Bart. Ch. Prac. 332; 2 Rob. Prac. (Old) p. 414. The petition filed in this case does not allege either circumstance necessary for it to be treated as a bill of review; and it seeks to set aside an interlocutory, and not a final, decree, the established definition of a final decree being: "A decree that ends the cause, so that no further action of the court in the cause is necessary." *Battaille v. Hospital for Insane*, 76 Va. 63. It is clear, therefore, upon well-settled principles, that this paper cannot be treated as a bill of review.

In order to obtain relief in equity from injury sustained by reason of surprise or mistake, as a general rule, it is proper to file an original bill impeaching the decree on that ground. *Anderson v. Woodford*, 8 Leigh, 328. But when relief is sought from surprise, occasioned by the entry of an interlocutory decree, there is no good reason why it should not be done by filing a petition for a rehearing in the same cause in which the decree was entered. Treating the proceeding taken by the appellants as a petition for a rehearing of the de-

cree complained of, upon the ground of surprise, they have not made out a case that entitles them to the relief sought. The petition alleges that there was an understanding and agreement between the counsel for plaintiff and the defendants in the court below that this suit was not to be heard until certain other suits, involving the same question, were decided, and that, when heard, the depositions in the other suits were to be used in this so far as applicable. This contention is emphatically denied by counsel for the plaintiff below, who assert most positively that they never had such an agreement.

The well-settled rule of practice as to verbal agreements or understandings between counsel, when not admitted, is to disregard them. When, however, a misunderstanding between counsel results in such a surprise as to work a hardship, the court may, in its discretion, grant a continuance; but, in order to secure this relief, the party claiming to be surprised must make a motion for a continuance, supporting said motion with affidavits of the parties, or statement in writing of counsel, setting forth the ground of the application and the cause of surprise; and, when the decree is entered overruling the motion, it should bring the cause on to be heard upon said motion and affidavits and the court's refusal to grant the continuance, so that the error, if any, can be corrected by appeal from that decree.

If the parties had not been present in court when the decree was entered, and had had no notice that the decree would be asked for, and could show that this was a surprise to them, by reason of a misunderstanding between counsel as to the time of hearing, and had been by this means deprived of an opportunity to move for a continuance, and to make the refusal to continue part of the record, they would then have been in a position to apply for relief from the decree complained of.

In this case, however, the appellants were present, by their counsel, in court, when the decree was entered. They failed to make their objection to the cause being heard, and the court's refusal to continue, a part of the record. They allow the decree to be enforced by a sale of the property; and at a subsequent term, when the sale is about to be confirmed, they file a petition for a rehearing of the decree of sale, in which they allege "that they were so taken by surprise, and thrown off their guard, that they could not call to mind, in such manner as to present them to the court, in the proper form to be considered by the court, the facts as they really existed, which would have entitled them to a continuance." This is not the kind of surprise a court of equity will relieve against.

The object sought is to set aside the deliberate decree of a court of competent jurisdiction, pronounced with all the parties before it, and present by counsel when the decree was entered. The petition for rehearing fails to make out a case that justifies the inter-

ference of the court, and was properly dismissed.

There is no error in the decree appealed from, and it is affirmed.

#### On Rehearing.

(Nov. 19, 1896.)

KEITH, P. This case was argued and submitted at the term of this court held at Staunton in September, 1895, and an opinion was rendered affirming the decree appealed from. Upon a petition to rehear, that decree was set aside, and the cause was again argued and submitted at the term of the court held in Staunton, September, 1896. From the bill which was filed on September 20, 1890, in the circuit court of Page county, it appears that the Valley Land & Improvement Company sold to Spilman, Adams & Co. two lots of land in Page county, one for the sum of \$575, and the other for the sum of \$287.50; that for these lots deeds were executed, and at the same time a deed of trust was taken, in which T. A. Smoot was named as trustee, to secure the payment of the unpaid purchase-money notes. These notes were afterwards transferred to A. G. Gilpin, and this suit was instituted to enforce the lien for their payment. On the 22d day of April, 1892, the case was heard upon the bill and exhibits filed, and leave was granted the defendants to file their answer in 90 days; and at the January term, 1894, the cause was again heard upon the bill and exhibits, and, no answer having been filed, the bill was taken for confessed; and thereupon the court entered a decree that Spilman, Adams & Co. do pay the complainant the sum of \$575, with interest from September 25, 1890, and unless this sum shall be paid, together with costs of the suit, within 30 days from the date of the decree, that a commissioner be appointed to take possession of the lots mentioned in the deed of trust, and sell the same, in accordance with the terms of the deed. The money was not paid. The lots were exposed to sale, and brought the sum of \$23.75 in gross. At the April term, 1894, a report of the sale was made, and a paper called a "bill of review," or a "petition for a rehearing," with accompanying affidavits, was filed by Spilman, Adams & Co., asking that the decree of the January term, 1894, might be reheard and reversed. From this petition it appears that Spilman, Adams & Co. were induced to enter into a contract for the purchase of the lots from the Valley Land & Improvement Company by fraudulent and false misrepresentations of material facts; and, without stating the averments of the petition in detail, it is sufficient to say that it shows a state of facts which, if presented at the proper time and in the proper manner, furnished a complete defense to the suit against them. As we have seen, however, no answer was filed to the original bill. The bill was taken for confessed as

to Spilman, Adams & Co., and the petition undertakes to account for the failure to present their defense at the proper time. The petitioners aver that there were pending on the docket of the circuit court of Page county a number of suits instituted against others who had purchased lots at the same time and under like circumstances; that when the pleadings were being made up, and steps were being taken to prepare the cases for trial, it was found that the same questions were involved, and that the same depositions would have to be taken in each case, involving a great deal of time, cost, and expense; that there were two cases against S. A. Walton, one brought to enforce the payment for stock subscription, and the other to enforce the payment of notes given for the purchase money of lots; that it was agreed among counsel representing the plaintiffs and defendants that these two cases should be gotten ready and pressed to a final hearing, and that the decision in those cases should settle all other cases of a like character; that for this reason no effort was made by the petitioners to get ready for trial; that their defense consisted of affirmative matter; and that the burden of proof was upon them. At the January term, 1894, of the circuit court of Page county, the cases against Walton were continued; and, when the case against petitioners was called, they asked for a continuance—First, because it was understood that all the cases were to be held in abeyance until the case of a like character against Walton had been heard; secondly, that it was agreed that the depositions in the cases against Walton were to be read and used in all the cases in which they were applicable, and that the said depositions were not only applicable, but necessary, in the case of petitioners. Their application for a continuance was refused by the court; petitioners were forced into trial; and the decree complained of rendered against them. They aver that this action of the court surprised them, and “threw them off their guard, so that they could not call to mind, in such manner as to present them to the court, in the proper form to be considered by the court, the facts as they really existed, which would have entitled them to a continuance, and which they have since been able to call up to their recollection, and which they here and now produce in the form of affidavits.” The case was heard upon the papers formerly read, the petition for a rehearing, and the affidavits on behalf of the petitioners and those in adverse interest; and the court, being of opinion that the burden of proving the existence of such an agreement between counsel was upon the defendants, and that the weight of evidence was against their contention, refused to rehear the decree of the January term, dismissed the petition, and confirmed the report of sale.

If the statements in the petition are true, the petitioners have been the victims of a fraud by which they were induced to enter into a contract to pay \$862.50 for property which sold in this suit for \$23.75. If they have had their day in court, if they have had the opportunity to make defense to the claim preferred against them, and have themselves or by their counsel neglected, at the proper time and in the proper manner, to avail themselves of it, the hardship of the case should not entitle them to relief, but they should be left to suffer the consequences of their negligence and inattention to their interests. Hard cases should not make bad law, but hard cases do and should make the courts vigilant to discover and pursue a mode by which, without doing violence to established law and forms of procedure, the wrong may be redressed. The decree of January, 1894, was not a final, but an interlocutory, decree. The plaintiff came into court, asking the enforcement of a specific lien. In order to afford complete relief in such cases, a court of chancery, having taken jurisdiction over the subject, not only enforces the lien, but, to make an end to litigation, gives a personal decree for the debt. The source of equity jurisdiction, however, is not the right to a personal decree, but the right to the enforcement of the lien. A decree is final which disposes of all questions presented for decision in a cause, and gives all the relief to which, under the pleadings and the proof, the parties are entitled. See *Rawlings' Ex'r v. Rawlings*, 75 Va., at page 76; *Ryan's Adm'r v. McLeod*, 32 Grat. 367; and *Cocke v. Gilpin*, 1 Rob. (Va.) 20. In this case not only does the decree of January 20, 1894, fail to give all the relief to which the plaintiff was entitled, but it did not give that relief the prayer for which alone gave the plaintiff a standing in a court of equity. The petition filed, therefore, by Spilman, Adams & Co., praying to have the decree of January 20th reheard, is not a bill of review; it is a petition for a rehearing.

It is settled that a bill of review lies to rehear a decree for after-discovered evidence; and, with respect to after-discovered evidence, there seems to be no difference between a bill of review and a petition for rehearing. A bill of review lies also for error apparent upon the face of the record; but the proofs, unless they are set out on the face of the decree or admitted in the pleadings, cannot be considered upon a bill of review. See *Thomson v. Brooke*, 76 Va. 160. In this respect a court has far greater power in dealing with interlocutory decrees upon a petition to rehear than with final decrees upon a bill of review. It is difficult to define the precise limits of the duty of courts upon petitions to rehear. It may be safely stated, however, as being established by the authorities, that where a case has not been heard upon the merits, but an

interlocutory decree has been rendered upon the bill taken for confessed, and other circumstances tending to excuse the defendant's default in making his defense at the proper time appear, the rehearing of the decree upon a petition filed for that purpose, showing that the defendant had a meritorious defense, may, in the discretion of the court, be entertained. The discretion thus exercised is, of course, a judicial discretion, and one not to be exercised arbitrarily either in granting or withholding the relief sought. In 2 Danell, Ch. Prac. (1st Am. Ed.) at page 1230, it is said: "Where the case has not been heard upon its merits, the court will exercise a discretionary power of vacating an enrollment, and of giving the party an opportunity of having the merits of his case discussed; thus where a decree of dismissal was made by default, owing to the neglect of the plaintiff's solicitor in providing counsel to attend at the hearing. So, in *Benson v. Vernon*, 3 Brown, P. C. 626, where a bill had been taken for confessed, for want of an answer, and it was proved that the defendant was in an unsound state of mind, and had omitted, from that circumstance, to put in an answer, the house of lords ordered the enrollment of the decree to be vacated. The same principle was also acted upon by Lord Hardwicke in *Kemp v. Squire*, 1 Ves. Sr. 208, who said that the above cases proved it to be discretionary in the court (he did not mean it arbitrarily so) to exercise the power if it sees fit. In *Pickett v. Loggon*, 5 Ves. 702, however, the court refused to act upon this discretion; and it is to be observed that, in all those cases where it has been exercised, the merits of the cause had not been discussed before the decree was announced; and that, where such has been the case, the court has refused to exercise the discretionary power before alluded to, unless there has been something in the nature of a surprise upon the party affected." See, also, 2 Rob. Prac. (Old) at page 389, where it is said that "the granting of a rehearing to an interlocutory decree is a matter of sound discretion." During the term of the court all its proceedings are in its breast, and its judgments and decrees may be set aside upon motion. When the term is ended, final judgments have passed beyond the power of the court, except to a very limited extent, regulated by statute, and final decrees also, except in so far as the power to control them is regulated by statute or by the law governing bills of review; but in courts of law, where proceedings are far less plastic than in courts of equity, interlocutory orders may be controlled, and the record amended, and made to speak the truth, until a final judgment has been entered, and the term ended at which it was entered.

We have seen that the petition for rehearing presents a complete defense to the plaintiff's demand, and that the decree complained

of which establishes his demand is an interlocutory decree. It further appears from the averment of the petition, which, being uncontradicted, must be accepted as true, that when the case was called for hearing at the January term, 1894, the defendants asked for a continuance, on the ground that they had failed to take depositions, and prepare the case for hearing, relying upon an agreement between counsel that depositions taken in another case should be read in this, the existence of which agreement opposing counsel denied. Upon the question of fact as to the existence of such an agreement, we do not doubt the circuit court correctly decided. Even if there had been such an agreement, yet, not being in writing, it ought not to have been enforced by the court; but when it appeared to the court that counsel had acted in the belief that such a convention existed, and in reliance upon it, and when it appeared that the rights of innocent parties would be sacrificed if the court proceeded to an adjudication of the cause as it then stood, we are of opinion that the court should have continued the cause until the next term, or for such a reasonable time as would enable the parties properly to present their defense. That the motion was made must be accepted and treated as a fact. It is so averred, and it is not denied. The defendants, in fact, then did what it was their duty to do for the protection of their rights and interests. Their dereliction consists, at the utmost, in failing to spread upon the decree of January, 1894, the motion for a continuance, and the reason upon which it rested. We have, then, this state of facts: The defendants moved the court for a continuance, upon the ground of the existence of a convention between their counsel and opposing counsel that depositions taken in a similar case might be read in this, which, if read, would have established a complete defense to the action; that, relying upon this convention, made in the interest of economy, and for the promotion of speedy justice, they had failed to prepare their case; that a decree upon the bill taken for confessed had gone against them, interlocutory in its character; and that at a subsequent term these facts were all called to the attention of the court, and none of them denied. Can it be doubted that the court could nunc pro tunc have amended its decree of January, 1894, so as to make it show, in accordance with the truth, that the motion had been made for a continuance for the reasons stated? And can it be doubted that a decree so amended would disclose error which would entitle the petitioners to a reversal of it? In other words, if petitioners had gone before the court in April, and said, "By inadvertence the decree of January omits to state that we move the court to continue our case for cause then shown, and we now ask that that decree may be so amended as to let the truth appear," can it be denied that there was a power resident in the court so to amend

this decree, and that, in the interest of justice, such power should have been exercised?

What we have said with respect to amending the decree was intended, of course, to illustrate the authority of the court over causes, either at law or in chancery, up to the time of the entry of a final judgment or decree. There was, in fact, no motion made to amend the decree; but, if the court had the power to entertain and to grant such a motion, it would seem to be conclusive of its power to entertain the petition which was actually presented; and, if the power existed, there can be no doubt that justice required that it should be exercised. The question before the court was not as to the existence of the alleged agreement of counsel as a matter of fact, but whether counsel did in good faith rely upon its existence. In the case of *Wager v. Stickle*, 3 Paige, 407, the default of the defendant was occasioned by the supposition on the part of his solicitor that he had made an agreement with the solicitor of the adverse party, by parol, to extend the time for answering. The defendants swore to a defense on the merits, and that they had also applied to the solicitor of the adverse party to waive the default, which was refused. Chancellor Walworth says that in such cases, "if the verbal agreement is denied, or even if it is admitted, and the objection is made that it was not in writing, so far as the question of regularity is concerned the court must consider the agreement as not existing. If the court is satisfied, however, that the party has acted on the supposition that such an agreement had been made, although he may have been mistaken in point of fact, it may be sufficient to excuse his default, and entitle him to relief upon equitable terms." We think the doctrine of that case is applicable to this, and persuasive as to the duty of the court in the case before us.

For the foregoing reasons, we are of opinion that the decree of the circuit court should be reversed, and this court will enter such decree as the circuit court should have rendered.

RIELY and CARDWELL, JJ., concur.  
HARRISON and BUCHANAN, JJ., dissenting, and adhering to the original opinion.

(93 Va. 678)

#### COLUMBIA ACC. ASS'N v. ROCKEY.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

#### PLEADING—STATEMENT OF PARTICULARS—DEFENSE ADMISSIBLE UNDER GENERAL ISSUE.

1. A statement of particulars of a cause of action or ground of defense which may be required by the court to be filed under Code, § 3249, is not a pleading forming an issue to be tried, and is not subject to demurrer, but is intended only to inform the adverse party, and can be attacked for insufficiency only when it fails to set out the particulars of the claim or defense sufficiently for that purpose.

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2. The object of the act of 1831 (Code, § 3299) permitting a defendant in an action at law to plead an equitable set-off by a special plea was to enlarge the right of defense, and it does not take away any right then existing; and the defense of failure of consideration can be made under the general issue, the same as before the statute was enacted.

3. In an action on a contract of employment, to recover salary, evidence to prove a condition of the contract by which the liability of the defendant was to depend on a contingency which never happened is admissible in defense under the general issue.

Appeal from hustings court of Staunton: Charles Grattan, Judge.

Action by one Rockey against the Columbia Accident Association. Judgment for plaintiff, and defendant appeals. Reversed.

White & Ker, W. E. Craig, and T. K. Hackman, for appellant. A. C. Braxton, for appellee.

RIELY, J. It is unnecessary, in disposing of the writ of error in this case, to notice any of the proceedings prior to the mistrial at the September term, 1894. After the mistrial, the defendant, being required to file a statement of the particulars of its ground of defense, as the court, on the motion of the plaintiff, had previously directed it to do, tendered the plea of non assumpsit, which was filed without objection. It also tendered, then and subsequently, four statements, as containing the particulars of its grounds of defense. These statements were unnecessarily prolix, and possessed much of the formality of regular pleas. The third of these statements admitted that the defendant had contracted with the plaintiff to pay him, as its general manager, the salary for which he had sued, but that he had so unskillfully and improperly managed its business, through neglect, and improper disagreements with certain named persons, that he had injured its business, and had not earned his salary. The first, second, and fourth of the said statements are really one, in substance, and may be jointly considered, as presenting a single, and the same, ground of defense. They set forth, in substance, that the agreement to pay him a salary was a conditional contract; that he was a promoter of the company, and had agreed with it that, in consideration that it would pay him a salary of \$2,500 per annum, its business would be so conducted that his salary would be paid from the profits of the business, and the one-half of its capital which had been dedicated as a fund for the conduct of its business, the other half of its capital being set apart as a reserve fund to meet losses by death, or other extraordinary demands; that, if the business was not so conducted that his salary could be paid from the sources named, he would not charge any salary; and that the part of its capital so dedicated to run its business had been consumed; and that there were no profits of the business, so that in fact the company owed him nothing. Each of these state-

ments was objected to by the plaintiff, and was rejected by the court.

Before considering the propriety of the action of the court, it will be proper to advert to the statute under whose authority the statements were required to be filed. The object of the statute (section 3249 of the Code) was simply to give to the defendant more definite information of the character of the claim of the plaintiff than very often appears from his declaration or notice, and also to give to the plaintiff more particular information of the ground of defense than is generally disclosed by a plea, so as to enable the parties to prepare more intelligently for the trial, and to prevent surprises which may, and often do, result in injustice. The statute was enacted in the interest of justice, and is one of the most serviceable statutes we have for its attainment. But such statement does not constitute the issue to be tried, and it was never intended that the particulars of the claim or ground of defense should be set forth with the formality or precision of a declaration or plea, but only in such manner, however informal, as would fairly and plainly give notice to the adverse party of its character, where the same was not so described in the notice, declaration, or other pleading. The statement is not the subject of a demurrer, but the proper practice is, if it is deemed insufficient, to move the court to require a sufficient statement. *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167. If the court should be of opinion that the statement filed is insufficient to inform the adverse party of the particulars of the claim or ground of defense, it should require a further and sufficient statement to be filed, and, if not furnished, "exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character." Such statement may or may not disclose a legal claim, or constitute a defense at law. If it does not, the proper practice is to move the court, on the trial of the issue,—if tried by a jury,—to exclude any evidence offered in respect to the matter contained in such statement, or, if the evidence has been admitted, to move the court to strike it out, or to correct its effect by appropriate instructions.

The objection made to the third statement was twofold: First, that it set up the defense of failure of consideration, which, it was claimed, could only be done by a special plea of equitable set-off, under section 3299 of the Code, verified by affidavit; and that the statement neither conformed to the requirements of the statute, nor was it sworn to. This raises an important question, that was much discussed at the bar. It was contended by counsel for the plaintiff that whatever may have been the law prior to the act of 1831, which was the original of section 3299 of the Code, it has not been competent, since

its enactment, to make the defense of failure of consideration, except by a special plea under that statute, verified by affidavit. It was entirely competent, prior to the said statute, according to the practice at common law, to prove, under the plea of non assumpsit, a want of consideration for the promise, or failure or fraud in the consideration, and, in short, with a few well-understood exceptions, to prove whatever showed that there was no existing debt due. 4 Minor, Inst. (3d Ed.) pt. 1, pp. 770, 774, 798; *Tyler, Steph. Pl.* 176; 1 Chit. Pl. (16th Ed.) 495; 5 Rob. Prac. 264-278; 2 Tuck. Comm. 160; *Withers v. Greene*, 9 How. 213; *Van Buren v. Digges*, 11 How. 461; *Winder v. Caldwell*, 14 How. 434; *Blerly v. Williams*, 5 Leigh, 700; *Todd v. Summers*, 2 Grat. 168; and *Insurance Co. v. Buck*, 88 Va. 517, 13 S. E. 973. But while a defendant, under the plea of non assumpsit, might give evidence of matter by way of recoupment, or in diminution of the damages claimed by the plaintiff, even to the entire defeat of his action, yet it was not competent for the defendant to recover in that suit any damages he may have shown in excess of the damages of the plaintiff. If he wished to recover such excess, he could only do so in an independent action against the plaintiff. 4 Minor, Inst. pt. 1, pp. 793, 798. Nor was it competent, at common law, as against sealed contracts, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of the title or soundness of personal property; but the defendant was driven, as when he proposed to recover against the plaintiff any excess of damages, to his independent action at law to recover the damages he had sustained. 4 Minor, Inst. pt. 1, p. 792; *Taylor v. King*, 6 Munf. 358; *Burners v. Keran*, 24 Grat. 42; and *Hayes v. Association*, 76 Va. 225. The object of the act of 1831 was to remedy these defects, and to enable a defendant both to make such defenses to a suit at law on specialties, and also to recover against the plaintiff any excess of damages he may have sustained, in order to settle in one suit all the rights of the parties arising under the contract, and to prevent circuity of action and a multiplicity of suits. Its object was to enlarge the right of the defense, and not to impair any previous right, or to take away such defenses, where the law previously permitted them to be made.

In the case of *Todd v. Summers*, 2 Grat. 168, the general issue only was pleaded; but the parties agreed, when the issue was made up, that the defendants and plaintiff might give in evidence any matter which could have been specially pleaded or replied to according to law. It appeared upon the trial that the plaintiff had not fully performed his part of the contract sued upon, but the court instructed the jury that the defendants could not be allowed in that action any damages they had sustained by any failure of the plaintiff to perform the agreement on his part.

This court held that the defendants were entitled in that action, in reduction of the claim of the plaintiff, to the benefit of any damages they had sustained by his failure to comply with the agreement on his part, and reversed the judgment of the lower court for the error contained in its instruction. "It seems to me," said Judge Allen, in delivering the opinion of the court, "there would have been no necessity for a special plea to let in evidence of the plaintiff's failure, and all the circumstances of the transaction, to enable the jury to determine what, in justice, he should recover." The case of *Todd v. Summers*, supra, was decided in 1845. Subsequently, in 1856, the very question we are considering was brought directly before the special court of appeals in *Davis v. Baxter*, 2 Pat. & H. 133. It was there held that it was competent, under the general issue, to give evidence in diminution or recoupment of the plaintiff's damages. The same contention was made in that case as is made here,—that since the act of 1831 the defense of failure in the consideration could only be availed of by an equitable plea of set-off, in accordance with that act. Judge Thompson, who delivered the opinion of the court, after pronouncing such contention to be "a very novel construction of the law," said of that statute: "Its leading object was to allow defendants to go behind and inquire into the consideration of specialties upon equitable pleas of offsets, and, if you choose, to enable defendants to make such defenses in case of parol contracts, where, by the rules of common law, the defense could not be made in a legal forum. What those cases of parol contracts were, which were in the legislative mind, I will not stop to inquire or enumerate, because most certain it is that the act was not intended to take from a defendant a single legal right of defense, but to enlarge the right of defense in a court of law. To show the consequences to which such a construction would lead, take the case of a promissory note, on which the plaintiff elects to bring an action of general indebitatus assumpsit, which he may do, and give the note in evidence to support his action. The defendant pleads non assumpsit. As the law stood in 1831, I suppose no one would gainsay the defendant's right to prove fraud, illegality, or failure in the consideration. Suppose he had, on the same or a similar note, brought debt, and the defendant pleaded nil debet; it is equally certain, under that issue, he might have proved fraud, illegality, or failure in the consideration, and have defeated the plaintiff. I could multiply cases of a similar kind, yet nobody has ever supposed that these defenses must now be made in the form of an equitable plea under the statute, which would follow as a consequence from the counsel's construction of the statute. I cannot give to a statute, whose object was to enlarge the right of defense in a legal forum, a construction and effect so diametrically opposed to its policy and purpose, and

hold that it was designed to preclude such a defense as this, except in the form of an equitable plea,—a defense clearly admissible at law, in a case of general indebitatus assumpsit, according to all authorities, ancient and modern, English and American." I have made this copious extract from the opinion of Judge Thompson, in which opinion all the judges concurred, because it states so clearly and satisfactorily our view of the rule in question, and the object and effect of the act of 1831, as well as the constant practice, according to our experience, of the trial courts of this commonwealth. The case of *Davis v. Baxter* is cited by Mr. Robinson, in his work on Practice (volume 5, p. 268), as declaring the rule in this state on the subject under consideration. The court of appeals of West Virginia took the like view of the act of 1831. In *Organ Co. v. House*, 25 W. Va. 88, Green, J., said: "I do not understand this act of 1831, allowing special pleas in certain cases, where the defense is recoupment, to exclude the defendant from making this defense under the general issue of non assumpsit, accompanied with notice thereof to the plaintiff." We have been induced to consider this subject so fully because of its importance in daily practice before the courts. Our attention was called to the case of *Keckley v. Bank*, 79 Va. 458, in which a different view of the effect of the act of 1831 was suggested; but it is only necessary to say, as appears from what has already been said, that in the view so suggested we do not concur.

The first objection made by the plaintiff to statement No. 3 was therefore untenable. But, while the statement sets forth a ground of defense that is clearly admissible under the general issue of non assumpsit, it does not do so in a manner to apprise the plaintiff of the particulars of the defense. It conveys to him no real information, and is too vague and indefinite to be of any service. It would be impossible, from the statement for the plaintiff, even to conjecture, much less understand, what were the matters intended to be relied on to prove that he had not earned his salary. It was therefore, for the second objection made to it by the plaintiff, properly held by the court to be insufficient.

Statements 1, 2, and 4, when analyzed, and stripped of their prolixity and unnecessary formality, set forth a conditional contract. They give notice to the plaintiff that it claims, and will aim to prove on the trial, that he agreed, in consideration of its promise to pay him, as its general manager, a salary of \$2,500 per annum, that its business would be so managed that his salary would be paid from its working capital and the profits of its business, and that, if it could not be so paid, he would make no charge for his services, and averred that the said part of its capital had been exhausted, and that there were no profits. The existence of such part of its capital and of profits of the business under his management for the payment of his salary is thus averred

to be a substantive ingredient in the contract, and a condition precedent to the liability of the company. There was thus presented a definite and legal defense, which, if proved, would defeat the action. 5 Lawson, Rights, Rem. & Prac. § 2503; 1 Whart. Cont. § 598; and Insurance Co. v. Kearney, 71 E. C. L. 925. Objection was made to the said statements on the ground of insufficiency and other causes. The court sustained the objection, rejected the statements, and consequently would not allow the defendant to introduce on the trial any evidence in support of such defense. We are of opinion that the court erred in not holding the said statements to be sufficient, and in refusing to permit the defendant to introduce any legal and competent evidence in support of the said defense. The judgment of the hustings court must therefore be reversed, the verdict set aside, and the case remanded for a new trial, to be had in accordance with the views expressed in this opinion.

#### STONEBUNGER v. ROLLER et al.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

#### EQUITY — JURISDICTION — ADEQUATE REMEDY AT LAW—APPEAL—QUIETING TITLE—PLEADING AND PROOF.

1. In a suit to quiet title, the defense of an adequate remedy at law should be raised in the trial court.

2. In a suit to quiet title to land in another state, the validity of a tax title cannot be reviewed on appeal, the laws of such state in regard to the sale of lands for taxes not being in the record.

3. In a suit merely to quiet title, plaintiff is not entitled, where such relief is denied, to claim a rescission of the conveyance from his grantor, and recover a judgment against him for the price paid.

Appeal from circuit court, Shenandoah county; Thomas W. Harrison, Judge.

Bill by one Roller against one Stonebunger and others. From a decree for plaintiff, defendant Stonebunger appeals. Reversed.

Walton & Walton, for appellant. John E. Roller, for appellees.

**RIELY, J.** This suit was instituted to remove an alleged cloud upon the title of the land of the plaintiff, and to quiet his title thereto. The jurisdiction of a court of equity to remove a cloud from the title to land, where the party complaining has no adequate remedy at law, is well settled. *Iron Co. v. Kelly*, 93 Va. —, 24 S. E. 1020; *Carroll v. Brown*, 28 Grat. 791; and *Hale v. Penn's Heirs*, 25 Grat. 261. But in the absence of statutory authority, a court of equity, as a general rule, does not entertain a bill of this character, if the party filing it claims to be the owner of the legal title, unless he is in possession of the land upon the title to which the cloud rests. The jurisdiction exercised by courts of equity in this class of cases is founded upon the theory that the party in-

voking it has no adequate remedy at law for the injury of which he complains. If he is out of possession, and is the owner of the legal title, he has ordinarily a complete remedy at law by an action of ejectment. *Railroad Co. v. Taylor* (Va.) 24 S. E. 1013; *Otey v. Stuart*, 91 Va. 714, 22 S. E. 513; *Stearns v. Harman*, 80 Va. 48; and *Carroll v. Brown*, 28 Grat. 791. The plaintiff claimed in his bill to be the owner of the legal title to the land upon the title whereunto the cloud was alleged to rest. It appears from the record that the land is situate in the counties of Shelby and Panola, in the state of Texas. It does not affirmatively appear from the bill or the other part of the record that either the plaintiff or the party claiming adversely to him is in possession of the land; nor does the record disclose what the laws of Texas are as to the right to bring an action of ejectment in a case like the one before us. No objection, however, was made to the maintenance of the suit on the ground that the plaintiff had an adequate remedy at law, and we may therefore properly pass by any question as to the jurisdiction of equity, and proceed to the consideration of the case upon its merits.

The plaintiff claimed to be the owner of the entire interest in the land, and set forth in the bill his chain of title, which showed an apparently perfect title in himself, but alleged that, by the burning of the records of the clerk's office of Shelby county some years previously, the original deed from Christian Hockman to John W. Reeser, the grantor of the plaintiff, as well as the record thereof in the clerk's office, had been destroyed. He further alleged that after purchasing the land from Reeser he had applied to Hockman to supply this missing link in his chain of title by executing directly to the plaintiff a new deed for the land, but that Hockman had refused to do so unless Reeser and J. J. Stonebunger would unite with him in the deed or request him in writing so to make it, upon the ground that he had made the original deed to Reeser and Stonebunger jointly. The plaintiff further alleged that he had repeatedly applied to Stonebunger for a release of any real or supposed interest he had in the land, but that while refusing to do so, or to assert any title to the land, he had recently obtained from Hockman a new deed to Reeser and himself jointly for the land. He thereupon prayed that the court would annul the new deed Stonebunger had so obtained, and cause a proper deed to be made to him for the land by a special commissioner appointed for the purpose. It conclusively appears from the pleadings and the evidence that the appellant, Stonebunger, was jointly interested with Reeser in the land, and that the original deed from Hockman was made to Stonebunger and Reeser jointly, and not to Reeser alone; so that the plaintiff did not have in fact the legal title to all of the land, or

own the entire interest in it, but so far as the original deed showed, or the record of the title would have shown if it had not been destroyed, the title was jointly in Stonebunger and himself. There was, therefore, so far as the title papers or the record thereof showed, no ground upon which the plaintiff could ask for the removal of the cloud upon which he alleged to rest on his title, such alleged cloud being a bona fide legal interest in Stonebunger which the plaintiff had never acquired. It was not questioned that the plaintiff contracted with Reeser for the entire interest in the land, and paid him therefor, and that he was a bona fide purchaser thereof for value without actual notice of the outstanding interest and title in Stonebunger. He was simply misled by his grantor, and of him alone had he any ground to complain. But it was contended that Stonebunger, when questioned in regard to the master, disclaimed any interest in the land, and should therefore be compelled to convey to the plaintiff the apparent interest he has in it. There is testimony in the record tending to prove such disclaimer by Stonebunger, but it also shows that he subsequently procured from Hockman a new deed to Reeser and himself to supply the place of the deed Hockman had originally made to them. It does not appear from the testimony that Stonebunger was inquired of or approached in regard to the sale of land, or knew of it, until several months after Reeser had conveyed the land to the plaintiff, and the latter had paid the entire purchase money. He did nothing to induce the plaintiff to buy the land, and was in no wise responsible for his purchase of it. He was not guilty of any fraud, and did nothing that estops him from asserting his claim to the land.

There was put in evidence by the plaintiff a deed to Reeser for the land from a certain A. R. Chandler, who claimed that he had purchased it at a sale made thereof for delinquent taxes, though such deed was not set out by the plaintiff in his bill as a link in his chain of title, nor any claim made under it. Title under a tax sale was not put in issue by the pleadings, and the deed from Chandler was duly excepted to as evidence upon that ground. The land is situate, as we have seen, in the state of Texas. The record contains no information as to the laws of that state in regard to the forfeiture and sale of lands for the nonpayment of taxes, and lacks much else that is necessary to show any title in Chandler. We would therefore be unable, if it were indeed proper, to pronounce upon the validity of the tax title claimed through Chandler.

It was suggested by the plaintiff in his brief that, if he was not entitled to have the alleged cloud removed from his title, the sale of the land to him by Reeser should be rescinded, and a decree entered in his favor against Reeser for the amount of the

purchase money he had paid to him. The bill was not framed for any such purpose, but for a totally different one,—the removal of an alleged cloud upon the plaintiff's title. No ground for the rescission of the contract was alleged, and no such issue raised or litigated. The bill contains no suggestion of such relief in any contingency, and manifestly it could not be given under the pleadings in the case. In no view was the plaintiff entitled to the relief sought by his bill. The decree of the circuit court must therefore be reversed, and the bill dismissed.

(93 Va. 690)

WILLIAMS' ADM'R et al. v. CLARK'S  
REPRESENTATIVE et al.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

CREDITORS' SUIT—APPEAL BY DEBTOR—ACCOUNTING—RETURN OF EVIDENCE BY COMMISSIONER.

1. In a creditors' suit, though the claims are several and distinct, the debtor may appeal as to all the claims allowed if they aggregate \$500, though the claims of some of the creditors are less than that amount.

2. Though the decree under which a commissioner acts in taking accounts does not direct return with the report of the evidence on which it is founded, and though he has filed his report without the evidence, he may thereafter, on the request of one of the parties, return the evidence before the case is heard; the parties not having been notified when his report would be filed.

3. Where the commissioner to whom the taking of accounts has been referred has lost part of the evidence on which his report is founded, the case should be recommitted to him.

Appeal from circuit court, Frederick county; Thomas W. Harrison, Judge.

Suit by Clark's representative and others against Williams' administrator and others. From the decrees, defendants appeal. Reversed.

R. T. Barton, J. J. Williams, and M. McCormick, for appellants. A. R. Pendleton, W. L. Clark, R. E. Byrd, and C. S. W. Barnes, for appellees.

BUCHANAN, J. The first question to be disposed of upon this appeal is whether this court has jurisdiction to review the decrees complained of as to the appellees, whose debts are each less than \$500. A large number of debts were reported against the estates of D. W. Barton and of Phillip Williams, of which the appellants are, respectively, the personal representatives. Many of them were excepted to by the appellants. Of those decreed to be paid, some were over and others under \$500. The appellees, whose debts are each less than \$500, insist that as to them the appeal should be dismissed by this court, because the amount involved is less than \$500. If this was a question of first impression in this court, I would strongly incline to the opinion that their motion to dismiss should be sustained. In an ordinary creditors' suit, where the claims of the creditors are several and distinct, founded upon different contracts, it is

clear that no creditor has the right of appeal unless his claim amounts to \$500. If the matter in dispute as to the creditor be separate and distinct, it would seem to be separate and distinct also as to his adversary, the debtor; and there does not seem to be any good reason why he should be allowed to appeal as to that creditor, unless the amount in controversy between them amounted to \$500. *Schwed v. Smith*, 106 U. S. 188, 1 Sup. Ct. 221. But this question arose and was decided in the case of *Railroad Co. v. Colfelt*, reported in 27 Grat. 777; and the court held that the aggregate amount of the debts decreed against the debtor was the amount which he had in controversy, and that he had the right of appeal as to all the creditors, although the claims of some of them were less than \$500. 4 Minor, Inst. (3d Ed.) 1062. See *Craig v. Williams*, 90 Va., at page 502, 18 S. E. 899. The motion to dismiss must be overruled.

The commissioner who took the accounts in the case did not, when he returned his report, file with it the evidence upon which it was based. This was not required by the decree directing him to take the accounts, nor was he requested by any party to return the evidence until after his report was made and filed. In response to a call made upon him by the appellants after his report had been filed, he brought into court, on the day the case was heard, a basket full of loose papers, which he stated in an affidavit was in part the evidence on which he founded his report. The lower court was of opinion that there was no authority for a commissioner, after his report had been completed and filed, to return the evidence upon which it was based without an order of court directing him to do so; and it was further of the opinion that the evidence thus irregularly brought before the court, and which did not appear to be all the evidence upon which the commissioner based his report, ought not, under the circumstances of the case, to be considered by it in passing upon the exceptions filed to the report. This action of the court is assigned as error.

Generally, a party who desires that the evidence, or any part thereof, upon which the commissioner founds his report, should be returned with it, should request him to do so before the report is filed, unless the decree or decrees under which he is acting directs it. But in a case like this, where it does not appear that the commissioner had notified the parties when his report would be filed, we see no objection to his returning the evidence to the court at any time before the case is heard, when requested by any party to do so; at least, the parties are entitled to have the evidence returned so far as it is necessary to enable the court to pass upon exceptions taken to the report, and the court should direct it to be done upon the motion of any party interested, unless the application has been unreasonably delayed. In this case all the evidence in the hands of the commissioner had been returned, and no good could have

resulted from having an order made to do what had already been done.

Although the evidence, so far as it was in the possession of the commissioner, had been returned to the court, the case was not in a condition for the court to pass upon the exceptions to the commissioners' report without running the risk of doing injustice to one or the other of the parties. If it disposed of the exceptions without considering the evidence, it must presume that the debts reported were properly proved, and render a decree against the appellants therefor, except in so far as the report on its face showed that they were not valid claims. On the other hand, if it considered the evidence returned by the commissioner as all the evidence that was before him, it might have to reject claims the evidence in whole or in part to establish which had been lost, although they had been fully proved. Under these circumstances, the proper course, and the one least likely to do injustice, would have been to recommit the report as to the items excepted to.

It is true, as stated by the trial court, that the accounts had been before the commissioner for many years, and the creditors had been greatly delayed; but for this delay the creditors were to blame, as well as the appellants.

Under all the circumstances of the case, we are of opinion that the court erred in passing upon the exceptions to the commissioners' report in the then condition of the case, and that the decrees must be reversed so far as appealed from, except as to the debt of W. P. McGuire, administrator of A. R. H. Powell, deceased, as to which the decree will be amended and affirmed, in accordance with the written agreement of the parties filed in the papers of the cause, and the cause remanded to the circuit court, with direction to recommit the report as to the claims of the appellees, with instructions to the commissioner, after notice to the parties, to consider the evidence now in the cause, that which has been lost so far as it may be found or set up, and any additional evidence which the parties may adduce before him as to the items in controversy, and to make the report to the court without delay, returning therewith the evidence upon which he bases his report.

As to the other questions made in the petition for appeal we express no opinion, as they are questions which may be affected by the evidence, and cannot be properly considered and decided until after the recommitted report has been returned.

HANNAH et al. v. WOODSON.

(Supreme Court of Appeals of Virginia. Nov. 19, 1896.)

SPECIFIC PERFORMANCE—SUFFICIENCY OF EVIDENCE.

An agreement by decedent to give to plaintiff, a negroess and his natural child, \$10,000 and 25 acres of land, in consideration that plaintiff should keep house for him during his life, is

not sufficiently shown by the testimony of plaintiff, corroborated by that of two negro witnesses to the alleged agreement, who at the time of the agreement were only 13 and 15 years old, and by the testimony of a negro that decedent, when he returned with plaintiff, told him of the agreement, where the other evidence showed that decedent paid regular wages to plaintiff while she worked for him; that plaintiff, during the 23 years she lived with decedent, never mentioned the agreement to any one, and that after decedent's death she spoke of her luck in having received from decedent, before his death, a deed to a small house and lot, as otherwise she would have received nothing; and that a negro man and woman who were present at the time of the alleged agreement, and who were shown to have been of good character, were not called as witnesses.

Appeal from Circuit Court, Roanoke County.

Suit by Mary W. Woodson against one Hannah, administrator, and others. There was a judgment for complainant, and defendants appeal. Reversed.

G. W. & L. C. Hansbrough and Griffin & Glasgow, for appellants. Penn & Cocke, for appellees.

CARDWELL, J. This is a suit instituted in the circuit court of Roanoke county by the appellee, Mary Woodson, against the appellants, the personal representative and heirs of William M. Utz, deceased, for the specific performance of a parol contract alleged to have been made and entered into between Utz and the appellee in the year 1867. The case is as follows: Utz, a bachelor and slave owner, about the beginning of the late war removed from Culpeper county to Roanoke county, and resided in the latter county, upon the estate known as "Waverly," owned by himself and his father jointly, until his death, on the 6th day of February, 1890. Among the slaves owned by Utz, and carried with him to Waverly, was the appellee, who at that time was about 10 years of age. In the spring of 1866, Lewis Daingerfield and other former slaves of Utz returned to Culpeper county to live; the appellee going with them, but promising Utz to return to Waverly in a short time. Failing to return, Utz, about March, 1867, went to Culpeper, and carried her back to Waverly, where she lived in the capacity of a servant, cooking and doing other work about the premises, until the death of Utz. In the meantime the appellee was twice married; was divorced from her first husband, and raised a family of children by her second husband at Waverly. About 10 years prior to the death of Utz, he built a house on the outer edge of the Waverly farm, which was occupied by the family of the appellee; and on the day before his death Utz conveyed this house, together with  $7\frac{1}{2}$  acres of land, to her, by a deed which was delivered to her at the time it was executed by Utz, and in the presence of the officer who took the acknowledgment. Subsequent to Utz's death, the appellee instituted a common-law suit in the circuit court of Roanoke county against the personal rep-

resentative of Utz to recover the sum of \$10,000, and the value of 25 acres of land, which she alleged was due to her by reason of a contract made and entered into with her by Utz in March, 1867, and which he had failed to perform; but the plaintiff in this action took a nonsuit, and afterwards instituted this suit in equity. The contract alleged in her bill is that Utz agreed "that if she would go back with him [Utz] to his home, become his housekeeper, and take upon herself the care and management of his household, and continue in that capacity during his life, he would give her a house and lot in his lifetime, near his residence, and at his death would give her 25 acres of land adjoining the house, \$10,000 in money, and his household furniture." The bill alleges, also, that she was at that time about 17 years of age, and did return with Utz to his home, became his housekeeper, and took upon herself the care and management of his household, and so remained and continued until the death of Utz. It is further alleged that the appellee is the natural child of Utz, and that he did build for her a house about a quarter of a mile from his residence, and, a short while before his death, executed a deed to her, conveying seven acres of land, upon which the house is situated, but, dying unexpectedly, he did not comply with his promises and undertaking, except in conveying the house and lot, which was only a part compliance, while she, on her part, fully performed the alleged contract. The personal representative and heirs of Utz demurred to the bill, and filed their answer, denying every material allegation, and averring that, instead of such a contract having been made, the appellee was paid by Utz monthly wages for her services, up to the time of his death, and that he had conveyed to her, as a gift, the house and lot, with the  $7\frac{1}{2}$  acres of land attached. The circuit court of Roanoke county overruled the demurrer, and, upon the hearing of the cause upon its merits, held that the contract with Utz, as set out in the bill, had been proven, and that the complainant was entitled to a specific execution of the contract for the real estate, and for the money specified to be paid upon the death of Utz, and decreed accordingly. From this decree an appeal was taken to this court.

The appeal may be disposed of upon the merits of the cause, without a review of the numerous authorities cited by counsel in support of the demurrer to the bill. Appellee's proof upon the main question consists of her own deposition, to which no objection was made until the conclusion of her examination, which was too late, and the deposition of John Daingerfield, Sarah E. Tyler, Ben Sims, and Robert T. Goodman. John Daingerfield was at the time of the making of the alleged contract, 25 years previous to his examination, only 18 years of age, and his sister Sarah E. Tyler but a few years older. According to

the testimony of appellee, when Utz came to Culpeper for her, he found her 20 miles away from the home of Lewis Daingerfield, and took her up behind him, on horseback, and carried her to Lewis Daingerfield's house, arriving there about dark, where they spent the night in the cabin with Lewis Daingerfield and his family, and the family of his son-in-law, Tyler; that the contract was made and entered into that night in the presence of Tyler, Daingerfield, and their respective wives and children; that she (the appellee) was very averse to returning to Roanoke, but on being persuaded by Lewis Daingerfield, and others present, she consented to go; and that the following morning Utz took her on his horse, behind him, and carried her 12 miles, to Culpeper Courthouse, where they took the train for Roanoke. Her statement is that Utz was very much opposed to her marrying a fellow by the name of Jewell, and assured her that "he would do better by her than the fellow, Jewell," and he agreed that, if she would go back with him, he (Utz) would, when he got home, build her a house upon any site that she might pick out anywhere on the outer edge of the farm, and give her the house and lot during his lifetime, and at his death would give her 25 acres adjoining the house and lot, \$10,000 in money, and his household furniture, provided she stayed with him and kept house for him. John Daingerfield and Sarah E. Tyler deposed to the same effect; both of them, however, saying that the house and lot was to be on the outer edge of the farm, while the bill alleges that it was to be "near his residence." Ben Sims, the other witness to this contract, testifies that he was at the depot at the station, now Roanoke city, when Utz arrived there with the appellee; that he walked home with Utz, and, in a conversation with him, Utz told witness of the contract,—the witness adding only to what the other witnesses testified was the contract, that the house and lot were to be "anywhere she picked a place." Goodman's testimony is to the effect that 10 or 11 years prior to Utz's death, when he was building the house for the appellee, Utz told him that the house was being built for her, and pointed out the land which he intended to give to her; but the witness could describe the land only by a diagram which he had drawn. He says that Utz spoke of the land as being about 20 or 25 acres, but the witness does not testify that Utz told him of any contract or agreement whatever between appellee and Utz. He only testified that Mr. Utz told him that he intended to give her the land, of which the 7½ acres conveyed to her by deed executed the day before his death was a part, and contained the house which Goodman built. The other witnesses examined for appellee do not testify as to any contract made by Utz with the appellee, except Julia Davis, her daughter, whose testimony, in effect, is that, some four or five years prior to Utz's death, she was present at a conversation between Utz and the appellee

relative to Mrs. Hannah's moving there to live with Mr. Utz, and that she heard him say something about a bargain; but she does not mention to what bargain reference was made. She says only that her mother said "Mrs. Hannah's moving there did not make any difference to her, provided it did not interfere with her business and the bargain." To which said Utz said, "No." The other witnesses testify mainly upon the question whether or not the appellee was in fact Utz's natural child.

On the other hand, the proof is that the appellee lived with Utz in the capacity of a servant; that he paid her wages, charging her with what she received from him and what he paid out for her, and refused, on a number of occasions, to pay money for her until it became due to her for wages. She attempts, however, to show that he only paid her wages for cooking after the family of Mrs. Hannah came to live in the house with Utz, some five years before he died; but the proof is that he was paying her wages prior to that time, as he was paying other servants on the place. It further appears that the appellee, on the day before Utz's death, sent for Goodman, who was a justice or a notary, to come to the house of Utz and attend to some business for her; that Goodman went, and on arriving there, he was told by Utz, in the presence of appellee, her husband, and their children (all of whom were in Utz's room when Goodman arrived), that appellee had been "cutting up," and had sent for him (Goodman) that morning. The witness Goodman further says, "He told me this when I went in," and Utz then brought out the deed and acknowledged it before him (Goodman), which deed, conveying the land, with the house on it, in which the appellee lived, was then and there delivered to her; and not one word further was said by her as to any additional claim she had against Utz, and witness "never heard of any more cutting up." An effort was made to show by this witness that the appellee carried the keys belonging to Utz, but on cross-examination he says that, when Utz told her to get the deed to be executed, she got the keys out of Utz's pocket, and opened some drawer or trunk, and got it. The other testimony on the point is conclusive that Utz carried his own keys, gave out the provisions for his employees, and that appellee cooked and washed, and had nothing to do with the house, except to clean up Utz's room. The next morning after Utz died, the appellee said to Mrs. Utz and Mrs. Hannah, nieces of William Utz, who were then at his house, that she had made a narrow escape: "Mars William deeded me that poor piece of land the day before he died, and, if I had waited until to-day, I would not have had anything at all." She then requested Mrs. Utz and Mrs. Hannah (who are, together with Mary J. Hansbrough, an infant, William Utz's heirs at law) to give her the piece of land in front of her house, so as to extend her land out to the macadam road; and on being told by Mrs. Utz and Mrs. Hannah that they were

unable to give her the land, as there was an infant interested, appellee said that, if they would give their part, she (appellee) would buy the infant's interest. In this connection appellee stated that Utz had paid her up in full to Christmas, saying that her pay was four dollars per month, and wanted to know of Mrs. Hannah what was due her from Christmas. This is not denied by the appellee, but she attempts to explain it away by saying that she did not then know what her rights were; and, on being questioned as to who she had ever told that she had such a contract with Mr. Utz as she alleged in her bill, she was unable to name a single person to whom she ever told of such a contract till after the death of Utz. She then says that she did not know what her rights were until she talked with a colored lawyer, who told her that, if she resorted to law, she would be entitled to her labor, or words to this effect.

It should be borne in mind that Utz never owned at any time but an undivided half interest in the Waverly farm. While the proof is that Utz said to a number of persons, during his life, that he intended to give appellee a place, it is not shown by any witness that he ever mentioned any bargain or contract by which he was bound to her for any particular piece of property, or for the payment of any money at his death. Eldridge Carter (colored), who had been Utz's foreman on the Waverly farm for 22 years prior to the latter's death, and necessarily thrown with appellee frequently, testifies that, while he heard Utz say that he intended to give her the house and lot where her family was living, he never said at any time how much land he intended to give her with the house, nor did he or appellee ever mention to witness any contract or agreement between them; and witness never heard of the alleged contract by which appellee was to have 25 acres adjoining the house and lot, \$10,000, and Utz's household furniture, until after Utz's death. This witness further testifies that appellee told him of the conversation she had with Mrs. Hannah and Mrs. Utz, immediately after it took place, on the morning after Utz's death, saying that Mrs. Utz had agreed to give her the piece of land between the house and lot conveyed to her and the macadam road, and expressed herself as satisfied. Mrs. Hannah and other witnesses say that they heard Utz say that he intended to give appellee the place on which he had built the house for her, but did not intend to do so till his death, and this declared purpose on his part was carried out by the execution of the deed which he delivered to the appellee the day before he died. It is worthy of notice that neither Lewis Daingerfield, at whose house the alleged contract was made, and who, it is also alleged, persuaded appellee to enter into the contract, nor William Tyler, the husband of Sarah Tyler, are examined as witnesses, though both are still living, or were when the depositions in this cause were taken; and it is further noteworthy that it is

proven in the record that Lewis Daingerfield bears a good character for truth and veracity. This alleged contract is testified to by only two of the persons present when it was made, other than appellee herself, viz. John Daingerfield, a boy 13 years old at the time, and Sarah Tyler, the two latter testifying 25 years after the alleged parol contract was made, of which no memoranda was made at the time; and it seems that they had not talked the matter over together, or with any one except appellee, and not with her till the summer before their testimony was given, and they claim to have had very little talk with her about it. They could remember with remarkable particularity the details of the "bargain," but their memory was not sufficient to recall other incidents or occurrences at the time just as likely to have impressed themselves on their memory as the alleged conversation in which the "bargain" was made. It is also shown that there is inconsistency in their statements made in the case at bar and those made by them before the jury in the common-law trial; and the only corroboration of this testimony is found in the testimony given by the witness Ben Sims, whose statement is so highly improbable, and so much at variance with the conduct and declarations of appellee at a time when, from the nature of the contract she is suing to enforce, she would not have refrained from telling about it, that it is unworthy, we think, of consideration. The conduct of the appellee in her efforts to secure testimony to sustain this claim against the estate of Utz, never mentioned to any one, so far as the proof shows, till after his lips are sealed, is far from being calculated to give credit to her story, or to the testimony adduced in support of it. One of her own witnesses says that she said to him that she would give him \$100, if he knew anything that would do her any good. Another says that she told him: "If you will come up, and do what you can for me, you will never lose anything. You will get the best pay you ever got." This witness was summoned in the common-law case, but was not examined. In the various conversations with Utz testified to, and in which he expressed his purpose to give appellee the house and lot at his death, saying that he was her father, not one word was said as to any contract of the character attempted to be set up here, and no intimation whatever of any agreement to make any provision for her, other than that he made by the deed delivered to her the day before his death, and which she accepted without a word to indicate that she had any further claim upon him,—on the contrary, congratulating herself the next day for having gotten her deed, which she said she would not have gotten, had she waited another day, and would not have had anything.

If it be a fact that appellee is the natural child of the decedent, Utz, under the policy of our law, it adds nothing to the strength of her claim asserted in this suit, however persuasive it may be in considering the probabili-

ties that the alleged contract was in fact entered into. It would seem that, if Utz designed to make any such provision for appellee as the alleged contract embodied, he would have made it by a writing duly executed, or would have had it witnessed by reliable persons of intelligence, at least, and would not have contented himself with the loose declarations that have been testified to as having been made at the house of the colored man Daingerfield, only spoken of by him (Utz) during the remainder of his life of 23 years to the colored man Ben Sims, whom he casually fell in with while walking from the depot homeward on the night of his return from Culpeper with the appellee. Surely, if such a contract was made, in the 25 years that elapsed from its date to the taking of the depositions in this cause, some proof of it of a more satisfactory character could have been obtained. Upon reason and authority, the evidence relied on to establish such a contract as is here sought to be enforced should be clear and satisfactory. It is, we think, far from being of this character, while, to say nothing of the improbabilities that such a contract was ever entered into, the preponderance of the testimony is decidedly against its existence. We are therefore of opinion that the decree appealed from is erroneous and should be reversed, and this court will enter such decree as the court below should have entered, dismissing appellee's bill, with costs to the appellants.

(119 N. C. 422)

**CECIL v. HENDERSON.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**WITNESS—IMPEACHMENT—IMPROPER QUESTIONS.**

It is error to permit counsel for a plaintiff, in the cross-examination of a defendant who had pleaded the statute of limitations as a defense, to ask him, for the purpose of impeachment, if he had not interposed the same defense to various claims.

Appeal from superior court, Davidson county; Hoke, Judge.

Action by W. L. Cecil against W. F. Henderson. Judgment for plaintiff, and defendant appeals. Reversed.

Shepherd & Busbee and Walser & Walser, for appellant. M. H. Pinnix, for appellee.

**FAIROLOTH, C. J.** Action on a note against defendant, as surety for one Loftin. Plea, statute of limitations. The controversy on the trial was whether defendant had agreed with plaintiff not to rely on the statute of limitations. The evidence on that question, of plaintiff and defendant, was conflicting. On cross-examination the defendant was asked, for the purpose of impeaching the witness, if he had not pleaded the statute of limitations to various claims (specifying them). Objection by defendant overruled. Exception. The plaintiff insists that the question is not prejudicial to the

defendant, and relies on *Bost v. Bost*, 87 N. C. 477. That case does not support his contention, because the question was not asked for the purpose of impeaching any witness or party to the action, but went only to the testamentary capacity of the testator. No court can allow a suitor or witness to be impeached or discredited because he had entered a plea allowed by statute, and enforced by the courts. The question, then, was irrelevant, and, if answered in the affirmative, it would have been the duty of the court to withdraw the same from the jury. The admission of the question would allow an appeal to local prejudice, if any should exist, on the question of pleading a "debt out of date," as it is usually termed in the country; and this would result in trying the same question in different localities according to local sentiment, and there would be no uniform rule to govern courts and juries. The principle announced was decided in *Russell v. Hearne*, 113 N. C. 361, 18 S. E. 711, where the question was, did not the plaintiff have the reputation of suing for usury, and if he had not so sued before? Held incompetent. New trial.

(119 N. C. 724)

**WHITLEY v. SOUTHERN RY. CO.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**DISMISSAL—WAIVER OF RIGHT TO—DEFECTIVE COMPLAINT.**

A defendant is not entitled to a dismissal, on the ground that the complaint contains only a statement of a defective cause of action, after he has filed an answer denying its allegations, and pleading an affirmative defense, showing that he understands the nature of the claim sued on.

Appeal from superior court, Cabarrus county; Greene, Judge.

Action by William Whitley against the Southern Railway Company. Judgment dismissing the action, and plaintiff appeals. Reversed.

Action heard before Greene, J., on a motion of defendant to dismiss, because the complaint contained only a statement of a defective cause of action, and the court adjudged that the cause be dismissed, and that the defendant go without day, and recover costs, and from this judgment the plaintiff appealed. The complaint is as follows: (1) Alleges defendant to be a corporation, etc., and is operating the North Carolina Railroad, on which are the towns of Concord and Charlotte. (2) That on said day the plaintiff's daughter, Mrs. Deaton, desiring to go and take her three small children from Concord to Charlotte, on defendant's regular passenger train, which was due and arrived at defendant's station in Concord about 11 a. m., the plaintiff, for the purpose of purchasing the necessary tickets, accompanied said daughter and children to the station, and the defendant agreed and undertook for hire (to wit, the sum of 75 cents,

which was paid to it, and a ticket obtained for the passage or carriage of said daughter and children and their baggage, before the arrival of said train) to carry on said train, from said station in Concord to defendant's station in Charlotte, said daughter and children and their baggage, which baggage was a valise of ordinary size. (3) That upon the arrival of defendant's train at the station in Concord, and while it was stopped for passengers to get on and off, said station being then and now a regular station for that purpose, none of defendant's servants, agents, or employes aided or offered to aid said daughter or children, or either of them, to get on board defendant's train or car, or to put or help to put said baggage thereon; and thereupon the plaintiff, in the presence and view of the conductor, who was the defendant's agent, servant, or employe, and had charge of said train of cars, and after having notified said conductor of his (plaintiff's) intention to aid said daughter and children to get on board of defendant's car with said baggage, and to seat said daughter and children in said car, and, as soon as that was done, of plaintiff's purpose to get off, aided and assisted with the utmost dispatch, and without objection from said conductor or other agent, servant, or employe of defendant, said daughter and children to board and enter, with said baggage, the car in which said daughter and children were entitled to ride and have said baggage; and plaintiff started to leave and get off said car and train without delay, and, before he had seated said daughter and children, and notwithstanding the hurry and dispatch of plaintiff, of which said conductor had knowledge, and also of his intent to get off, when plaintiff stepped upon the platform of said car, for the purpose of getting off said train, and when said conductor knew plaintiff had not gotten off, and had not had time to do so, the defendant wrongfully and negligently caused its said train of cars to be slowly and almost imperceptibly moved forward, and although plaintiff was making reasonable haste to get off said train, and could have done so without difficulty and notwithstanding said motion, just as plaintiff reached the first step of the said platform the defendant negligently and wrongfully caused said car to be given a sudden and violent jerk, thereby, without any fault or negligence on his part, causing plaintiff to lose his equilibrium, and, before he could regain the same, the motion or speed of said train had become such as to throw the plaintiff, without any fault or negligence on his part, but by the negligence and wrong of the defendant, from said platform step upon the ground, and with such force as to break two bones of or near the ankle of his right leg, from which wound or injury he has suffered, and does yet suffer, great bodily and mental anguish, and said wound or injury has caused him to become a permanent invalid or cripple, to his damage

\$2,000. Wherefore plaintiff demands judgment against defendant for \$2,000 and costs of this action. The defendant put in an answer, but at the trial moved to dismiss the action, upon the ground that the complaint contained only a statement of a defective cause of action. The motion was sustained, and the plaintiff excepted, and appealed from the judgment rendered.

W. G. Means, for appellant.

AVERY, J. The court allowed a motion to dismiss, on the ground that the complaint contained only a statement of a defective cause of action. An answer had been filed, which was evidently framed upon the assumption that the plaintiff had properly set forth the material averment that he had been injured by the negligence of the defendant's servants, while on the premises of defendant, accompanying a passenger, and therefore entitled to protection against negligence of servants. *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327. The defendant admits in the answer the contract of carriage, denies the allegation that the injury was caused by its negligence, and sets up by way of defense the plea of contributory negligence. If it were conceded that the statement of the cause of action was insufficient, such an answer would be held, by way of aid, to have cured any such defect, though the complaint might have been held bad pleading on demurrer. *Knowles v. Railroad Co.*, 102 N. C. 59, 9 S. E. 7. The answer shows that the defendant was not misled, but understood the cause of action to be the alleged injury received by a passenger through the neglect of its servants in charge of the train. The right to dismiss for defects of this kind grows out of the fundamental principle that a declaration or complaint must be sufficient to put the party sued upon notice of the nature of the claim, so as to enable him to intelligently prepare his defense. *Garrett v. Trotter*, 95 N. C. 480. But this and other rights, even though guaranteed by the organic law, may be waived by conduct inconsistent with the purpose to insist upon their enforcement, or by a failure, in the manner of asserting them, to observe a due regard for the rights of others. *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427. The plaintiff has a right to demand a speedy trial upon putting the defendant on notice to prepare to meet his demand. The defendant demonstrates by the pleadings the fact that it understands the nature of the claim, which it has the right to controvert. There is therefore no reason why either should be surprised or injured by trying the issues raised by the pleadings. We must not be understood as deciding that the complaint was in fact defective; but it is sufficient for the disposition of this appeal to hold that, conceding its insufficiency, the defect was cured by the answer. The judgment is reversed.

(119 N. C. 420)

**HEDRICK v. BYERLY et ux.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**LIMITATION OF ACTIONS—MORTGAGE—FORECLOSURE—HUSBAND AND WIFE.**

Where a wife mortgages her land to secure a debt of her husband, evidenced by a note, the bar of limitations against an action on the note does not bar a suit to foreclose the mortgage.

Appeal from superior court, Davidson county; Hoke, Judge.

Action by P. A. Hedrick against Eli Byerly and wife. There was a judgment for plaintiff, and defendants appeal. No error.

Walser & Walser and R. T. Pickens, for appellants. Robbins & Raper, for appellee.

**MONTGOMERY, J.** This action was commenced on the 6th of August, 1895, to foreclose a mortgage on real estate. The land conveyed was the property of the feme defendant, and the debt that of the husband, evidenced by a sealed promissory note executed by both of the defendants, and payable on the 1st day of November, 1894. A payment was made on the debt on the 8th of September, 1893. The feme defendant requested his honor to hold, as matter of law, "that the land mortgaged being the property of the wife put her interest in position of surety to the debt of the husband; that the demand, as to her, was barred in three years; and that no act of the husband after the three years had run could renew or continue the lien or mortgage on the land of the wife for the debt of the husband." His honor refused to so decide as to the mortgage, and held that the payment made by the husband on the debt within 10 years from maturity would continue the lien of the mortgage. There was no error in this ruling. "It is well settled by repeated decisions of this court that, where a wife joins her husband in a conveyance of her separate property to secure a debt of the husband, the relation which he sustains to the transaction is that of surety." *Purvis v. Carstarphan*, 73 N. C. 581; *Gore v. Townsend*, 105 N. C. 235, 11 S. E. 160; *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56. And it is also true that whatever act which, on the part of a principal, would discharge a surety, would also discharge the property of the wife from liability under a mortgage or deed of trust made to secure the debt of her husband. *Hinton v. Greenleaf*, supra. But it is to be borne in mind that a married woman cannot, in this state, make a legal contract, either as principal, or as surety for her husband, which will bind her real estate. She can, if she chooses, charge her separate real estate with the payment of a debt of her husband, by way of mortgage or deed of trust with privy examination. *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998. Therefore, when a mar-

ried woman charges her separate real estate with the payment of her husband's debt, the land is not conveyed to make good any legal contract that she has made with the creditor, but to secure the husband's contract,—to make good his debt by a charge on her separate estate. She, by her act, makes no contract, but appropriates the property conveyed in the deed to the payment of her husband's debt; and, as long as the mortgage is not barred by the statute of limitations, the lands can be subjected to the payment of the debt. And it has been held in the case of *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. 67, that the payment of interest by a husband upon his note secured by a mortgage upon the separate real estate of his wife operates to keep alive the mortgage security. But, for the sake of the argument, suppose it be admitted that the feme defendant's plea of the statute of limitations had been a good one, and so held by the court below; it could avail her nothing. The statute of limitations defeats the remedy when the note is sued upon, but it does not discharge the debt; and, although the debt might be barred by the statute, yet the mortgage by which the debt is secured, if itself not barred, may be foreclosed by the mortgagee in proceedings for that purpose. *Capehart v. Detrick*, 91 N. C. 344; *Arrington v. Rowland*, 97 N. C. 127, 1 S. E. 555; *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696. No error.

(119 N. C. 784)

**STATE v. MITCHELL.**

(Supreme Court of North Carolina. Dec. 8, 1896.)

Dissenting opinion. For report of majority opinion, see 25 S. E. 783.

**CLARK, J.** (dissenting). In the dissenting opinion of Brother MONTGOMERY and myself in *State v. Ostwalt*, 118 N. C. 1217, 24 S. E. 660, we pointed out many of the inconveniences and inconsistencies which would follow the departure from the long-settled legislative and judicial recognition of bastardy as a police regulation, and therefore a quasi civil proceeding. The present adds an additional instance to those cited by us. It may be that, on thus being called to the attention of the lawmaking power, the evil may be remedied by unequivocal legislation. It is no benefit to add bastardy to the criminal law, when there exists already a far more efficient criminal proceeding by an indictment for fornication and adultery; and besides, by giving to bastardy proceedings the technical advantages conferred on those put on trial for crime, it has been rendered almost utterly inefficient for the purposes for which it was really intended, and used for so long a period,—of making the father support the child and protect the county from liability therefor.

(119 N. C. 730)

**UTLEY v. WILMINGTON & W. R. CO.**

(Supreme Court of North Carolina. Nov. 24, 1896.)

**RAILROAD COMPANY—APPROPRIATION OF LAND—  
DAMAGE—LIMITATION OF ACTION—  
COLOR OF TITLE.**

1. Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have his damage assessed, and fixes no limitation of the action, such petition is neither an action of trespass nor one on a liability created by statute, within the meaning of Code Civ. Proc. § 155, subds. 2, 3, limiting such actions to three years. *Land v. Railroad Co.*, 12 S. E. 125, 107 N. C. 72, followed.

2. An unregistered deed, accompanied, since its execution, by the continuous possession of the premises by the grantee, constitutes color of title. *Avent v. Arrington*, 10 S. E. 991, 105 N. C. 389, followed.

Appeal from superior court, Cumberland county; Green, Judge.

Proceeding by Fanny L. Utley against the Wilmington & Weldon Railroad Company for the appointment of commissioners of appraisal to determine and report the compensation defendant ought to pay plaintiff for constructing its roadway across her property without her consent, and without any proceeding of condemnation or compensation therefor. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

G. M. Rose, for appellant. R. P. Buxton, for appellee.

**MONTGOMERY, J.** The defendant company on the trial below made numerous exceptions, but in the argument here it abandoned them all except the second and third, which are, in substance, as follows: "(2) Because Judge Hoke [at a previous term], upon objection by plaintiff, refused to submit an issue upon the statute of limitations, although asked to do so by defendant. (3) Because Judge Hoke held that the deed to the plaintiff from T. S. Lutterloh, administrator and commissioner, dated September 11, 1860, accompanied by possession, was color of title, although only recorded June 26, 1886, and although the railroad had been constructed across the lot in 1885." There was no error in the ruling of his honor upon either of the matters to which those exceptions were made. In the case of *Land v. Railroad Co.*, 107 N. C. 72, 12 S. E. 125, it was decided that the defendant there (the defendant here also) could not avail itself of the provisions of section 155, subds. 2, 3 (Statute of Limitations), of the Code, in actions like this, on account of peculiar features in its charter. The plaintiff, to show title to the land, offered in evidence a deed as color of title, which was executed to herself by T. S. Lutterloh on September 11, 1860, and which had been accompanied by the possession of the plaintiff or tenant since its execution, but which had never been reg-

istered until after the railroad had been constructed across the land, in 1885. The deed was admitted by the court as color of title, and the plaintiff filed the second exception. This deed, accompanied as it was with the possession as above set out, was color of title, notwithstanding Act 1885, c. 147. *Avent v. Arrington*, 105 N. C. 389, 10 S. E. 991. No error.

(119 N. C. 446)

**JOHNSON et al. v. RODEGER et al.**

(Supreme Court of North Carolina. Dec. 1, 1896.)

**NOTES—CONSIDERATION.**

A note executed by one of the incorporators of a company to other incorporators as his part of the purchase money of land conveyed by them to the corporation, pursuant to an agreement that they should so convey, one-fourth of the purchase money to be paid them in cash or by notes of the other incorporators, and the corporation to execute its note to each incorporator for the cash he had paid or note he had given for his part of the purchase money, and to issue stock for that amount, all of which was done, has a valuable consideration.

Appeal from superior court, Forsyth county; Norwood, Judge.

Action by C. S. Johnson and others against George Rodeger and others, executors. Judgment for plaintiffs. Defendants appeal. Affirmed.

A. E. Holton, for appellants. Watson & Buxton, for appellees.

**MONTGOMERY, J.** The action is upon a plain promissory note executed by the testator of the defendants to the plaintiffs. The defendants, in their answer, aver that there was no consideration for the note, and that it was an accommodation paper. Upon the trial, the testimony introduced by the defendants showed that the plaintiffs and defendants were members of a company incorporated as the Boston Cottage Company; that the plaintiffs conveyed a tract of land to the company, one-fourth of the purchase money to be paid in cash, or to be secured by the personal notes of the incorporators; that the company was to execute a mortgage to the plaintiffs for the balance of the purchase money upon the land; that the corporation was to execute its note to each incorporator for the amount of the cash he had paid for the land, or the note he had given for his part of the purchase money, and also to issue stock for that amount, which was done; and that the note sued upon was the note executed by the testator of the defendants for his part of the purchase money of the land. Upon this evidence, the defendants asked the court to instruct the jury: (1) That, upon all the evidence of witnesses to the jury, they should find in favor of the defendant; (2) that if the jury find that the note in suit was given for the purchase money of the land, and the plaintiffs deeded the land to another, to wit, the Boston Cottage Company, then there would have been

a want of consideration to support the note; (3) that it was for the jury to say what the Boston Cottage Company note was given for to Fischesser, defendant. The instructions were refused, and the defendants excepted. Verdict and judgment for the plaintiffs, and appeal by defendants.

The testimony introduced by the defendants showed that the note was executed for a valuable consideration. There was not even a scintilla of evidence going to show a failure of consideration. The matter is too plain for discussion. No error.

(119 N. C. 428)

STITH v. JONES et al.

(Supreme Court of North Carolina. Dec. 1, 1896.)

**NONSUIT—REFERENCE BY CONSENT—FAILURE TO PROSECUTE.**

1. To authorize the trial court in setting aside a nonsuit granted on motion of defendant for failure of plaintiff to prosecute the action, plaintiff having failed to appear at the hearing of the motion, excusable neglect must be shown.

2. That a reference by consent has been had does not deprive the court of the right to direct a nonsuit for failure to prosecute the action.

3. The failure of plaintiff to take any steps in the action for 4½ years authorizes a nonsuit for failure to prosecute.

Appeal from superior court, Davidson county; Green, Judge.

Action by F. H. Stith, administrator, against A. B. Jones and others. From an order setting aside a nonsuit, defendants appeal. Reversed.

R. O. Burton, for appellants. J. B. Batchelor and Robbins & Long, for appellee.

CLARK, J. This action was begun in 1886, and was referred by consent at March term, 1889. The referee held two or three sittings, the last being in February, 1891. Thereafter the plaintiff took no further steps to procure a hearing or to have the report made; and at the fall term, 1895, the cause being reached regularly on the docket, the defendant moved for judgment as of nonsuit. This motion was continued over till the second week, when, the case being again reached, the plaintiff was called, and, not appearing by counsel or in person, judgment was entered as of nonsuit. It is true that the plaintiff, after a nonsuit, can bring a new action within a year; but we do not concur with appellant that therefore a judgment of nonsuit cannot be set aside, like any other judgment, if there was excusable neglect, because a plaintiff in such cases might be unjustly mulcted in a large bill of costs, or otherwise prejudiced, when not in default. We think, however, the facts in this case do not show excusable neglect on the part of the plaintiff. The delay to prosecute the case before the referee, or to take any steps to secure a report, or give any attention whatsoever to the case from February, 1891, till September, 1895, a period of more than

four years and a half, was inexcusable neglect. When the case was reached, the first week of the term, and that state of facts appeared, his honor might well have adjudged that the plaintiff had failed to prosecute his action. The case was continued over to the second week, with the motion to nonsuit still pending; and the parties to an action pending in court are fixed with notice of all motions therein, made at term. *Coor v. Smith*, 107 N. C. 439, 11 S. E. 1089; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Hemphill v. Moore*, 104 N. C. 379, 10 S. E. 313; *Stancill v. Gay*, 92 N. C. 455; *Williams v. Whiting*, 94 N. C. 481; *University v. Lassiter*, 83 N. C. 38; *Sparrow v. Trustees of Davidson College*, 77 N. C. 35. When, therefore, the case was again regularly reached on the second week, the plaintiff certainly should have shown cause why the nonsuit should not have been entered. It was inexcusable neglect not to have shown that much attention to the case, for the judge does not find that the plaintiff or his counsel was sick or unable to attend. Besides, upon the facts now shown by him, if the plaintiff had been present, he could not have successfully opposed the nonsuit, when for four years and seven months he had given no attention to the cause.

It is true that, ordinarily, the rule is that a consent judgment cannot be set aside except by consent or the death of the referee (*Clark's Code*, 2d Ed., p. 406), though there may be exceptions to that rule, as to most others. This, however, is not an attempt to set aside a consent reference, but a dismissal of the action for a failure to prosecute it; and such failure may be shown by long-continued failure to prosecute it before the referee, as well as in any other way (*McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493), for the court retains jurisdiction of the action. If this were not true, then if a plaintiff can once get his case referred by consent, and finds it likely to go against him, he can vex the defendant by continuing it indefinitely. Judges and lawyers might come and go, but that case, like Tennyson's brook, would "go on forever and forever." The judge does not find that there was excusable neglect, nor does he find facts which would justify such conclusion of law. If there was excusable neglect, the judge, in his discretion, might set aside the judgment, or refuse to do so, and the exercise of such discretion is not reviewable. *Simonton v. Lanier*, 71 N. C. 498; *Brown v. Hale*, 93 N. C. 188. But the discretionary power only exists when excusable neglect has been shown. *Code*, § 274. The judgment setting aside the nonsuit is not based upon excusable neglect, or, indeed, any other ground; but the "case on appeal" settled by the judge apparently rests his action on the ground that the nonsuit "was improvidently and erroneously adjudged." If so, it could only have been corrected by an appeal. The action of the court below in setting aside the nonsuit is reversed.

**MEMORANDUM DECISIONS.****CHAMPION v. SMITH.****CARTIN v. SUSONG.**

(Supreme Court of Georgia. Aug. 10, 1896.)

**JUDGMENT BY DEFAULT.**

These cases are controlled by the decision of this court in the case of Cooley v. Beach Co. (rendered at the present term) 25 S. E. 691.

Error from city court of Savannah; A. H. MacDonell, Judge.

Actions by Frances J. Champion against John O. Smith, and by Q. O. Cartin against W. A. Susong. Judgment for plaintiffs by default. From an order setting the judgments aside, plaintiffs bring error. Affirmed.

A. C. Wright, W. B. Morrison, and A. L. Alexander, for plaintiffs in error. Nicolson & McKethan and Garrard, Meldrim & Newman, for defendants in error.

**PER CURIAM.** Judgment in both cases affirmed.

**HUSSEY et al. v. HILL et ux.** (Supreme Court of North Carolina. Nov. 17, 1896.) Appeal from superior court, Duplin county; Starbuck, Judge. Action by L. Hussey and A. J. Stanford against Friday Hill and Lizzie Hill, his wife, to foreclose a mortgage executed by defendants to plaintiff Stanford, who transferred it to plaintiff Hussey. From a judgment in favor of plaintiffs, defendants appeal. Affirmed. Stevens & Beasley, for appellants. Simmons & Ward, for appellees.

**FURCHES, J.** It seems to us that none of the questions argued in this court are presented by the record. The exceptions seem to be intended to present a question of estoppel as to the plaintiff Hussey, arising out of his assignment of his note and mortgage, of a prior date to the Stanford note and mortgage, after he had become the assignee and owner of the Stanford note and mortgage; the validity of the Wilson sale, as assignee of Hussey; and as to whether the defendant Friday Hill is estopped by his subsequently acquired title through and under the Wilson sale. These are interesting questions, but, as they do not arise in this case, we are not called upon to decide them, and any opinion we might express as to them would be but obiter. These questions can only arise should the title to the land become involved between the purchaser under the Stanford mortgage and the defendant, who now claims to

hold under the Hussey mortgage through the Wilson foreclosure sale. This is simply an action of debt upon a note of hand, and to foreclose a mortgage given to secure the payment of the note. The mortgage is but the incident of the debt. The execution of the note is admitted, and the execution and registration of the mortgage are admitted, and it is also admitted that the note has not been paid. Those admissions entitled the plaintiff to judgment, ascertaining his debt, and to a sale and foreclosure of the mortgaged premises. As to whether the defendant Friday Hill has a good title, or any title, to the mortgaged land, does not come in question in this action. The judgment is affirmed. Affirmed.

In re **NELSON.** (Supreme Court of North Carolina. Oct. 27, 1896.) Petition by Edgar Nelson for a writ of habeas corpus. From a judgment denying the petition, and remanding the prisoner, he appeals. Dismissed. A. B. Andrews, Jr., and W. L. Watson, for appellant. J. C. L. Harris, Atty. Gen., and Ed. Johnson, for the State.

**PER CURIAM.** It being made to appear to the court that Edgar Nelson, the appellant, has been discharged under another proceeding since the appeal was taken in this matter, and is now at large, on motion of the appellee this appeal is dismissed. Appeal dismissed.

**PEOPLE'S BANK OF NEW YORK v. CITIZENS' NAT. BANK OF RALEIGH et al.** (Supreme Court of North Carolina. Nov. 24, 1896.) Appeal from superior court, New Hanover county; Starbuck, Judge. Action by the People's Bank of New York against the Citizens' National Bank of Raleigh and others. From a judgment for plaintiff, the defendants appeal. Affirmed. Battle & Mordecai, for appellants. Iredell Meares, for appellee.

**MONTGOMERY, J.** Upon examination of the record in this case we find that the only difference between it and that of National Citizens' Bank of New York v. Citizens' Nat. Bank of Raleigh (reported at this term) 25 S. E. 971, is that in the latter the check for the proceeds of which the action was brought was drawn on a bank in Raleigh other than the defendant bank, while in this action the check was drawn on the defendant bank itself. For the reasons stated in National Citizens' Bank of New York v. Citizens' Nat. Bank of Raleigh, supra, we are of the opinion that in the rendering of the judgment by his honor in favor of the plaintiffs in this action there is no error. No error.











